

**THE EQUAL RIGHTS AMENDMENT:
HOW CONGRESS CAN RECOGNIZE RATIFICATION
AND ENSHRINE EQUALITY IN OUR CONSTITUTION**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

FEBRUARY 28, 2023

Serial No. J-118-4

Printed for the use of the Committee on the Judiciary



www.judiciary.senate.gov
www.govinfo.gov

U.S. GOVERNMENT PUBLISHING OFFICE

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**THE EQUAL RIGHTS AMENDMENT: HOW
CONGRESS CAN RECOGNIZE RATIFICATION
AND ENSHRINE EQUALITY IN OUR
CONSTITUTION**

TUESDAY, FEBRUARY 28, 2023

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice at 10:01 a.m., in Room 106, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Whitehouse, Klobuchar, Blumenthal, Hirono, Booker, Padilla, Ossoff, Welch, Graham, Grassley, Cornyn, Lee, Cruz, Hawley, Cotton, and Kennedy.

Also present: Senators Cardin, Hyde-Smith, and Murkowski.

**OPENING STATEMENT OF HON. RICHARD J. DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Chair DURBIN. This meeting of the Senate Judiciary Committee will come to order.

[Gavel is tapped three times.]

[Pause.]

[Gavel is tapped three times.]

Chair DURBIN. This meeting of the Senate Judiciary Committee will come to order. Well, it was a long time ago, many years, I was a young lawyer on my first assignment, new graduate of Georgetown Law School. I returned home to my home State of Illinois where I was working in the Illinois State Senate for the Lieutenant Governor Paul Simon. At the time, the lawmakers in my State were considering the ratification of a constitutional amendment that was first introduced many years before, in 1923. It was called the Equal Rights Amendment.

Well, here we are, a century after its first introduction, 2023, and here I am nearly 50 years after I started that first assignment. It's time to get the job done. In fact, it's long overdue.

Today, this Committee is holding a hearing on finally—finally, enshrining the Equal Rights Amendment into the Constitution. I want to start with a video—

[Applause.]

Chair DURBIN. Thank you. I want to start with a video which gives us a little insight into the history of this issue.

[Video is presented.]

Chair DURBIN. I apologize for the audio. We'll try to make that a little better the next time, but we didn't want anyone to miss any words. The principle of equal justice under the law is fundamental to who we are as a Nation. But unless that principle is protected in our Constitution, it is nothing more than words. For 100 years, Americans have been fighting to enshrine equality in our Constitution with the Equal Rights Amendment—100 years.

In the half-century since Congress approved the ERA, 38 States have ratified it. That's the exact number of States needed to certify the ERA as the Twenty-Eighth Amendment to the Constitution. So why the holdup? When Congress first approved the ERA in 1972, it imposed an arbitrary time limit on the ratification process. But that was more than 50 years ago. In the decades since, as I mentioned, the Amendment has crossed the 38-State threshold with Virginia becoming the most recent State to approve it in 2020. Think of it this way: If not for Congress standing in the way, the ERA would already be on the books. So it's time to clear the path for equality.

The joint resolution we're considering today will repeal that arbitrary deadline in the preamble of this resolution once and for all. There is no room for uncertainty when it comes to protecting equal rights under the law. Sadly, that lesson was driven home last year by the Supreme Court's decision to overturn *Roe v. Wade* and—for the first time in history—to take away a constitutional right from every woman in America.

For years, we've heard well-known arguments against the ERA. I remember the single-sex bathroom argument of many years ago. Some have argued that it's not necessary. Others have argued it's dangerous. Others have claimed that the ERA and the Fourteenth Amendment are redundant.

The reality is that the Supreme Court, which at the time was made up entirely of male Justices, established a lower level of scrutiny for sex discrimination claims under the Fourteenth Amendment. The ERA would finally change this.

When we have a conservative super majority on the Supreme Court who believe the meaning of the Fourteenth Amendment was set in stone when it was ratified at 1868, the ERA is far from redundant. When a sitting judge—Justice on the Supreme Court, Clarence Thomas, argues that the Court should reconsider constitutional protections for family planning and birth control, protections the Court recognized under the Fourteenth Amendment nearly 60 years ago, the ERA is far from redundant, far from unnecessary.

So now, the question for Members of this Committee is straightforward. What kind of America do we want to leave our daughters and granddaughters? A country in which their fundamental rights are safe and secure? Or one in which the Constitution continues to fail to recognize fundamental equality on the basis of sex? As a father and a grandfather, I think the answer is obvious. Let's live up to the promise of equal justice under the law.

Join us in supporting this resolution to revoke the deadline on the ERA's ratification. There is no time limit on equality. With that, I'll turn to the Ranking Member Lindsey Graham for his opening statement.

**OPENING STATEMENT OF HON. LINDSEY O. GRAHAM,
A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Thank you, Mr. Chairman. Well, this is a hearing—this has a political agenda, which is okay. We're a political body. I have absolutely no problem talking about political things. Everybody's entitled to their causes. Everybody in America can push as hard as they like, but you got to look at the facts. So in 1972, the Congress, as you said, Mr. Chairman, by two-thirds vote, put in motion the ratification of the Equal Rights Amendment, as drafted in 1972, for a 7-year period.

Apparently, during that time period, they fell 3 votes short of 38. And this is what Justice Ginsburg said: "The ERA fell three States short of ratification. I hope someday it will be put back in the political hopper, starting over again, collecting the necessary number of States to ratify it."

So that's what she said. Now, there was an extension by majority of vote from 1979 to 1982, which you referred to, to give three more years to try to make up the shortfall. That didn't happen. But what did happen, five States who had previously ratified the Amendment rescinded it: Kentucky, Idaho, Nebraska, Tennessee, and South Dakota.

So, from the time period in question, the support for the Amendment went backward. And this resolution before us is pretty simple. It says there will be no time limit to ratify the Equal Rights Amendment, but it also acknowledges that the Equal Rights Amendment is part of our Constitution. Well, that's what disturbs me the most because it never received 38 States during the time period in question.

In *Dillon v. Gloss*, the Supreme Court concluded that Congress has the power to set time limits on when the Amendment must be ratified. So it's gone to the Supreme Court. You lost there. It never got 38 votes before 1982. There's been an effort to 1982 to add to the vote total. You didn't mention that five States rescinded. So it's never gotten 38 votes if you count rescinding by 5 States. And I think it'll be pretty obvious why five States rescinded when you look at the potential effect of this Amendment.

So we will have this debate, and I think we're going to have a vote on the floor. I think Senator Schumer promised a cloture vote. I think it will fall well short of the 60 votes necessary. And I'll be glad to talk about the reasons why, but thank you for the hearing.

Chair DURBIN. Thank you, Senator Graham. Today, we welcome three Members of Congress to testify before the Committee on the Equal Rights Amendment: Senator Ben Cardin of Maryland, Senator Lisa Murkowski of Alaska, and Senator Hyde-Smith of Mississippi. Senators Cardin and Murkowski have co-lead the bipartisan Joint Resolution to affirm ratification of the ERA by removing the arbitrary deadline in its preamble. Senator Cardin, could you please proceed with your statement?

**STATEMENT OF HON. BENJAMIN L. CARDIN,
A U.S. SENATOR FROM THE STATE OF MARYLAND**

Senator CARDIN. Well, first, thank you, Chairman Durbin. And I also want to thank Ranking Member Graham for the courtesy of

being able to testify on this bill. And thank you for holding this hearing.

I do want to acknowledge the extraordinary leadership of Senator Murkowski on this issue, maintaining the bipartisan support for the Equal Rights Amendment, which we saw from its inception. This is not about any one issue, but it's about putting in our Constitution a lens of equality in judging the actions of our States and laws of our country.

Senate Joint Resolution 4 simply states—and you put this in the video, but I want to repeat it because it's pretty straightforward—“Equality of rights under the law shall not be denied or abridged by the United States or any State on the count of sex.” Quite frankly, most Americans already believe this is in our Constitution, but Congress needs to complete the job and remove any ambiguity. Thirty-eight States have ratified the Amendment. That's the prerequisite number, three-quarters of the States of our Nation.

Article V of the Constitution puts no time limits on the amount of time necessary for ratification. And I point out that the Twenty-Seventh Amendment of our Constitution was part of the original Bill of Rights proposed in 1791 and ultimately ratified in 1992—over 200 years later—dealing with the congressional pay issue. Congress established a time limit for ratification. We're unclear of the effect on that. Congress has the authority to remove that time limit.

Senate Joint Resolution 4 does exactly that. The precedent for Congress to declare that a requisite number of States that ratified a constitutional amendment, as the House and Senate did this in 1992 by the resolution affirming the validity of the Twenty-Seventh Amendment.

So this is not the first time we see in a resolution the acknowledgment that the prerequisite number of States have ratified the constitutional amendment. And as you point out, there should be no time limit on equality.

It is needed to advance equality in the fields of workforce and pay, sexual harassment and violence, protection for the LGBTQ+ community, and so many other areas where this particular provision would provide a strict standard for the courts to apply in regards to laws and governmental policies. The Equal Rights Amendment is all about equality, the most fundamental of American values.

One hundred years ago, women received the right to vote, and it's been a 100-year struggle to put the Equal Rights Amendment in the Constitution. America's strength is in its values. Mr. Chairman, I would point out that 85 percent of the countries in the world have some form of an Equal Rights Amendment in their constitution, and most of our States have some provision against discrimination based upon sex.

The U.S. is the only industrial democracy that does not have a protection in their Constitution against discrimination based upon sex. The ERA is important for us to pay us in regards to our own protections, but also for America's leadership on our basic values. We got to take care of our work at home first.

So on behalf of my wife, on behalf of my two granddaughters, and my daughter, and all Americans, let us do what's right to put

equality in our Constitution to take a major step forward. Thank you, Mr. Chairman.

[Applause.]

Chair DURBIN. Thank you, Senator Cardin. Senator Hyde-Smith.

**STATEMENT OF HON. CINDY HYDE-SMITH,
A U.S. SENATOR FROM THE STATE OF MISSISSIPPI**

Senator HYDE-SMITH. Good morning, Chairman Durbin and Ranking Member Graham, and colleagues. I sure appreciate this opportunity very, very much, and I'm honored to be here this morning to discuss the Equal Rights Amendment, the unconstitutional and deeply misguided effort to resurrect a proposed constitutional amendment that expired over 40 years ago. The Equal Rights Amendment proposes to add very vague language to the U.S. Constitution to ensure equality between the sexes.

However, the ERA won't do that. In fact, it would do the exact opposite and instead harm the very woman it intends to protect.

Since 1972, the year that the Equal Rights Amendment was sent to the States for potential ratification, women's rights have advanced by leaps and bounds. Good things came out of this.

Today, every State has elected women to represent them in Washington, and Congress has a record number of women. That includes me, the very first woman to represent Mississippi in Congress.

Women are already protected from discrimination under the law through the Fourteenth Amendment to the Constitution, which ensures equal protection under the law.

Women's rights are also protected by the Equal Pay Act of 1963, the Title VII of the Civil Rights Act of 1964, the Title IX of the Education Amendment of 1972, the Pregnancy Discrimination Act of 1978, and more.

The Equal Rights Amendment would only muddy the waters. Because of its vague language, it would work to undo many of these great achievements, and it does not allow for any distinction between men and women, even when it would make sense to do so based on biological differences.

I'm particularly concerned about the privacy and the safety for women and girls that the Equal Rights Amendment would destroy: Locker rooms, prisons, hospital rooms, domestic violence shelters, and restrooms would allow men into areas where women should feel safe and protected and have privacy.

Advocates of the ERA are also no longer shy about their goal to use ERA to impose unrestricted abortion on demand up to the moment of birth across the Nation and to enforce taxpayers to pay for this. Their apparent goal is to use ERA to overturn the *Dobbs* decision that returned the issue of abortion to the legislative process and instead re-empower unelected judges to impose a radical abortion policy that is in line with China and North Korea.

Even the most modest pro-life protections, like waiting periods, parental involvement laws, and restrictions on late-term abortions or partial-birth abortions, when the babies really feel this pain, could be struck down by the ERA.

Beyond the problematic content in the Amendment, all Senators should be offended of the blatant disrespect for the legislative proc-

ess with this effort to resurrect this long-expired Amendment. The legitimate constitutional role of Congress in the constitutional amendment process ended when Congress submitted the Equal Rights Amendments to the States on March the 22nd, 1972.

In *Idaho v. Freeman*, Federal District Judge Marion Callister held that Article V does not permit Congress to extend a ratification deadline, writing that once the proposal is made, Congress is not at liberty to change it. As Ruth Bader Ginsburg, a long proponent of the Equal Rights Amendment said in 2020: “I would like to see a new beginning. I’d like it to start over.”

Congress has no power to go back in time and resurrect an expired constitutional amendment like the ERA. Under Article V, however, Congress may again propose the same or modified language addressing the same subject and try to approve a new joint resolution with the required two-thirds votes in each House of Congress. The 1972 Equal Rights Amendment would harm the rights of women and weaken the United States Constitution. I call on my colleagues to reject this unconstitutional and misguided effort. Thank you, Mr. Chairman.

[Applause.]

Chair DURBIN. Thank you, Senator Hyde-Smith. Senator Murkowski.

**STATEMENT OF HON. LISA MURKOWSKI,
A U.S. SENATOR FROM THE STATE OF ALASKA**

Senator MURKOWSKI. Thank you, Chairman Durbin, to Ranking Member Graham, to Members of the Committee. It is good to be here today to testify about this ERA resolution, a resolution that Senator Cardin and I have introduced for three Congresses now. Three Congresses, we have introduced the same language to put before colleagues here. I want to thank Senator Cardin for his leadership in advocating for equal rights for women year over year over year.

And I really am glad that we’re able to get before the Committee here today. At least since I’ve been working on this issue, I think there’s been a surprising lack of attention by the Senate on this. In fact, as I talk to so many people, they say, “Well, we thought that the Equal Rights Amendment had already been adopted.” They actually believe that we’ve taken care of.

I’m going to speak quickly on our Resolution’s contents and some of the process issues, but I’d like to spend most of my time talking about why the Resolution is important and why the Equal Rights Amendment is still needed.

I think you, Mr. Chairman, have outlined much of the process here, and Senator Cardin has spoken to the very clear and, I think, very, very direct language that is included within the Equal Rights Amendment. It is not convoluted. It is not vague. It is very clear that what we’re talking about is advocating equal rights for women under the law.

S.J. Res. 4 removes the deadline for ratification by the States. It clears the hurdle for the Archivist to publish and certify the ERA. It also affirms that the ERA has been ratified by three-fourths of the States after Virginia became the 38th State to ratify the Amendment back in 2020.

And I know that there is debate about the authority of Congress to remove that deadline. It's been noted by Senator Graham whether or not that the ERA has been ratified by the 38 States given later rescission by five of them.

What we are trying to do with this resolution, some may say, is a little novel, but what we're trying to say here is what has happened in the States should not die here in the Senate. The fact is there's no law, there's no Supreme Court precedent that says that our resolution is somehow unconstitutional or something that Congress cannot do.

So, putting aside all that, I do look forward to what the Committee will hear in this next panel about these issues. But I would like to just give a few statistics in terms of why I think the Equal Rights Amendment is still needed, why it is not redundant.

According to the 2020 Census, women are about half—50.5 percent—of the U.S. population. Compare this to the makeup of the Senate, 25 percent of us are women. As Senator Hyde-Smith has noted, that's a record number. A record 128 women are serving in the House, but this is still only 29 percent of the Chamber's total. I don't think we're there yet. I'm not satisfied with that.

This Committee—you've been very active in processing judicial nominations, so just look at the nominations for the Federal bench: 38 percent of active district court judges are women; 66 of 170 active circuit court judges are women. That's 39 percent.

So we're making some progress. We're making some progress, that's good. Is it good enough? It shouldn't be good enough.

In the private sector, only about 10 percent of Fortune 500 companies have women CEOs, and this is the first time in history a double-digit number has been reached.

Notably and significantly, in 2021, women earned about 82 cents for every dollar men earned, certainly less than that in many States. Peeling back the layers of the onion, the gender pay gap was even greater for full-time female managers, who earned an estimated 77 cents for every dollar earned by full-time male managers.

Now, we know—we know that things have improved over the years, but we still have a long way to go when it comes to achieving equality for women. And I think that we need the Equal Rights Amendment to get there.

I'm very proud of the fact that in Alaska, we ratified the ERA in 1972, the same year that it passed the House and the Senate and was signed by President Carter. A few months later, Alaskans amended the State constitution to prohibit discrimination based on sex.

Mr. Chairman, women should have equal treatment to men under the law, and Congress should do all that it can to ensure that the ERA is finally made part of the Constitution. I think it's long overdue.

Senator Graham has mentioned that he's looking forward to the debate here to have a discussion about the potential effect of this resolution. I would suggest to you that the potential effect of this resolution is to ensure equal treatment under the law for women in this country. Thank you. I thank the Committee.

[Applause.]

[Gavel is tapped twice.]

Chair DURBIN. It's a little late for me to bring this up, but I'm going to anyway—

[Laughter.]

Chair DURBIN [continuing]. I ask those who are our guests here today and members of the audience to refrain from any type of interruption of the proceeding if they can, on both sides.

I thank everybody who's here for attending, but we're going to try to keep this at a certain centrist level of this debate for fairness on both sides. Let me thank my colleagues for coming.

Senator Cardin, Senator Hyde-Smith, Senator Murkowski, we know you have a busy schedule, but we think your contribution to this conversation on the Equal Rights Amendment is historic and important. Thank you for joining us.

We're now going to bring the second panel to the Committee. We welcome five witnesses. I will introduce the Majority witnesses and turn to Ranking Member Graham to introduce the Minority witnesses.

We have a slight change in the program. Our first witness is going to be Illinois Lieutenant Governor Juliana Stratton, who serves as my State's 48th Lieutenant Governor. She previously served as a member of the Illinois House of Representatives where she worked to ratify the ERA in Illinois. Lieutenant Governor Stratton is joining us remotely because, unfortunately, we learned this morning she tested positive for COVID-19. I'm grateful she's still able to participate.

We also are joined by Thursday Williams. Ms. Williams is a board member of the ERA Coalition and a former cast member of a Broadway show, "What the Constitution Means to Me."

Our final Majority witness is Kathleen Sullivan, currently serving as senior counsel at Quinn Emanuel and previously served as dean of the Stanford Law School. Let me turn to Ranking Member Graham to introduce his witnesses.

Senator GRAHAM. Thank you, Mr. Chairman. We have Ms. Elizabeth Foley. Professor Foley is a tenured professor and teaches constitutional law, civil procedure, and healthcare law at Florida International University College of Law. She went to University of Tennessee to get her J.D. and Harvard for her masters. She is of counsel at BakerHostetler, where her practice focuses on jurisdiction, separation of powers, appellate practice. She's a frequent media commentator, has published three books on constitutional law, has authored and co-authored numerous amicus briefs before the U.S. Supreme Court.

She serves on the Florida Advisory Committee of the United States Commission on Civil Rights, on the editorial board of the Cato Supreme Court Review, and the research advisory board of the James Madison Institute. She is also a member of the American Health Law Association and the American Bar Association. She previously served as member of the Committee on Embryonic Stem Cell Guidelines at the Institute of Medicine, National Academy of Sciences, was Fulbright Scholar at the College of Law at the National University of Ireland.

Ms. Jennifer Braceras is a lawyer, columnist, political analyst. She is a graduate of Harvard Law School. She was an editor on the

Law Review at Harvard. She is director of the Independent Women's Law Center, a project of the Independent Woman's Forum. The organization defends free speech, due process, educational freedom, and the continued legal relevance of biological sex.

Ms. Braceras is an expert on Title IX of the Education Amendment of 1972. She has also been widely published by numerous networks and previously taught courses on civil rights, constitutional law at Boston College Law School and Suffolk University Law School. She's a former member of the United States Commission on Civil Rights and former trustee of the University of Massachusetts. Thank you.

Chair DURBIN. Thank you very much, Senator Graham. Let me lay out the mechanics for the hearing. After I swear in the witnesses, each witness will have 5 minutes to provide an opening statement. And then, a round of questions—each Senator has 5 minutes to ask questions. And I ask all to try to remain within their allotted time.

So I'd ask those who are physically present to approach the witness table and stay standing for just one moment while I administer the oath. And I hope Lieutenant Governor Stratton is remotely joining us and she will join in this oath-taking. If you please raise your right hand.

[Witnesses are sworn in.]

Chair DURBIN. Let the record reflect that all of the witnesses have answered in the affirmative. And I'm going to first defer to Lieutenant Governor Stratton for her opening statement. Let's hope that this is working. Lieutenant Governor, are you with us?

STATEMENT OF HON. JULIANA STRATTON, LIEUTENANT GOVERNOR, STATE OF ILLINOIS, SPRINGFIELD, ILLINOIS

Lieutenant Governor STRATTON. Good morning. And thank you, Chairman Durbin, Ranking Member Graham, and the distinguished Members of the Senate Judiciary Committee for the opportunity to testify before you virtually today.

My name is Juliana Stratton. I am the Lieutenant Governor of the great State of Illinois. I am the mother of four daughters, and I use she/her pronouns.

I am honored to be here today on this final day of Black History Month and on the eve of Women's History Month to do my part in a fight that started long before me.

I stand upon the shoulders of women like Sojourner Truth and Ida B. Wells, Fannie Lou Hamer, and so many others who paved the way for the rights of all women. They sacrificed so much to push us forward, and yet we still live in a country that does not guarantee we should be protected from discrimination in the Constitution. An explicit assertion that we are all equals is still missing despite the women lawmakers across the Nation who stood up to finish the work our Foremothers started.

In May 2018, I was one of those women. As a State representative, I joined a bipartisan vote for Illinois to ratify the Equal Rights Amendment. I made it clear to my colleagues in the Illinois House that gender equality and racial equality are not a zero-sum game, that we are all lifted up when everyone's rights are protected. We live with the stark reality that despite being the most educated de-

mographic in the United States, Black women are only paid 64 cents for every dollar paid to white men.

There should be stronger remedies to make sure women, all women, are paid an equal wage based on their abilities and qualifications and without discrimination based on sex. These protections will be of particular significance to women of color who face more workplace discrimination than their white counterparts.

And despite impressive recovery efforts, the COVID-19 pandemic has deepened economic disparities that have already harmed women for generations. The recovery for jobs traditionally held by women have lagged woefully behind the jobs often worked by men.

Also, women are twice as likely as men to work in low-paying occupations, and this rate is even higher for Black women and Latinas.

On top of this, we are seeing the eroding of women's rights and their ability to determine what is best for their futures. Recent events have shown us all too well how easily decades of progress can be erased when our rights are not guaranteed by the Constitution.

Every parent wants their child to have a better life. And that was certainly true for my late mother, Velma, who spent every day doing what she could to ensure doors of opportunity were open to me and her four children.

And now, I have a responsibility to my daughters, Tyler, Cassidy, Ryan, and Mackenzie, to honor my mother's legacy and ensure they can go even farther on this journey toward equality and justice—not just for them, but for young women and girls everywhere who deserve nothing less.

Make no mistake, should the ERA pass, it will not guarantee that women will be treated equally overnight. We all know, for example, that the struggle continues for racial justice and equal rights for Black people and other people of color under the Fourteenth Amendment. And women will also need to remain vigilant.

We need a firm foundation for equality that is long overdue. Finishing this work is as important as ever to acknowledge the rights that women, who make up over half the population, so deserve.

So I urge Congress when taking action to consider your mothers, your daughters, and the women in your districts. It's time to make real a vision 100 years in the making so that our daughters and our granddaughters and the next generation of women are seen as exactly who they are: equals. Thank you.

[The prepared statement of Lieutenant Governor Stratton appears as a submission for the record.]

Chair DURBIN. Thank you, Lieutenant Governor. Our next witness, help me pronounce your name—Braceras? Correct? Ms. Jennifer Braceras, please proceed.

Ms. BRACERAS. Thank you, Chairman Durbin—

Chair DURBIN. You need to turn your microphone on. Slide your finger over the red light. It should work. I hope it does.

STATEMENT OF JENNIFER C. BRACERAS, DIRECTOR, INDEPENDENT WOMEN'S LAW CENTER, INDEPENDENT WOMEN'S FORUM, CONCORD, MASSACHUSETTS

Ms. BRACERAS. Yes. Okay. Thank you, Chairman Durbin, Ranking Member Graham, and distinguished Members of the Committee.

On behalf of Independent Women's Law Center and as the mother of four children, including three daughters, I am here to warn you. The ERA is a Trojan horse. It promises equality, but hidden inside the empty rhetoric is a laundry list of policies that will harm women and girls. Back when the ERA was introduced in the House in 1971—

[Disturbance occurs in the hearing room.]

Chair DURBIN. Can I ask the Capitol Police to enforce?

[Disturbance continues in the hearing room.]

[Gavel is tapped twice.]

[Disturbance continues in the hearing room.]

[Gavel is tapped.]

Chair DURBIN. Let's try to maintain order so we can get through this proceeding and have all points of view expressed.

Ms. BRACERAS. The people who have been locked out of this process, frankly, are the 62 percent of American voters who either weren't born or were too young to vote when the ERA expired in 1979.

But, as I was saying, when the ERA was introduced in the House in 1971, it was still lawful to deny women credit, to refuse to sell or rent housing to women, to sexually harass women at work and at school, and to bar them from certain schools or certain fields of study.

Millions of Americans supported the ERA at that time as a solution to these problems. Frankly, I might have, too, had I been more than 3 years old. But 52 years later, I'm happy to say that sex discrimination and sexual harassment are illegal in the United States of America. And public policies that treat one sex less favorably than the other are already unconstitutional under the Equal Protection Clause.

Today, my three daughters and my son are legally equal. Indeed, so much has changed since the 1970s that even the late Justice Ruth Bader Ginsburg believed that when it comes to the law, quote, "there is no practical difference between what has evolved and the ERA." The ERA is therefore unnecessary in 2023. But that is precisely why it is so dangerous.

To begin with, the ERA does not define the word "sex." In 1971, there was no need to. We all knew that it meant biological sex.

Today, ideologues are actively trying to redefine the term to include gender identity. And there can be no doubt that they will use the ERA to constitutionally mandate the ability of male prisoners to self-identify into women's facilities, taxpayer funding of puberty blockers for trans-identified teens, and the participation of biological males on women's sports teams.

But even if the ERA did define the phrase sex consistent with biology, the Amendment would still jeopardize many single-sex spaces we take for granted.

Layering the ERA on top of the Equal Protection Clause could suggest that it requires something more. And it might imply that it forbids public policies that ever distinguished between males and females. But males and females are not the same. We never will be. And our laws and public policies shouldn't treat us as if we're interchangeable.

Do Members of this Committee really want to constitutionally forbid public schools from offering single-sex sports teams, sexual assault support groups, or even fraternities and sororities? Do you want to outlaw grants to female-owned businesses or grants that encourage women and girls in STEM?

Because make no mistake, by applying the strictest constitutional scrutiny to sex-based programs, this is what the ERA will achieve. But it gets worse. The ERA has the potential to outlaw not only single-sex spaces, but all sex disparities, or so its proponents claim.

But what if the disparities favor women? Women today earn the majority of bachelor's and master's degrees. Should State schools be forced to discriminate against women in order to achieve parity in all programs? Should the Government be required not only to draft women but to draft them and send them into combat in equal numbers as men? Shouldn't we at least let the State legislators who represent today's voters debate and vote on the merits of these policies before we force them on an unsuspecting public?

The ERA would be devastating not only to women and girls, but also to religious liberty, threatening the tax-exempt status of religious groups that ordain only men, and prohibit Federal funding of religious organizations that counsel young people about biological sex differences.

Americans could certainly choose to amend the Constitution to do any of these things, but at no point have 38 States agreed to an amendment that would do these things, and Congress cannot now dissolve the ERA's ratification deadline and claim that they have. Thank you.

[The prepared statement of Ms. Braceras appears as a submission for the record.]

Chair DURBIN. Thank you, Ms. Braceras. Ms. Williams.

**STATEMENT OF THURSDAY WILLIAMS, COLLEGE STUDENT,
FORMER CAST MEMBER OF "WHAT THE CONSTITUTION
MEANS TO ME," AND ERA COALITION BOARD MEMBER,
HARTFORD, CONNECTICUT**

Ms. WILLIAMS. Good morning, Chairman Durbin, Ranking Member Graham, and Members of the Committee on the Judiciary.

My name is Thursday Williams. I am currently a senior at Trinity College in Connecticut, and I serve on the board of the ERA Coalition. It is such an honor to be here today testifying on behalf of the Equal Rights Amendment. Thank you, Senator Durbin, for inviting me to share my story of why the Equal Rights Amendment is important to me, my peers, and the future generation.

We are at a tipping point. The future of our democracy is at stake. The ERA holds the promise of a brighter future for us all.

My family came to this country from Jamaica seeking the American dream of education and productivity, and my mission is to ful-

fill that dream. I proudly became a citizen, was accepted into a competitive college, took on leadership roles, became president of Trinity College Black Women's Organization, and engaged in spirited debates about rights and freedom.

I fell in love with the United States Constitution in high school when I participated in constitutional debates through the legal outreach program. I argued multiple constitutional issues at NYU and Brooklyn Law School, including the Equal Protection Clause, the Fourth Amendment, and voting rights.

What I love the most about the Constitution is how brilliantly it was designed to adapt to the changing needs of its people. Our Founding Fathers were visionaries. They understood that we needed a document that can endure throughout generations. That's when I knew this was the thing for me. I wanted to study law. I wanted to be one of the change makers.

During my senior year of high school, I had the opportunity to perform in an award-winning Broadway play, "What the Constitution Means to Me." Each night, I debated why we should keep the United States Constitution. There was a part in the play where I was talking about inequality, and I was thinking about the fact that not so long ago, I would have been considered property. Not so long ago, I wouldn't even have had the opportunity to stand on stage as a Black woman.

In my closing argument during one performance, I stopped mid-show, and I just stood there crying my eyes out at the idea. Here I am defending a Constitution that at one point considered me three-fifths of a person, a Constitution that doesn't explicitly recognize women in it, a Constitution that in 2023 still doesn't explicitly state that I am equal to a man. For the first time, it became clear to me that this document was not written for me.

Nevertheless, I will continue to defend this Constitution, and I will fight for my rightful place in it. This is why I am here today. I am here to defend an amendment that would finally guarantee me equality.

After graduating in May, I will be starting my professional career at one of the most prestigious law firms in the country. As exciting as this should be, I proceed with caution because I am aware that although I am as capable as any man, the system is stacked against me.

As a woman of color, I am more likely to be offered less than a man for the same work. I am more likely to be overlooked for raises and promotions. I will have to work twice as hard to get the same recognition as my male colleagues. And right now, I will have limited recourse to fight against it.

This is why it is important for myself, my peers, and the future generation to have the Equal Rights Amendment. We deserve a Constitution that guarantees equality regardless of sex, a Constitution that we can use as a tool to fight discrimination. The Equal Rights Amendment has fulfilled all requirements to be added to the Constitution. Now, it is time for it to be recognized.

If we continue to hold back more than half of our people from accessing equal opportunities, what does that say about us as a country? How can we be the beacon of freedom and democracy we claim

to be if we do not declare that sex discrimination contradicts the American dream?

The ERA will make the Constitution a more perfect document so we can have a more perfect Union. It is time we stop disappointing the future generation. Thank you.

[The prepared statement of Ms. Williams appears as a submission for the record.]

Chair DURBIN. Thank you very much, Ms. Williams. Professor Foley.

STATEMENT OF ELIZABETH PRICE FOLEY, PROFESSOR OF LAW, FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW, MIAMI, FLORIDA

Professor FOLEY. Thank you, Chairman Durbin, Ranking Member Graham, Members of the Committee, I'm grateful for the opportunity to testify about this important issue. And as a constitutional law professor and someone who practices constitutional law, I'm going to stick to the law.

Okay, so let's talk about Article V of the Constitution. Article V of the Constitution gives Congress an express power to propose constitutional amendments, including a power to propose their mode of ratification, and Congress usually does this via a joint resolution.

Once that joint resolution passes by two-thirds super majorities as required by Article V, Congress' role under the Constitution is done. It's exercised all the power that it has under Article V. And, in fact, it is the entire joint resolution, including its preamble, that is then submitted to the States for ratification. The joint resolution that you would pass in your Article V capacity is the proposal itself. So preambles are therefore not only a part of the Article V proposal, they are often an important part because they often contain the mode of ratification.

So let me give you a quick example. When Congress passed the Bill of Rights proposal, the preamble specified that those Amendments, the first 10 Amendments to the Constitution, those Amendments' mode of ratification must be by State legislatures rather than State conventions. And the Twenty-Third through Twenty-Sixth Amendments, like the ERA, contain a 7-year ratification deadline in their preambles.

So let's talk about the caselaw now. We've already mentioned *Dillon v. Gloss*. This is the most important Supreme Court case. The Court there unanimously held that a 7-year ratification deadline that was contained in the Eighteenth Amendment, the Prohibition Amendment, was judicially enforceable because it was an exercise of Congress' power to propose a mode of ratification under Article V.

Now, ERA proponents prefer to kind of ignore *Dillon*, and they focus instead on a plurality opinion that was pinned by Justice Black in the 1939 decision in *Coleman v. Miller*. Now, Black's plurality in *Coleman* took the position, like the ERA proponents do now, that all ratification issues are nonjusticiable political questions that Congress alone can resolve, not the courts. But of course, we all know—most of us in the room are lawyers—the Black plurality is just that. It's a plurality. It got four votes.

The other five Justices in *Coleman*, the majority of the Court, took a narrower view and held that Congress alone can decide if an amendment has been ratified in a timely fashion, and, importantly, it can do so by specifying a ratification deadline in its proposal. If there's no ratification period specified by Congress in its proposal, like with the Child Labor Amendment, which was what was at issue in *Coleman*, then the Court won't sort of superimpose one. The amendment will remain open indefinitely for ratification.

And that's what happened, for example, with the Twenty-Seventh Amendment, which took 203 years to ratify and was ultimately ratified in 1992 after being one of James Madison's original 12 Articles proposed.

[Disturbance occurs in the hearing room.]

Chair DURBIN. Please——

[Gavel is tapped twice.]

Chair DURBIN [continuing]. Restore order.

[Disturbance continues in the hearing room.]

Chair DURBIN. Disruption does not help.

[Disturbance continues in the hearing room.]

Chair DURBIN. I'm sorry, Professor Foley. Please proceed.

Professor FOLEY. Yes, no worries. All right. So if Congress does specify a ratification deadline in its proposal, like it did with the Eighteenth Amendment in *Dillon* and like it has done with the ERA, then the Court will in fact enforce that deadline. And either way, notice that Congress is the one in control. It can define the terms that it wants in its proposal that it initially submits to the States.

Now, given the Supreme Court precedent, it should be unsurprising that we have two district court opinions that have both held that the ERA's ratification deadline is in fact enforceable.

There was the *Idaho v. Freeman* case, of which I think someone mentioned earlier from 1981, and then, most recently, we have the *Virginia v. Ferriero* case from the D.C. District Court in 2021. Both of these courts have expressly rejected the argument that the ERA's ratification deadline is ineffective because it's in the preamble. In *Ferriero*, for example, Judge Contreras, who's an Obama appointee, held that the ERA's deadline was operative and not precatory.

So, unlike the Constitution's preamble or preambles in ordinary statutes, the ERA's deadline doesn't use flowery language that doesn't have some sort of discernible standard. It's operative language.

Moreover, and importantly, I think, Congress and the States have a very longstanding history of treating the mode of ratification that's contained in a preamble as binding. I gave you the previous example of the Bill of Rights preamble. This history is entitled to great weight and has been by courts.

And finally, *Ferriero's* ratification analysis isn't dicta as some of the ERA proponents claim. Judge Contreras expressly stated twice in his opinion that his conclusions both on standing and ratification were what he called alternate holdings. And as lawyers in the room know, it's black letter law that alternate holdings are not dicta, and my written testimony cites numerous cases, including Supreme Court cases on this.

If Congress can recognize ratification outside of proposal's specified deadline, then think about it: Congress will have a vast new power that is not contemplated under Article V or any other part of the Constitution. Congress could specify one mode of proposal in the actual proposal that it submits to the States, and then years or even centuries later, it could alter the mode of proposal by a simple majoritarian resolution. The constitutional amendment process would no longer be fixed and stable, but it would be a chaotic ever-moving target.

This wouldn't be fair to the States, and it would effectively gut Article V's supermajoritarian process. So I would urge opposition to Senate Resolution 4 or any similar proposal. Thank you.

[The prepared statement of Professor Foley appears as a submission for the record.]

Chair DURBIN. Thank you, Professor Foley. Ms. Sullivan.

**STATEMENT OF KATHLEEN M. SULLIVAN, SENIOR COUNSEL,
QUINN EMANUEL URQUHART & SULLIVAN, LLP, LOS ANGELES,
CALIFORNIA**

Ms. SULLIVAN. Thank you so much, Chairman Durbin, Ranking Member Graham, and distinguished Members of the Committee. It's a privilege to be before this Committee, which I first had as a privilege 37 years ago, which is a sobering thing to think about.

I am delighted to have this opportunity to speak in support of Senate Joint Resolution 4 from the perspective of a constitutional scholar. And I'd like to respectfully disagree with my learned colleague, Professor Foley, on several points, but I'd like to really focus on three points today.

First, I want to echo the points made so eloquently in the opening panel by Senators Cardin and Murkowski that this ERA is very much a bipartisan enterprise. And it has been since its inception 100 years ago. It was authored by Republican as well as Democratic authors. It was proposed in a bipartisan fashion, and it was ratified in bipartisan fashion. It was great Republican Congresswomen who reached across the aisle to Democratic Congresswomen to propose the ERA in 1972. And it's been bipartisan right through the ratifications by Illinois, Nevada, and Virginia.

Second point, I would like to echo the Chairman's eloquent words about why the ERA is not redundant of existing equal protection jurisprudence as announced by the Court. It's not redundant. It's true, we've had—as all of my colleagues have said, we've had advances for women, very important advances, over the last 50 years. But they're not guaranteed in the Constitution. And under the current Supreme Court's approach to interpreting the Fourteenth Amendment and the other Civil War amendments, they look to history. And I can tell you that the history of the framing of the Fourteenth Amendment was not surrounded by the view that women were the equal of men.

And don't take it from me. You can take it from the Supreme Court, which upheld in *Bradwell* against Illinois in 1872, a few short years after the Fourteenth Amendment; the power of Illinois to exclude women from the practice of law or the Supreme Court, in *Minor v. Happersett*, an 1874 decision in which the Supreme Court held women did not have an equal right to vote with men

under either the Equal Protection or the Privileges or Immunities Clause of the Fourteenth Amendment.

So if we look to 1868 to see what the Equal Protection Clause means, we're not going to find that it protected the equality of women to men. That's why the ERA is not redundant. That's why it should be enacted now. That's why it should be affirmed now.

It's my belief that under Article V, Congress proposed that 38 States ratified it. It is the law now, and the only thing standing in the way is the congressional deadline, which Congress set in 1972, altered in 1978, and has the power to change today.

And that's what I want to end on my third point, and the most important point for today is to absolutely affirm, from a perspective of a constitutional scholar who's looked at Article V, that this body has the power to remove the deadline that was set in 1972 and extended in 1978.

Now, why does the Congress have constitutional authority to eliminate the deadline? Well, to begin with, there's already a body of precedent in this body. This body decided it had the power to extend the deadline in 1978 and did so on the advice of the executive branch and Office of Legal Counsel memo at the time.

But the most important reason why you have this power, and here I want to respectfully disagree with my friend, Professor Foley, is the prior deadline was in the preamble and not in the text.

Now, over time, Congress has had a different approach to where it put these deadlines. It put a deadline in the text of the Eighteenth Amendment, the Prohibition Amendment, and it said it shall be inoperative unless adopted. And when it went out to the States for ratification, the States voted on that language. That was an expiration date.

What this body said in 1972 for the ERA could not have been more different. It just said it shall be the Amendment, a part of the Constitution when ratified by the legislatures of three-fourths of the States within 7 years. That was advisory. It was hortatory. It was something that expressed the wish of the body then, but it can be changed.

Now, here's the key point: When the Framers wanted to put time limits in the Constitution, they knew how to do it—6 years for a term of office; 2 years for a term of office; 4 years for a Presidential term of office; the Pocket Veto Clause, Article I, Section 7, "If any Bill shall not be returned by the President within ten Days ... after it shall have been presented to him, the Same shall be a Law." There is no time limit in Article V.

And when this body adopted the time limit in the preamble by joint resolution and majority vote, it set the precedent for this body now today to decide by joint resolution through majority vote to change the deadline, to remove the deadline.

And that is why Senate Joint Resolution Number 4 is proper, it's constitutional, it's within this body's power, and it will make clear and undisputable that the Equal Rights Amendment is now the Twenty-Eighth Amendment to the Constitution. Thank you.

[The prepared statement of Ms. Sullivan appears as a submission for the record.]

Chair DURBIN. Thank you, Ms. Sullivan. We now will turn to questions, and each Member has 5 minutes.

I'm going to try to ask two questions to clarify I think two important issues, and I'm going to start with you, Ms. Sullivan. And I want to go to this preamble question.

Professor Foley noted Article V in her presentation to the Committee—I looked at Article V—there is no mention of the word “preamble” in Article V. I looked, of course, to the preamble to the Constitution, and as memorable as the words may be, I don't believe that they have driven decisions of the Court at any stage. The body of the Constitution does, over and over again. I can't recall. Maybe I'm just not aware of it.

But the preamble has been a driving force to establish or to question a person's rights. And, of course, this Constitution in Article VII spells out exactly what ratification of the Constitution entails. And again, we have an important paragraph which does not include the word preamble at any stage.

So my question to you initially is the argument that this is in a preamble and should be treated differently than other places you've stated already, but what is your comment on the preamble to the Constitution and the fact that it has not been a driving force?

Ms. SULLIVAN. Preambles can have eloquent power. The preamble to the Constitution is perhaps the greatest preamble ever written. But preambles do not drive the interpretation of Article V joint resolutions, and they never did. And no court has ever declared it. And crucially, I want to focus on *Dillon v. Gloss*, which Senator Graham mentioned earlier, a 1921 decision that, of course, did hold that the Eighteenth Amendment was not unconstitutional by virtue of the 7-year expiration date that was baked into it and ratified by the States. That crucially was not a preamble. It was the language—the 7-year deadline was an expiration date in the text.

Now, why does that matter? It matters because the States vote on the text of the Amendment. When they ratify, the States are not ratifying the preamble. They are ratifying the text. So it's one thing to bake the deadline into the constitutional text and have the States vote on it, that might be binding, but a preamble is just advisory. It's your dialogue with the States saying, “Get this done in 7 years, but maybe we'll revisit it.”

And, if anything, the language of *Coleman v. Miller*, the 1939 case, is supportive of the view that the Congress does have the power now to say we think the ERA is still vital, and we think we should remove the prior deadline.

One Congress can't entrench itself into the future by binding a future Congress. One Congress can't prevent the States from exercising their ratification role by setting a binding deadline on the States enforceable by a court.

So, just to—there's no constitutional decision by the Supreme Court standing in your way. *Dillon v. Gloss* is an apposite, because it was about a deadline in the text and not the preamble. And *Coleman v. Miller* is supportive of this Congress' role in deciding that the ERA still has a vital role to play today.

Chair DURBIN. So let me go to the second question that was raised by Professor Foley as well as by Senator Graham. Since Congress sent the resolution proposing inclusion of the ERA in the Constitution to the States in March of 1972, as we know, 38 States have ratified the Amendment.

However, five of those States have subsequently sought to rescind their ratification: Nebraska, 1973; Tennessee, 1974; Idaho, 1977; Kentucky, 1978; and South Dakota in 1979. North Dakota also recently voted to rescind its ratification in 2021.

What is the legal significance, Ms. Sullivan, of these State legislatures voting to rescind their ratifications?

Ms. SULLIVAN. It has no—a State rescission has no force under the text of Article V, which speaks of ratification and not of rescission. Number two, when two States tried to withdraw or rescind their ratification of the Fourteenth Amendment after it was proposed and adopted, this body rejected that. So there's precedent in this body for rejecting efforts to rescind. And to the extent this body has the power I described before, this body has the power to affirm that those rescissions are ineffective now just as they were for the Fourteenth Amendment. We wouldn't have had the Fourteenth Amendment today if we'd listened to rescissions.

Chair DURBIN. Thank you very much. Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. Give me a little bit of latitude, if you don't mind. There's sort of some breaking news here. Apparently, the D.C. Circuit Court of Appeals just affirmed the holding, I think—it's *Virginia v. Ferriero*. Is that the name of it?

Professor FOLEY. Yes, that's the name of it.

Ms. BRACERAS. Illinois now.

Senator GRAHAM. Let me—give me a second to set the stage, Mr. Chairman, if you don't mind. So you had two States, basically, sue in district court, who ratified the ERA after the time period in question, compelling the National Archivist to enroll it in the Constitution. Is that generally what they were suing about, Ms. Foley?

Professor FOLEY. Well, I don't know. I haven't read the opinion yet since—

Senator GRAHAM. No, Illinois and Nevada brought a lawsuit—

Professor FOLEY. Yes.

Senator GRAHAM [continuing]. In the district court—

Professor FOLEY. Correct.

Senator GRAHAM [continuing]. Saying their ratification after 1982—

Professor FOLEY. Was valid.

Senator GRAHAM [continuing]. Should count and get you to 38, and the district court said no. Is that correct?

Professor FOLEY. That's correct. They sought a writ of mandamus to force the U.S. Archivist to publish.

Senator GRAHAM. So the district court upheld the idea that we, the Congress, could set deadlines, which we did in this case.

Professor FOLEY. Correct, citing *Dillon*.

Senator GRAHAM. Okay. So today, the D.C.'s Court of Appeals rejected the mandamus request and upheld the lower court. So that's where we're at, like, 11 or whatever time it is.

The point I'm trying to make is that the reason we're not starting over and we're trying to turn the Constitution, in my opinion, upside down is because if you started this process today, you wouldn't come anywhere near two-thirds of the House and Senate to ratify this Amendment. And y'all all know that. Times have changed. Women's rights have been acknowledged. And why it would be so soundly rejected, this Amendment would lead to chaos.

This Amendment would really punish women who are trying to play sports fairly. This Amendment would give the Court the ability to strike down every pro-life measure passed by the States. And if you don't believe me, this is what NARAL said—sent out a national alert: The ERA—what we're debating here today—would “reinforce the constitutional right to abortion.” It would “require judges to strike down anti-abortion laws.” Ms. Braceras, do you agree with their position?

Ms. BRACERAS. Yes, I do.

Senator GRAHAM. Ms. Sullivan, do you agree with their position?

Ms. SULLIVAN. I'm sorry.

Senator GRAHAM. That NARAL is saying if the ERA were passed, become a constitutional amendment, it would allow courts to strike down all restrictions on abortion that exists in the States today based on the ERA. Do you agree with that?

Ms. SULLIVAN. Senator, I respectfully do not agree with that.

Senator GRAHAM. So you disagree with NARAL?

Ms. SULLIVAN. I do, but on that point, on that prediction.

Senator GRAHAM. Okay. So—

Ms. SULLIVAN [continuing]. I think that there would be a case-by-case determination that would balance the right to women's equality against other rights, which is how we practice constitutional law every day, Senator.

Senator GRAHAM. The ACLU wrote the House in March of 2021: “The Equal Rights Amendment could provide an additional layer of protection against restrictions on abortion. It could be a tool against further erosion of reproductive rights.” Do you agree with that, Ms. Braceras?

Ms. BRACERAS. I certainly do. I mean, certainly, that's what the proponents of the ERA want to—

Senator GRAHAM. Okay, so let's just be honest. The people who are pushing politically to pass this are hanging their head on if it became law, every pro-life measure in this country would fall. You didn't say that in 1982. So if there is a law in a State, pick a State, that says a biological male cannot compete against females, would that law be subject to being struck down if the ERA is passed, Ms. Braceras?

Ms. BRACERAS. Yes, it would. In fact, I would add that in my home State of Massachusetts where we have a State Equal Rights Amendment, schools are required to allow boys to compete in women's sports. And as a result, my daughter, who is now a Division I field hockey player in her senior year of high school—her team competed against at least three teams that had more than three men on them, as is their constitutional right in Massachusetts.

Senator GRAHAM. So if gender identity becomes the new standard on—

Ms. BRACERAS. Oh, and this isn't gender identity. These were not trans-identified—

Senator GRAHAM. Right.

Ms. BRACERAS [continuing]. Individuals. These were boys who identify as boys and were very good athletes in hockey and lacrosse and thought, wouldn't it be fun—or funny to go out and play field hockey against a bunch of girls, some of whom were future Division I athletes—

Senator GRAHAM. So I'll just wrap—

Ms. BRACERAS [continuing]. And take their spots on varsity teams.

Senator GRAHAM. Yes. I'll just wrap this up, Mr. Chairman. The reason it wouldn't get two-thirds votes, most Americans don't like the outcome we're talking about here. Most Americans would be really upset to have a constitutional amendment that would do the things we're talking about—mandate abortion on demand up to the moment of birth. That's what it would do. And the people pushing it, that's what they want.

And if you can't pull this rabbit-out-of-a-hat constitutional exercise and count the States, not count the ones that rescinded, count the ones that did after the time period, and you had to start over as Justice Ginsburg indicated, you would fail miserably because the times in which we live have changed.

You wouldn't get anywhere near two-thirds vote in the Senate or the House because most Members of Congress, and I think a majority of Senators, do not want a constitutional amendment that requires abortion on demand up to the moment of birth.

I think most Members—

[Disturbance occurs in the hearing room.]

Senator GRAHAM [continuing]. Of the House and most Members of the Senate—

[Disturbance continues in the hearing room.]

Senator GRAHAM [continuing]. Most Members of the House and most Members of the Senate would be offended by a law—

[Disturbance continues in the hearing room.]

Senator GRAHAM [continuing]. A constitutional amendment, mandating that biological males can take over girls' sports. That's why you would fail so miserably.

[Disturbance continues in the hearing room.]

Senator GRAHAM. Thank you. Have a good day.

[Disturbance continues in the hearing room.]

Senator GRAHAM. Goodbye.

Chair DURBIN. So, if the Senator from South Carolina—bear with me here. I see this opinion that you've referenced in your statement. And as I understand it, the circuit court was affirming what the district court had decided, that the court itself was not going to overturn this decision, which puts the ball right smack dab back in Congress' court.

Senator GRAHAM. Yes, sir. That's right. And the point is that the courts have upheld the position of the district judge. And what I am saying, no, it doesn't put it back. The law of the land is that 7 years plus 3 years is the limit. And we're not buying into what you're selling here. No, we don't agree with that.

Chair DURBIN. And so, let me tell you the sequence of Members who will be called on based on the early bird rule. First, Senator Whitehouse, then Senator Grassley, Klobuchar, then Senator Lee, and the list goes on from there. So let's start with Senator Whitehouse.

Senator WHITEHOUSE. Thanks, Chairman. It's always interesting to me to figure out who's here in the room. So if you don't mind, Ms. Braceras, I'd like to ask you a few questions about the Independent Women's Law Center.

Ms. BRACERAS. Sure.

Senator WHITEHOUSE. What is its relationship with the Independent Women's Forum and the Independent Women's Voice organizations?

Ms. BRACERAS. We are the legal advocacy arm of the Independent Women's Forum and Independent Women's Voice.

Senator WHITEHOUSE. So they share support for the organization that you are here representing, together?

Ms. BRACERAS. Correct. We're a part of Independent Women's Forum.

Senator WHITEHOUSE. I'm sorry. You're a part of Independent Women's Forum or you're a part of Independent Women's Voice?

Ms. BRACERAS. We're a part of, well, both.

Senator WHITEHOUSE. Okay. Got it. What else do Independent Women's Forum and Independent Women's Voice share? Do they share officers?

Ms. BRACERAS. I'd be happy to respond to those questions in writing. I don't really have the corporate structure in front of me right now.

Senator WHITEHOUSE. You don't know if they share officers or not?

Ms. BRACERAS. We have overlapping employees, some, not all.

Senator WHITEHOUSE. Okay. So you share staff—some staff. Correct?

Ms. BRACERAS. Correct.

Senator WHITEHOUSE. You're not sure whether you share officers or not, but you'll get that to me in writing. Correct?

Ms. BRACERAS. If you'd like.

Senator WHITEHOUSE. I would like. Do you share donors?

Ms. BRACERAS. I have no idea. I'm an employee. I'm not a part of the fundraising arm.

Senator WHITEHOUSE. Okay. Could we add that to the questions you'll get back to me in writing on, whether you share—the organizations share donors?

Ms. BRACERAS. Sure. I'm quite sure they don't share donations. Individuals may donate to either Independent Women's Voice, Independent Women's Forum, or both. But no, they don't share the donations.

Senator WHITEHOUSE. But they may have the same donors. Correct?

Ms. BRACERAS. It's possible.

Senator WHITEHOUSE. That's what you'll let me know. Correct?

Ms. BRACERAS. Sure.

Senator WHITEHOUSE. And office space, do they share office space?

Ms. BRACERAS. We're a virtual office. We have been since long before COVID, actually. Our staff almost is entirely of women. And for a variety of reasons, our organizations made the decision long ago to allow our staff to work from home.

Senator WHITEHOUSE. What distinctions would we find between the office arrangements for Independent Women's Voice and Independent Women's Forum?

Ms. BRACERAS. Well, as I said, we're both virtual companies.

Senator WHITEHOUSE. So there's no difference between the office—

Ms. BRACERAS. There is no office—

Senator WHITEHOUSE [continuing]. For either of them?

Ms. BRACERAS [continuing]. There is no office for either of them.

Senator WHITEHOUSE. There's no physical office.

Ms. BRACERAS. There's no physical office.

Senator WHITEHOUSE. You get together, you have meetings, you do Zooms, you do phone calls, all of that sort of thing that offices do. Correct?

Ms. BRACERAS. Correct.

Senator WHITEHOUSE. And when you do that, is there a distinction between whether it's being done by Independent Women's Voice or Independent Women's Forum?

Ms. BRACERAS. Yes, depending on the meeting. I mean, if IWF policy staff calls a meeting, then it's a meeting of the IWF policy staff.

Senator WHITEHOUSE. Okay. The history of your organization, as I understand it, is that Independent Women's Forum was led from 2000 to 2005 by Koch Industries' lobbyist Nancy Pfotenhauer. I don't know if I pronounced that name right, but is that true?

Ms. BRACERAS. Nancy Pfotenhauer was president of IWF for a time period. I don't have the exact dates in front of me.

Senator WHITEHOUSE. And as I understand it, in 2003, she was also president of Americans for Prosperity, which is the Koch organization's primary political battleship, I would call it, entity.

Ms. BRACERAS. I have no idea, Senator. And I'm pleased that you're so interested in the work of IWF. I hope that you'll ask the other panelists here today, and other panelists that come before you on other—

Senator WHITEHOUSE. Well, there are more mysteries around—

Ms. BRACERAS [continuing]. Similar questions.

Senator WHITEHOUSE [continuing]. I think there are more mysteries around yours than the others. So if you don't mind, I'll focus on that.

Ms. BRACERAS. Oh there's no mystery about IWF.

Senator WHITEHOUSE. It originated as Women for Judge Thomas. Correct?

Ms. BRACERAS. Yes, it did, founded by Ricky Silberman, who had been vice chair of the EEOC with Justice Thomas.

Senator WHITEHOUSE. And the Koch Industries' lobbyist ran both those organizations at the same time that she ran Americans for Prosperity for those years.

Ms. BRACERAS. I have no idea what you're talking about—

Senator WHITEHOUSE. Okay.

Ms. BRACERAS [continuing]. A Koch Industry lobbyist. I think you're—I have no knowledge of that.

Senator WHITEHOUSE. All right. You do take positions on judicial nominees. Do you not?

Ms. BRACERAS. We do.

Senator WHITEHOUSE. Have you ever taken a position in favor of an appointee of a Democratic President?

Ms. BRACERAS. Have I personally, or has the organization?

Senator WHITEHOUSE. Either organization or yourself, all three.

Ms. BRACERAS. I'm sure that I have.

Senator WHITEHOUSE. Okay, let's put that aside then and look at the two organizations since that's where my question was going. Have they—

Ms. BRACERAS. Well, the organizations—to be honest with you, the organizations have for the most part only weighed in on Supreme Court nominations. I think there were a—

Senator WHITEHOUSE. Have you ever supported a Democratic nominee—has either organization ever supported a Democratic nominee to the Supreme Court?

Ms. BRACERAS. Not in my knowledge, no.

Senator WHITEHOUSE. Has the—

Ms. BRACERAS [continuing]. We support nominees who support an originalist interpretation of the Constitution.

Senator WHITEHOUSE. Had the International—this will be my last question. Did the International—sorry—the Independent Women's Forum call the testimony here to this Committee by Dr. Christine Blasey Ford a publicity stunt?

Ms. BRACERAS. Did the Independent Women's Forum say that?

Senator WHITEHOUSE. Yes.

Ms. BRACERAS. I don't recall.

Senator WHITEHOUSE. Okay. My time's up.

Chair DURBIN. Senator Grassley.

Senator GRASSLEY. Ms. Braceras, Justice Ginsburg quote about the Equal Rights Amendment falling three States short of ratification has already been referred to, and she said it should start all over again. Given how rare it is for our history to amend the Constitution, do you agree with Justice Ginsburg that the amendment process should start over to ensure constitutionality and the confidence of the American people?

Ms. BRACERAS. I do, and particularly because the circumstances have changed so much that the Amendment that is currently before you today is effectively a different amendment than the one that the States voted to approve—the 35 States voted to approve in the early 1970s. I would also argue that 62 percent of the American voters, at least 62 percent, were not of voting age or were not yet born at the time that the States first considered this Amendment. The majority of American voters today are women. And today's women and their elected representatives in the States should have an opportunity to weigh in on whether or not this is necessary in 2023.

Senator GRASSLEY. Also, the Department of Justice issued an opinion that the Equal Rights Amendment has expired—expired was their word—and it is constitutionally required that the process start again. So can you talk about why this is the case and what

effects it would have on the Amendment to continue as it stands? And I think you already spoke to that point a little bit, but if you want to expand on it, feel free to do that.

Ms. BRACERAS. Yes, sir. When the Amendment fails to garner 38 States in the time allotted by Congress, the Amendment died. And there's nothing to—there's effectively—you're talking about lifting a deadline on something that no longer exists. It died when it expired in 1979, I would argue. Some people argue it expired in 1982, but regardless, it is dead now and therefore cannot be resurrected from the dead.

Senator GRASSLEY. Yes. Professor Foley, the Supreme Court held that Congress could fix a reasonable time for ratification about an amendment. Congress fixed the time for this constitutional amendment, and, of course, this expired. Are you aware of any constitutional amendments that were ratified after the deadline for ratification of the amendment?

Professor FOLEY. No, this is the only one.

Senator GRASSLEY. Also, do you explain to us whether Congress has the constitutional authority to pass a proposed amendment without a ratification deadline and then years later impose a ratification deadline before the threshold for State ratification has been satisfied?

Professor FOLEY. No. As I said in my testimony, you know, the only power Congress has is under Article V, and that is to make a proposal that is submitted to the States. Once that proposal is submitted to the States, your job is done and you're locked in, and you can't change it by simple majoritarian resolutions in the future.

So, for example, your mode of ratification that you choose can include not only a ratification deadline should you choose to impose one, but it can also include, and does generally include, the mode of ratification that's expressly mentioned in Article V, which is specifying whether the ratification should occur via State legislatures versus State conventions. And once you pick State conventions or State legislatures, you're also locked in just like you're locked in on the deadline. So whatever mode of ratification you pick is fixed.

Senator GRASSLEY. Yes. And my last question will be to you also, Professor Foley. What are the legal risks of disregarding the ratification deadline for this constitutional Amendment?

Professor FOLEY. Well, I think the biggest problem of all is that if you sort of arrogate to yourself through a majoritarian resolution the idea that you have this sort of new power to change the mode of ratification, then that means the mode of ratification, including picking State legislatures versus State conventions, and any deadline is changeable at whim of any future Congress.

And, you know, that's a moment of constitutional instability. It's deeply unfair to the States who always treated your modes of ratification as fixed and binding on them, and it basically guts the super majoritarian process of Article V. So I think it's a very dangerous precedent to set.

Senator GRASSLEY. Thank you.

Chair DURBIN. Thank you, Senator Grassley. And next is Senator Klobuchar.

Senator KLOBUCHAR. Well, thank you very much, Mr. Chairman. I have long supported the Equal Rights Amendment—I guess long is the right adjective to use here—and I’ve really appreciated all the testimony, especially Senator Murkowski’s willingness to talk about the importance of bipartisan support for this. And I’d start with you, Lieutenant Governor Stratton. Could you talk about Illinois where just in 2018, Illinois ratified the ERA with bipartisan support, including from the House Republican leader, nine other Republicans, and how the ERA gathered that kind of bipartisan support in Illinois and still, in fact, has it nationally?

Lieutenant Governor STRATTON. Yes. Thank you so much, Senator, for that question. In 2018, as I served in the Illinois House, I was proud to not only vote for the ratification of the Equal Rights Amendment in Illinois but to do so alongside of my colleagues on both sides of the aisle. It was a bipartisan vote. And I think that one of the things that was so influential in that debate on the House floor was to talk about the implications not just for women today, but for women and girls of the next generation and the generations to come.

I think I heard a statement in one of the previous speakers talking about what would happen if we needed to wait for every vote—wait until we had the next generation to be alive and able to make a vote. Well, certainly that is not something that I would have wanted as it relates to the Fourteenth Amendment as a Black woman, for someone to say, well, let’s just wait until the next generation is alive and can vote.

I’m grateful that there are votes that can be taken and amendments that can be made to our Constitution that enshrine rights, that demonstrate that we should be able to live free from discrimination—

Senator KLOBUCHAR. Thank you.

Lieutenant Governor STRATTON [continuing]. Right now in Illinois.

Senator KLOBUCHAR. Thank you. Okay, thanks. I just have a few more questions. We have our little 5 minutes here, so I guess I will go to you, Professor Sullivan.

Last year, I joined Senators Blumenthal and Cortez Masto, as well as former Representative Maloney, who’s here today, returned—thank you for being here—and Speier—in urging the Justice Department to withdraw an opinion issued under the previous administration seeking to stand in the way of the ERA being added to the Constitution.

The Justice Department said that the prior opinion did not prevent the Congress, in fact, from taking action related to the ratification of the ERA. Quickly, do you agree with the Justice Department that there’s nothing stopping Congress from taking action regarding the ERA?

Ms. SULLIVAN. Yes.

Senator KLOBUCHAR. Okay. Well, that is nice and succinct. Thank you. The other question I wanted to ask you was that, given the Supreme Court’s willingness to roll back fundamental rights, do you agree that it is more important than ever to enshrine formal protections in our Constitution guaranteeing women’s equality?

Ms. SULLIVAN. Yes, absolutely.

Senator KLOBUCHAR. Okay. And I think that's very important for people to know the moment that we are in time. While this has been going on, as I described it early on, for a long, long time, and women have been fighting for their rights, and it has been, in fact, ratified in so many States, it is all the more relevant today.

I guess I would end with you, Ms. Williams. I know in high school you performed on Broadway in "What the Constitution Means to Me." I actually got to personally see the play when it came to Minneapolis, and it was an amazing experience, and I know different high schoolers have performed as part of that play for many years.

I want to give you the opportunity to tell the Committee what a guarantee of equality in the Constitution would mean to you.

Ms. WILLIAMS. Yes. So, as I've previously mentioned in my testimony, in May, I will be starting a position as a litigation paralegal at one of the most prestigious firms. And I think when thinking about the experience of women, especially Black women, in this country, it is important for us to have tools to fight against discrimination, to have tools that will help us gain the equality we deserve.

As I've said, women in this country are not offered as much as men. I will have to work as hard as my male colleagues. I may not receive the same respect as my male colleagues, and I will have limited recourse to fight against that, and I deserve that.

As a Black woman, I experience this world very differently from each and every person on this Committee. And it is important that my perspective and my experience is in this Constitution, is in this document. So this is why we need the ERA.

Senator KLOBUCHAR. Very good. Thank you.

Chair DURBIN. Thanks, Senator Klobuchar. Senator Lee.

Senator LEE. Thank you very much, Mr. Chairman, and thanks to all of you for being here. It's important to remember that when Congress proposed this Amendment in 1972, it didn't happen in a vacuum. When Congress went to propose it, it didn't have the votes that it needed. It added the 7-year limitation in order to secure the consensus necessary to achieve a two-thirds supermajority vote in both Houses.

In other words, there were Members of Congress needed to vote for it who weren't willing to vote for it without that provision. So that's how they achieved the bargain. And we can't just ignore that. That shouldn't be ignored. You can't ignore it without doing violence to the process articulated in Article V of the Constitution for how to amend it. It's important anytime we amend the Constitution to make sure that we understand what the language means.

We've seen through other amendments—one of many examples would be the Fourteenth Amendment. You can't always anticipate at the outset, when you adopt something like this, what ramifications it might have. And that's one of the many reasons it's important to get this right.

All sorts of things have changed since 1972, and that's yet another prudential reason why it makes sense to put limitations in there. But to be very clear, there is a remedy for what you're talking about.

When something expires, it's not like it can't ever be brought up again. It's just that it becomes a different proposal. That proposal has a shelf life. That shelf life has now passed. It has expired. Congress could propose another Equal Rights Amendment. It has yet to do so, and that matters. It matters in a way that's been recognized by the courts. The U.S. District Court for the District of Columbia ruled against the position that this can be extended. And the U.S. Court of Appeals for the D.C. Circuit today affirmed that ruling.

So, this argument has lost at the district court. It has lost at the court of appeals. If it were to come before the United States Supreme Court, it will lose there, too. And so, that really is a significant thing.

There are some policy considerations that also need to be taken into account. In the 1970s, my dad wrote a book. It was called "The Lawyer Looks at the Equal Rights Amendment." And he asked a number of questions about the legislation. And one of the questions he asked, that he identified as the most important question, relates to what standard of review would be applied if the Equal Rights Amendment were to become law of the land. He asked, for example, is it going to be rational basis? Is it going to be strict scrutiny? Is it going to be intermediate scrutiny? Or what's it going to be? Or is it going to be a complete prohibition or a complete prohibition with qualifications?

Ms. Braceras, does the text of the 1972 ERA make clear what standard of review courts would apply?

Ms. BRACERAS. It does not, but the advocates of the ERA hope and will argue that it requires strict scrutiny.

Senator LEE. Okay. And under strict scrutiny, if it were to apply, how would that be different? Because, currently, something like this where there is a Government-imposed distinction, a differentiation on the basis of sex, it is not strict scrutiny that applies. It's a form of intermediate scrutiny. Tell us why that matters. Why do you think that matters? What's the difference between switching from intermediate scrutiny to strict scrutiny?

Ms. BRACERAS. So, strict scrutiny is the standard that courts use to analyze policies that deal with race, and it's the right standard to use with race because in the racial context, separate is unequal.

That is not true in the context of sex. Separate is not always unequal for women and men when it comes to issues of privacy or places where biological differences matter, such as sports. And so, sex should not be treated the same as race under the Constitution. Our current intermediate scrutiny standard leaves space for courts to take into consideration biological differences where they matter. And in all other cases——

Senator LEE. And strict scrutiny doesn't accommodate that in the same way.

Ms. BRACERAS. No, it does not.

Senator LEE. So what might this do for sex-segregated prisons, prisons for women? What might this do for Government-sponsored, Government-funded and operated shelters for abused women, for example, or public restrooms, locker rooms, athletic facilities, athletic competitions? What might strict scrutiny do to every one of those?

Ms. BRACERAS. So, in the racial context, courts have been very clear that prisons cannot separate inmates on the basis of race, even where doing so would prevent certain gang violence in the prison, and that's the right standard. They should not be able to separate inmates on the basis of race.

If you applied that same standard to men and women, that would mean that prisons could never—they would have to have coed prisons. You could never separate inmates on the basis of sex, and male and female prisoners would have to be housed together.

Senator LEE. So protections in law, State, and Federal as they now exist, protections put in place for women reflecting biological differences between men and women—based on differences between men and women, would be at stake. They would be jeopardized. They would be threatened, and, in many cases, undone through judicial order.

Ms. BRACERAS. That's correct.

Senator LEE. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Lee. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. Thank you for having this hearing. Thank you all of our witnesses, all of our audience for being here today, everybody who's watching. This issue is supremely important.

Ms. Williams, I'm really proud that you're here today—

Ms. WILLIAMS. Thank you.

Senator BLUMENTHAL [continuing]. And that you go to school at Trinity in my home State of Connecticut. I hope one day maybe it'll be your home State, too, and maybe you'll be sitting up here—

Ms. WILLIAMS. Thank you.

Senator BLUMENTHAL [continuing]. In the chair that I have.

I'm really proud of your testimony. You know, there are not too many people in this country who can say, quote, "I fell in love with United States Constitution in high school." But thank you for your commitment to our Constitution and for your understanding about the brilliance of that Constitution. And you say it in your testimony, "Our Founding Fathers"—I'm quoting—"Our Founding Fathers were visionaries. They understood that we needed a document that could endure throughout generations."

Ms. WILLIAMS. That's right.

Senator BLUMENTHAL. The fact is, generations have fought for the ERA. I've been proud to support the ERA for a long time. And now your generation is fighting for it. And whether it occurs in this Congress or not, I believe that your generation will finally accomplish the ERA if we don't. And I want to ask you what you would tell others in your generation about the importance of the ERA to them in their daily lives.

Ms. WILLIAMS. So, as I've been sitting here listening to the testimonies and the questions, there are a lot of concerns about men performing in women's sports. And I am here as a young woman of color who is in her senior year of college. We're not worried about that. I am not worried about that. It's the truth. We're not.

We have way more important issues that we need to be focusing on. And I will tell every young person, and I've been telling as many as I can, this is important for us. The ERA protects everyone, me, Black women, white women, white men. So it's important to

all of us, and it's important now. It was important before and it will be important in the future.

Senator BLUMENTHAL. Now, you happen to be going to a school in Connecticut, which ratified—

Ms. WILLIAMS. Yes.

Senator BLUMENTHAL [continuing]. The ERA overwhelmingly, and in 1974, in fact, adopted its own constitutional amendment by 77 percent—the equivalent of the ERA in our State. Is it good enough that Connecticut has done it? You live in Connecticut.

Ms. WILLIAMS. So, it's not good enough. I actually just want to say that, as a young person, I've been concerned about the most recent activity of our Supreme Court, the fact that a lot of our rights are continuing to be rolled back, and I am now actually seeing the importance of having this Amendment because of that.

So having a law in Connecticut is not enough. We need this Amendment. We need it so when things are being rolled back, we can use it to continue to fight against.

Senator BLUMENTHAL. And in the future, are you going to continue to work for the ERA?

Ms. WILLIAMS. Absolutely, absolutely. I joined the ERA when I was I think 18, and I am now about to be 22. And I am even more determined than I've been before. I am even more for it now than ever.

Senator BLUMENTHAL. Thank you. Thanks, Mr. Chairman.

Chair DURBIN. Thank you. Senator Hirono.

Senator HIRONO. Mr. Chairman, you know, I'd like to say that, you know, yes, the times have changed, the times in which we live, where, sadly, violence—gun violence is rampant, where we see a rise in hate crimes against Asian Americans, Jews, LGBTQ persons, when FBI Director Wray says that domestic terrorism and white supremacy are major concerns. So I'd say yes, the times have changed. And the times—when we live in the times when sex discrimination is deemed okay, it's not okay. This is why I would say we need the Equal Rights Amendment.

Ms. Sullivan, we've been hearing some scare stories about how our prisons have got to be—that men and women will be put together, but that is not the strict scrutiny test. The strict scrutiny test says the law must achieve a compelling State interest and be minorly tailored to that interest. So it's not as though the floodgates open and all of these terrible things that—to some, terrible things—will happen. Can you talk a little bit more about how the Equal Rights Amendment, once in the Constitution, will lead to strict scrutiny?

Ms. SULLIVAN. Thank you very much, Senator. And I just want to reiterate the points so eloquently made earlier today by several Senators, including the Chairman, that the Equal Rights Amendment is about everyone. It's about your wives, your daughters, your granddaughters, your mothers, your aunts, your cousins. It's about all women.

It's not about—and why would you be against an Equal Rights Amendment, which is part of the Constitution, as mentioned earlier, of all the other democracies with written constitutions? Why would we want to be allied with nations that don't have equality for women, that don't let girls go to school with boys, that don't let

women appear outside with their hair uncovered? Why would we want to filibuster something that's about fundamental equal rights for all people?

And Senator Lee, your father was a great constitutional lawyer who I admired so greatly, but Senator Hirono's absolutely right. This amendment is not about the level of scrutiny. This is about a fundamental guarantee, in the majestic words of the Constitution, of equality. And the courts will work it out later in spirited debates between lawyers in courts about what the standard of scrutiny should be.

And this Amendment is not saying women and men have to be treated the same when they're different. It's saying all people have to be treated equally. And there is plenty of room in the majestic guarantee of equality to recognize times when women have to get protection because only women can get pregnant, that women have to have rectification of past discrimination. All those benefits for women that Senator Hyde-Smith was worried would disappear, I think that's a false picture, and this parade of horrors is very misleading.

All this Amendment will do is make sure we can't have a court roll the clock back to 1868 or 1874 under the Equal Protection Clause by interpreting it historically. And as Senator Klobuchar said, guaranteeing equality in its broad, vague terms that will be worked out later in specific cases.

So, Senator, no, it is scare tactics that this body should ignore to suggest that anything is fixed about how the ERA will be interpreted. I believe it will be interpreted in ways that empower women and girls into the future as Ms. Williams has so eloquently suggested it would do, but I don't think you should listen to these parade of horrors you've heard today.

Senator HIRONO. I agree with you. And by the way, we've heard Ruth Bader Ginsburg mention a number of times, but it was very clear that she thought that the ERA should be part of the Constitution. And whatever statement she was making was in the context of that she thought it should be in the Constitution. And here is a woman who spent her entire adult life fighting for equal rights for everyone.

And in spite of that, she didn't think we had gotten it done, and she thought that the ERA should be part of our Constitution. So I think that the people who are continuing to toss her name out as though she supports the proposition that we should not be supporting this resolution are really off base.

Also, Ms. Sullivan, can you explain very briefly how the ERA, by explicitly prohibiting against sex discrimination, would supplant the current patchwork of Federal, State, and local laws that currently address sex discrimination and provide a bedrock of a legal protection against it, and why it's important?

Ms. SULLIVAN. Senator, the ERA would nationalize protections against sex discrimination that already exist in many of our statutes at the Federal level and many of our State constitutions. That's important because of federalism. We believe that people have the right to move between States in our country, and that means that your rights won't disappear when you cross a State border from Senator Blumenthal's Connecticut to another State. So, it

simply guarantees for all, all women nationwide, what is already recognized in a patchwork of other laws. That's a good thing.

Senator HIRONO. Thank you. Thank you, Mr. Chairman.

Senator LEE. Mr. Chairman.

Chair DURBIN. Senator Lee.

Senator LEE. Since my name was invoked, I'd like 20 seconds to respond.

Chair DURBIN. Sure, 20 seconds to Senator Lee.

Senator LEE. Professor Sullivan made the argument that we don't know whether this is about strict scrutiny. It's not a credible plausible argument to make. There is no reason to push for the Equal Rights Amendment unless you're trying to push it into strict scrutiny. That's the only difference between them. Strict in scrutiny, fatal in fact is the exact reason why distinctions in law on the basis of sex need to be evaluated under intermediate scrutiny.

So if you say we don't know what standard will be used, that simply isn't true. And what we do know is that you'll push it into strict scrutiny. Strict scrutiny is not accommodating of the same things. It is strict in scrutiny, strict in theory, fatal in fact. So, this is not a theoretical argument. It is a virtual certainty that it will be strict scrutiny. Thanks.

Chair DURBIN. Senator was given the Senatorial 20 seconds.

Senator LEE. Did I go over that?

Chair DURBIN. Slightly. Senator Welch.

Senator WELCH. Thank you very much. In 2019, we have this wonderful high school girls' soccer team, the Burlington High School soccer team. And they got national attention when they advocated and supported the U.S. Women's National Soccer Team's fight for equal pay. And last year, as you know, the U.S. Women's National Soccer Team finally won their long-running battle for equal pay. And all of us here, I think, agree that everyone's entitled to equal pay. I'm going to ask my first question for Thursday Williams. You went to Trinity College in Hartford?

Ms. WILLIAMS. I am still there. I graduate in May.

Senator WELCH. Well, my daughter went there. So I sent her a picture of you, told her you were—

[Laughter.]

Senator WELCH [continuing]. You know, a person was testifying here, but thank you for coming. That's fantastic. So, how can the ratification of the ERA help advocates win their fight to eliminate gender disparities in pay? And try to be brief so I can ask a few more questions.

Ms. WILLIAMS. Okay. So in my testimony, I did mention that after graduating in May, I will be starting a litigation position—

Senator WELCH. Right.

Ms. WILLIAMS [continuing]. At a very prestigious law firm. And I am aware that, as I've mentioned, the system is stacked against me. I'm aware that while right now I might be okay, in the future, there is a wealth disparity between a woman, especially a Black woman, and my male colleagues—or my male peer. And so, that is why this is important.

Senator WELCH. Thank you.

Ms. WILLIAMS. Thank you.

Senator WELCH. Professor Sullivan, two things: One, just—I want you to comment on how recognizing the ERA strengthens enforcement of laws that are intended to ensure wage parity; and second, you might just follow up on Senator Lee’s concern about having the Amendment push analysis into strict scrutiny because I’m not quite sure most of us know exactly what that has to do with the question of treating women equally and not being discriminated against on the basis of a gender.

Ms. SULLIVAN. Well, thank you, Senator. To start with the second point, the ERA would simply make constitutional bedrock something we already recognize, which is women and men should not be treated unequally.

Senator WELCH. Mm-hmm.

Ms. SULLIVAN. How that gets worked out when there are real differences between men and women is a question for the future. And this court—excuse me—the Senate need not specify to courts of the future how to work those questions out. I believe it will strengthen protections for women, all women, and it will not destroy any special protections women may receive now as it was suggested earlier.

Senator WELCH. Okay. Thank you. And for Lieutenant Governor Stratton, if the ERA is to be officially included in the Constitution, how would that impact your ability as Lieutenant Governor to ensure your continuing efforts for equal pay and for equal work?

[Pause.]

Senator WELCH. I don’t know if you heard me. Did you hear the question?

Lieutenant Governor STRATTON. Yes, I did. There’s a little bit of a delay.

Senator WELCH. Okay.

Lieutenant Governor STRATTON. Thank you, Senator, for that question. I am proud to chair the Illinois Council on Women and Girls. And whether it’s an issue of addressing equal pay or the pay gap or the wealth gap, whether it’s an issue of access to healthcare, whether it’s opportunities to help more women and girls enter the fields of science and math, or access quality healthcare, there are so many issues that would allow us with the foundation in our Constitution—enshrined in our Constitution that says that no one should be discriminated against on the basis of sex. It would give us that starting point, that grounding and baseline, to say, whatever we fight for, we know it’s a value of our country that’s enshrined in the Constitution, and now we can fight for rights for everyone to be equal.

Senator WELCH. Thank you very much. Mr. Chairman, I yield back.

Chair DURBIN. Thank you, Senator. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. Welcome to each of the witnesses. Many judges across the country follow a straightforward mode of constitutional interpretation that is looking to the original public meaning of constitutional language. Original public meaning posits that the object of interpretation is the constitutional or statutory text as reasonably understood by the American people at the time of the provision’s enactment.

The ERA resolution was passed out of Congress in 1972, and it had a clear and unambiguous deadline. Every person in this room understands what that deadline was. And in 1972, every person understood it as well. In this Congress, I've reintroduced legislation that did not pass in the preceding Congress. I'm quite confident Chairman Durbin has reintroduced legislation in this Congress that did not pass in the previous Congress. Why do we have to do that? Because there's a deadline.

When the previous Congress expired, legislation you introduced in the previous Congress is no longer before the Congress. Now, it's not only those of us in the room who understood the deadline to mean what the deadline actually says.

In 1978, Congress passed a resolution extending the ratification deadline until 1982. If the original deadline wasn't valid, there would have been no need to extend it to 1982. And even judges who don't subscribe to originalism acknowledged the obvious reality.

Justice Ruth Bader Ginsburg, a trailblazing advocate, said the following about the Equal Rights Amendment in 2019, quote, "The ERA fell three States short of ratification. I hope someday it will be put back in the political hopper, starting over again, collecting the necessary number of States to ratify it." Professor Foley, what was the Corwin Amendment?

Professor FOLEY. Corwin Amendment was an amendment that would have basically prohibited Congress from, or the States from—well, Congress specifically—from messing with slavery.

Senator CRUZ. And are there States that have attempted to rescind their earlier approval of the Corwin Amendment?

Professor FOLEY. Yes, several.

Senator CRUZ. So Maryland in 2014, Illinois in 2022?

Professor FOLEY. Mm-hmm.

Senator CRUZ. It would seem that legislators from those States, Illinois in particular, want to have their cake and eat it, too. On one hand, they want to say in the ERA context that a State cannot rescind its previous ratification, but at the same time, they want to be able to rescind their own ratification and conclude that doing so is perfectly permissible when it concerns a different topic, when it concerns slavery. Are those two positions consistent?

Professor FOLEY. They don't seem consistent to me.

Senator CRUZ. Professor Foley, have other constitutional amendments contained deadlines?

Professor FOLEY. Sure. Every constitutional amendment since the Eighteenth Amendment has contained a deadline except for the Nineteenth, which is gender voting rights.

Senator CRUZ. So eight of the last nine Amendments have had deadlines.

Professor FOLEY. Yes.

Senator CRUZ. Is there Supreme Court precedent that deals with Congress' ability to include a deadline when it provides instructions for ratification?

Professor FOLEY. Yes, absolutely. *Dillon v. Gloss* and *Coleman v. Miller*.

Senator CRUZ. Ms. Braceras, good to see you. Welcome.

Ms. BRACERAS. Nice to see you, sir.

Senator CRUZ. You and I were classmates in law school. Good to see you. Let me ask you, when the original version of the ERA was introduced, what was the state of the law concerning discrimination against women? And what protections are there to protect women against discrimination today?

Ms. BRACERAS. It was very different. When the House intro—it was introduced in the House first in 1971. And at that point, the Supreme Court had not yet decided *Reid v. Reid*, which is the famous case brought by the late Justice Ruth Bader Ginsburg, that established that the Equal Protection Clause of the Fourteenth Amendment prohibits government from treating similarly situated men and women differently. So that had not been decided when the ERA was first introduced. There were a lot of other things—laws that had not been passed to protect women. Pregnancy—

Senator CRUZ. So there are today vigorous protections against gender discrimination. And let me ask you—

Ms. BRACERAS. Both constitutional and statutory.

Senator CRUZ. Since my time has expired, let me just ask you, what are some of the potential consequences for American society if the ERA were ratified now into the Constitution?

Ms. BRACERAS. Well, I think one very important thing is that the meaning of the word sex was quite clear in 1971. Today, there are many people who are trying to argue that the word sex also includes gender identity. And so—

Senator CRUZ. Including to the Supreme Court in *Bostock*.

Ms. BRACERAS. Right. So, if the ERA were to be passed today, it would open up a whole host of areas to private women's spaces to men who identify as women.

Senator CRUZ. Mr. Chairman, I would ask unanimous consent to enter into the record a letter from Concerned Women for America concerning this Amendment.

Chair DURBIN. Without objection.

[The information appears as a submission for the record.]

Senator CRUZ. Thank you.

Chair DURBIN. Senator Ossoff.

Senator OSSOFF. Thank you, Mr. Chairman, and thank you to our panelists for your expertise, for lending your experience and counsel to the Committee. It was a century ago that the ERA was authored by Alice Paul and others. Nearly 50 years ago, my mother, who had just immigrated to the United States as a young woman, marched in support of the Equal Rights Amendment. Here we are a century after this was drafted, still not yet having made the Amendment to our Constitution that protects against discrimination on the basis of sex.

I'd like to ask each of you, beginning with you, please, Ms. Sullivan, if you can concisely articulate for us what you believe the impact would be on U.S. law, on State policy, on the provision of services to Americans were this to be ratified and the Constitution thus amended.

Ms. SULLIVAN. Thank you, Senator. It would guarantee that women cannot be treated as lesser than men, that girls cannot be treated as lesser than boys, that the privilege to attend school, to open businesses, to work, to prosper, to raise families, cannot be changed on the basis of sex by government. And that guarantee

would be built into the Constitution rather than relying on shifting and politically appointed Justices of the Supreme Court to interpret.

Senator OSSOFF. It would enshrine in constitutional law not requiring reliance upon the latest jurisprudence or the disposition of Congress the fundamental principle that there should not be discrimination on the basis of sex. Correct?

Ms. SULLIVAN. Exactly so, Senator.

Senator OSSOFF. Professor Foley, same question for you, please.

Professor FOLEY. I think the most significant legal effect would be a shift from intermediate scrutiny to strict scrutiny. And I think, as Senator Lee pointed out, that would mean that more laws and distinctions between men and women would be ruled unconstitutional than they currently are. I think the most obvious example would be the distinction between men and women today on Selective Service registration and military draft. So, presumptively, those would be unconstitutional, that women would have to register and would be subject to the draft should this Amendment go into effect.

Another possibility would be, right now under intermediate scrutiny, it is possible to make distinctions between men and women based on their gender, particularly when women are pregnant, and there is concern about exposing an unborn child to some hazard in the workplace. And I'm not sure—I would assume under strict scrutiny that that would not be possible anymore.

Senator OSSOFF. Thank you, Professor. Ms. Williams.

Ms. WILLIAMS. So, as a young person, I believe while this Amendment will give me the tools to fight against workplace discrimination, workplace harassment, once it is passed, State laws would be passed and enforced to ensure that I am protected as a Black woman and that other Black women are also protected. So that's—yes.

Senator OSSOFF. Thank you, Ms. Williams. Ms. Braceras.

Ms. BRACERAS. Well, sex discrimination and sexual harassment are already illegal in this country. And there are plenty of tools at the disposal of women who are victims to remedy those wrongs. That doesn't mean those things don't occur in our society today. They certainly do. But I'm happy that my three daughters live in a world where if they are discriminated against or harassed, they can bring a lawsuit to vindicate their rights. That is true today. That was not true completely in 1971 when this Amendment was introduced.

Senator OSSOFF. Thank you, Ms. Braceras.

I appreciate all of your contributions. I'd reflect on the experience of my mother, immigrated to this country, supporting the ERA 50 years ago, on the founding principles enshrined in the text of our Constitution about the fundamental equality of human beings, at the time of their drafting referring exclusively to men.

It strikes me with great respect for all of your views that it is a profound common sense that at this point in our Nation's development, we would enshrine in the most fundamental legal document that defines our country the basic principle, which I believe the overwhelming majority of Americans agree, that there should not be discrimination on the basis of sex and that we should not

rely upon the shifting tides of jurisprudence or the political disposition of the Congress to make that fundamental value a core part of American law. Thank you, all, for your contributions. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Ossoff. And thanks to this panel.

I'd like to say a few words. Fifty years ago when I was a brand-new lawyer fighting for the passage of the Equal Rights Amendment in the Illinois State Senate, many people, including a woman named Phyllis Schlafly, who was from the State of Illinois, told us that what we thought were the issues were not really the issues. The real issue was the fate and future of public restrooms and whether or not you would have privacy in those restrooms based on gender.

Now we hear that what's at stake really is not a constitutional right for women, but the fate of field hockey. I mean, I'm trying to keep up with the arguments here, but it's—

Ms. BRACERAS. It might not mean a lot to you, sir, but it means a lot to the girls who play.

Chair DURBIN. See, I believe you have a sincere belief in that. And I believe those girls would probably feel very strongly about the issue if they're field hockey players.

Ms. BRACERAS. Particularly when they're displaced by males on the varsity team.

Chair DURBIN. But you see, that's what the argument comes down to, the fate of field hockey. And I think it is much more fundamental. We are talking about the role of women in the United States of America and where we stand.

Ms. WILLIAMS, I heard your reference earlier to younger generations puzzled, shaking their head at all these gray-haired politicians who are struggling with the very basic question as to whether women's rights should be enshrined in the Constitution. And they're off on tangents that most young people just don't get.

Ms. WILLIAMS. We don't, right.

Chair DURBIN. Am I putting words in your mouth?

Ms. WILLIAMS. I agree. No, I agree. I definitely agree. The concern about the sports, that's not what we're worried about. I'm pretty sure there are way more important things for young people to be stressing about at the moment.

Chair DURBIN. And at the heart of this is the *Dobbs* decision, and other decisions, which relate to the right and role of women today. I think there has been a dramatic evolution in my lifetime of the role of women. And I'm sure glad that my daughters, and I assume my granddaughters, will benefit from that.

But we can't stop. If we don't get down, Ms. Sullivan, to the basics of whether or not there's a constitutional guarantee—I think we have another Senator on the way, so I'll speak for a few minutes more, which is the Chairman's prerogative, I guess.

If we don't get down to the fundamental basics of whether the law recognizes that, then I guess we have to ask ourselves, why is there so much fear of this on the other side? Why do they think this is so threatening in terms of families, the role of women? We hear about prisons and all these things, and yet, if you went to the basic question of should we maintain strict scrutiny when it comes

to race, I haven't heard a single person here say, no, let's get rid of it.

They should, I believe, apply that standard and honor that standard in the future. So why not the role of women as opposed to men?

I'm glad Senator Padilla is here. I'm going to let him—I'll recognize him if he's prepared. Are you ready, Alex? Senator Padilla.

Senator PADILLA. Thank you, Mr. Chair. I appreciate the patience and understanding. I just returned from presiding over the Senate. There's a vote open. I'm sure you're aware. So we'll be making our way soon. But I wouldn't want to miss this opportunity to offer some remarks.

I appreciate you and Ranking Member Graham for holding this important hearing. As we've discussed this morning, the ERA is and always has been about addressing sex-based inequality.

For generations, women have had to fight for access to some of our most basic rights. And in my view, last summer's *Dobbs* opinion was significant. Across the country, Americans have made their opposition loud and clear. And as we work to uplift their voices, we must ensure that we remember that, what is at stake here: Rights once recognized by the Supreme Court and held dear by Americans may no longer be safe unless they are enshrined in the Constitution.

I know some of our colleagues on the other side of the aisle talked about—what's the issue, what's the problem. It's already unlawful in America. It's already unlawful in certain States to do X, Y, and Z, but we know those rights can easily be compromised.

So, with that in mind, a modernization of the law to recognize sex equality is needed, and the guarantee of equal rights for women is non-negotiable. As we analyze this issue, I look forward to working with my colleagues to end sex-based discrimination in our country, once and for all.

Now, I do have a question if Lieutenant Governor Stratton is still with us. I know she was participating virtually. Before becoming Lieutenant Governor of Illinois, you served as a member of the Illinois House of Representatives and were a leading advocate for the bipartisan vote—bipartisan vote that ratified the ERA in Illinois.

I want you to describe your perception of the future of equality in America and what the impact the ERA ratification could have on future generations.

Lieutenant Governor STRATTON. Thank you so much for that question, Senator. I think the most important thing that I want to emphasize is that the Equal Rights Amendment will remove ambiguity and will make it abundantly clear that no one should be discriminated against on the basis of their sex. We have made progress, and we've heard today, yes, there's been progress made.

Of course, there's been progress because there's been a lot of women for many generations who have been fighting for this progress.

But we have to make sure that we not only keep the progress moving forward but that we protect any attacks on the progress that has already been made. That is what we talked about on the floor in 2018, in Illinois in that bipartisan vote. And that's why the Equal Rights Amendment is so important to provide a constitu-

tional safeguard to prevent any efforts to roll back the gains that we have made toward women's equality.

Senator PADILLA. Thank you. I just want to make sure I get in at least one more question with my time remaining. Enshrining an explicit guarantee of sex equality in the Constitution would provide the strongest protection against sex-based discrimination.

Unfortunately, State and Federal legal protections are vulnerable to future attempts to undermine women's security. And we need to look no further than the recent bills being introduced across the country targeting women's access to abortion care.

A question for Ms. Sullivan: In your opinion, are judicial remedies like the Equal Protection Clause and the Due Process Clause strong enough to protect a woman's right to abortion access and care?

Ms. SULLIVAN. Senator, the Equal Rights Amendment will guarantee that women are equal to men. It will not determine for all time difficult debates in our country like debates over reproductive rights. Constitutional rights are always subject to a balance, and I have no illusion that the ERA will end those debates. But Senator, it will guarantee equality. It will guarantee equality that women can't be treated as lesser than men.

And this body has the chance to, as the Lieutenant Governor said, remove ambiguity. Who would answer the question, "Are you for or against equal rights for women?" Elsewhere in the world, there are people who would say they're against it. In this country, no one would say, "I'm against equal rights for women."

So why not remove ambiguity about that? Why not remove ambiguity? And ambiguity is all that led the D.C. Circuit to act today. They said it was not clear and undisputable that Congress can—that the congressional deadline is incapable of binding the States. Make it clear and indisputable. Pass Senate Joint Resolution Number 4 and remove any doubt about that deadline. Conservatives tend to like two things, Senator. They like looking at the text, Article V has no deadlines, and they normally like States' rights.

So why not allow Illinois, Nevada, and Virginia to deliver us into the modern world where we, like other nations of the world, have equal rights for women, as you said, Senator, enshrined in our most foundational document?

Senator PADILLA [presiding]. Well, thank you very much. Wish we had time for many more questions and much more discussion.

But on behalf of Chairman Durbin, I want to thank the witnesses appearing before the Committee today. Today's hearing makes clear that we have waited far too long for the Constitution to finally explicitly recognize that equal rights should not be denied on the basis of sex.

Tomorrow marks the beginning of Women's History Month. There is no better time to move forward on this joint resolution: Remove the arbitrary deadline that has held equality at bay, and, once and for all, enshrine equality into the United States Constitution. And with that, this hearing is adjourned. Thank you.

[Whereupon, at 12:13 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

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**Senator Dianne Feinstein
Senate Judiciary Committee
Statement for Hearing on
“The Equal Rights Amendment: How Congress Can Recognize Ratification
and Enshrine Equality in Our Constitution”**

February 28, 2022

I thank the Chair for holding this important hearing on the Equal Rights Amendment. As the Chair of the Subcommittee on the Constitution, I welcome this hearing as an opportunity to highlight the importance of ensuring that the Constitution protects all Americans, regardless of their sex.

Like most Americans, I believe everyone should receive equal treatment and protections under the law. Shamefully, even in 2023, this is still not the case. For more than 50 years, we have been fighting to ensure that equal rights for all are guaranteed in the U.S. Constitution. Congress first passed the ERA in 1972, but it set a deadline requiring the states to ratify the ERA by 1982. Unfortunately, three-fourths of the states did not ratify the amendment by 1982. But as of 2020 they have.

Now that the Constitutional requirements for adoption of the ERA have been met, it is time to pass Senator Cardin’s Joint Resolution and officially ratify the ERA.

While our country has come a long way in the past 50 years, the ERA is as important now as it was in 1972. Sex discrimination persists. The gender pay gap still exists, with women earning 82 cents for every dollar that men earn. And over the last year, Americans have endured attacks on their bodily autonomy at all

levels of government across the country. Congress has the opportunity to fight this discrimination by removing the ratification deadline and ensuring that every American finally has equal protections under the law.

Thank you again, Mr. Chairman.



The ERA is a Trojan Horse

**Testimony of Jennifer C. Braceras
Director, Independent Women's Law Center
to the
U.S. Senate Committee on the Judiciary**

Tuesday, February 28, 2023

Chairman Durbin, Ranking Member Graham, and distinguished members of the Committee on the Judiciary, thank you for inviting me to testify today.

As Director of Independent Women's Law Center, I come before you to oppose congressional attempts to shoehorn the *so-called* Equal Rights Amendment into our Constitution – more than four decades after that proposal expired.

I refer to the “so-called” Equal Rights Amendment because, in America today, men and women are legally equal. Adding the ERA to our Constitution now would not ratify women's equality. Rather, it would undermine it.

Sex Equality Renders the ERA Both Unnecessary and Void

When Rep. Martha Griffiths introduced this version of the ERA in 1971, it was still lawful to discriminate against pregnant employees, to discriminate against women in the granting of credit, to refuse to sell or rent housing to women, and to refuse to provide women equal educational opportunities. Women could be struck from serving on juries and banned from working in certain professions.

But all that has changed.

In 2023, there is not a single constitutional right that belongs to my son but not to my three daughters. Not one. The Equal Protection Clause of the 14th Amendment prohibits unfair sex discrimination. And numerous, long-standing federal and state laws outlaw sex discrimination in education,

athletics, housing, the granting of credit, and employment – including prohibiting sexual harassment and unequal pay.¹

As a result, no less an authority than the late Justice Ruth Bader Ginsburg, an early supporter of the amendment, observed that “[t]here is no practical difference between what has evolved and the ERA.”²

In addition to significant changes in law (or some might argue because of them), women have achieved enormous social, economic, and political success in the past half century.³ What’s more, American society now fully embraces the principle that women and men deserve equal access and equal opportunity.

These seismic changes in American law and culture render the ERA unnecessary in 2023. As such, it’s likely that many of the states that voted to ratify the ERA in the 1970s would not do so again under current circumstances. Unless we begin this process again, we cannot be assured that the amendment has the contemporaneous support of $\frac{3}{4}$ of the states as required by Article V of the Constitution.

The ERA is a Trojan Horse

None of this is to say that adding the ERA to the Constitution now would be harmless or merely symbolic.⁴ To the contrary, the ERA is a Trojan horse, the negative consequences of which are hidden behind empty equality rhetoric.⁵

¹ See, e.g., Equal Pay Act, 29 U.S.C. § 206(d); Title VII, 42 U.S.C. § 2000e (prohibiting sex-based discrimination in employment); Title IX, 20 U.S.C. §1681 (Title IX) (prohibiting sex-based discrimination in educational programs that receive federal financial assistance); Equal Credit Opportunity Act, 15 U.S.C. § 1691(a) (prohibiting sex discrimination against credit applicants); Fair Housing Act, 42 U.S.C. § 3604 (prohibiting sex discrimination in the sale, rental, and financing of housing); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (requiring employers to treat pregnant women the same as other similarly capable employees).

² See Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. Times Mag. (Oct. 5, 1997).

³ Today, women earn the majority of bachelor’s degrees (57.7 percent), the majority of master’s degrees (61.4 percent), and the majority of doctorates (55.2 percent). Women outnumber men in both law school and medical school. See *Digest of Education Statistics*, National Center for Education Statistics (Oct. 2021), <http://bit.ly/3KFVVUC>; *Women in the Legal Profession*, American Bar Association, <https://bit.ly/3IVN6jh>; *Women in medical schools: Dig into latest record-breaking numbers*, American Medical Association, <https://bit.ly/3u4f8BY>. Women also outnumber men in the college-educated labor force. See Richard Fry, *Women now outnumber men in the U.S. college-educated labor force*, Pew Research (Sept. 26, 2022), <http://bit.ly/3KEDY3Z>. The political power of American women also has increased exponentially since the 1970s. In 21st century America, American women are both more likely than men to be registered to vote and more likely than men actually to vote. See 2020 Presidential Election Voting and Registration Tables, Census (Apr. 29, 2021), <https://bit.ly/3KHTwpW>.

⁴ Our Constitution is not a symbolic or aspirational document, it is a governing charter. There is simply no compelling reason to start adding groups to the text of our governing charter simply so people feel acknowledged or “seen.” Were that the goal, a country as diverse as ours would be amending our constitution every year.

⁵ Kate Kelly, speaking to the California Women’s Law Center on March 31, 2021, *available* at <https://bit.ly/3EEWJAn> (“I don’t know what the positive word for a Trojan Horse is? Like, this is a positive pinata, let’s say, of potential legislation. We get this Equal Rights Amendment, and then there’s all this great candy that we can get inside.”).

1. Definition of Sex

To begin with, the ERA does not define the word “sex.” In 1971, it may have seemed unnecessary to do so.

Today, the current administration is actively trying to redefine sex-based protections under Title IX and other federal laws to include “gender identity.” And a 2020 report of the Democratic-controlled House Judiciary Committee explicitly observes that “the ERA’s prohibition against discrimination ‘on account of sex’ could be interpreted to prohibit discrimination on the basis of sexual orientation or gender identity.”⁶ Can there be any doubt, then, that activists will try to use the ERA to constitutionally *require* all sorts of unpopular policies that state and federal legislatures will not or cannot pass? Unpopular policies, including those pushed by transgender activists, such as:

- ❖ Forcing schools to include biological males on women’s sports teams;⁷
- ❖ Requiring prisons to allow male offenders who claim to identify as women transfer to women’s facilities;⁸
- ❖ Requiring federal funding of puberty blockers for teenagers; and
- ❖ Opening domestic violence shelters to men who identify as women.⁹

2. Strict Scrutiny

Even if the ERA did clearly define the phrase “on account of sex,” which it does not, its adoption today would jeopardize many single-sex spaces upon which women rely. That is because adopting it on top of our robust Equal Protection Clause could be interpreted to mean that the ERA requires something *more* than the equal treatment of similarly-situated individuals.

⁶ Removing the Deadline for the Ratification of the Equal Rights Amendment, House Committee on the Judiciary, H. Rep. No. 116-378, at 6 (2020) (hereinafter, “2020 House ERA Report”).

⁷ See Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021) (establishing federal policy to permit access to school sports based on gender identity).

⁸ See Transgender Offender Manual, U.S. Department of Justice (Jan. 13, 2022) (rescinding biological-sex based placement of prisoners).

⁹ See *Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs; Withdrawal; Regulatory Review*, 86 Fed. Reg. 22125 (Apr. 27, 2021) (revoking proposed rule that would have permitted biological sex-specific emergency shelters).

In other words, courts might rule that the ERA requires strict scrutiny¹⁰ of sex-specific policies. This would limit, if not eliminate, flexibility to take sex into account where biology is relevant. It would raise constitutional doubts about everything from single-sex prisons and government funded domestic violence shelters to public school athletic teams and sororities and fraternities at state schools.¹¹ Strict scrutiny would call into question programs designed to support women and girls, such as the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), federal grants that attempt to increase the participation of women and girls in STEM programs, and grants administered pursuant to the Violence Against Women Act.

3. Disparate Impact

Likewise, the ERA could legally mandate, as ERA advocates intend, equal societal *outcomes* for males and females *as groups*.¹² In practice, this could require not only that women register for the selective service but that the military actually draft and send to the front lines equal numbers of women and men. Colleges and graduate schools could be forced to discriminate against women in order to balance the number of women and men in each program.¹³ And girls could face increased discipline in school, again to equalize outcomes with boys.¹⁴

4. Abortion

In the post *Dobbs*-era, ERA proponents have been quite vocal that they hope the amendment will be interpreted as creating a constitutional right to abortion on demand, without restriction, and fully funded by the

¹⁰ Strict scrutiny is exactly what ERA proponents hope for. See Martha F. Davis, *The Equal Rights Amendment: Then & Now*, 17 Colum. J. Gender & L. 419, 422 (2008).

¹¹ Compare *Johnson v California*, 543 U.S. 499 (2005) (applying strict scrutiny to race-based inmate double-occupancy) with *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 926 (D.C. Cir. 1996) (citing *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989)) (segregating inmates by sex is "unquestionably constitutional").

¹² See 2020 House ERA Report, *supra* note 6 at 6 (noting that "under some theories, the ERA could provide a basis for plaintiffs to challenge laws or policies that have a disparate impact on women, or to support efforts to create gender balance in certain contexts."); see also Brief for Amici Curiae Generation Ratify, *Virginia v. Ferriero*, No. 21-5096 (D.C. Cir. Jan. 10, 2022) (suggesting the ERA will flatten a range of societal differences, from the unequal participation of women in certain careers to menstrual needs).

¹³ See *supra* note 3.

¹⁴ Christopher Brueningsen, *Boys in crisis: Schools are failing young males. Here's what needs to change in classrooms*, USA Today (Oct. 9, 2021), <http://bit.ly/3m7WYZ>; Mark J. Perry, *For Every 100 Girls...*, American Enterprise Institute (Nov. 1, 2021), <http://bit.ly/3xTlapV>.

government.¹⁵ Although IWLC takes no institutional position on abortion policy, I would be remiss if I didn't point out that, while Americans could certainly choose to amend the Constitution to make abortion a constitutional right, at no point have 38 states debated such an amendment and agreed to do so. Congress cannot simply dissolve the ERA's ratification deadline and claim that they have.

5. Religious Liberty

The push for abortion by ERA proponents includes invalidating the Hyde Amendment,¹⁶ the compromise at the federal level in which the federal government permits widespread access to abortion in the states, but protects taxpayers—tens of millions of whom hold religious and moral objections to abortion—from funding it. In this respect, an ERA would be devastating to religious liberty.¹⁷

The ERA could also threaten the tax exempt status of and federal financial assistance to¹⁸ religious organizations that ordain only men as clergy or counsel young people about biological sex differences.

Conclusion

In conclusion, the version of the ERA that is before you today expired in 1979, during the era of Charlie's Angels, disco, and the Iran Hostage Crisis, when fully 62% of today's voters either weren't alive or were too young to vote. To declare now that the 1972 ERA is part of the Constitution would be to force a trojan horse upon the American people by hijacking the votes of the members of Congress and thousands of state legislators who consented to a very different proposition back in the early 1970s (and to a specific resolution that contained a definitive deadline).

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¹⁵ *ERA Coalition Statement Marking the 50th Anniversary of Roe v. Wade*, ERA Coalition (Jan. 20, 2023), <http://bit.ly/3EF3fXH> ("The Supreme Court's disturbing [*Dobbs*] decision reflected a stunningly limited view of the rights conferred by our Constitution, and only reaffirms why we need the Equal Rights Amendment.")

¹⁶ State-level ERAs have already been used, successfully, to challenge restrictions on public funding for abortion. See, e.g., *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 845 (N.M. 1998).

¹⁷ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2433 (2022) (respect for the free exercise of religion is "indispensable to life in a free and diverse Republic.").

¹⁸ Professor Jeremy Rabkin, Cornell University, U. S. Senate Hearing, *The Impact of the Equal Rights Amendment*, Senate Judiciary Subcommittee on the Constitution, on S. J. Res. 9/13/83, pp 99, 100.

Senate Judiciary Committee Hearing
“The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine
Equality in Our Constitution”
Questions for the Record
for Jennifer C. Braceras
Submitted March 7, 2023

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

You testified during the hearing that Independent Women’s Law Center (IWLC) is the legal advocacy arm of the Independent Women’s Forum (IWF), a 501(c)(3) organization, and the Independent Women’s Voice (IWV), an affiliated 501(c)(4) organization.

1. Please describe any and all resources shared between IWF and IWV. In your response, please include responses to the following questions.
 - a. Does IWF and IWV have overlapping board members? If so, please list all board members in common.
 - b. Does IWF and IWV have overlapping officers? If so, please list overlapping officers and provide the total number of overlapping employees.
 - c. You testified at the hearing that IWF and IWV are fully virtual and do not retain any office space. As of March 7, 2023, the website for IWF (<https://www.iwf.org/about/>) and the website for IWV (<https://www.iwv.org/connect/>) each list the following address and phone number:

Independent Women’s Forum
4 Weems Lane, #312
Winchester, VA 22601
(202) 807-9986

Please explain why IWF and IWV have the same mailing address and phone number.
 - d. Please identify all donors who donated to both IWF and IWV in the last five years.
2. Please describe the role of IWF’s past President Nancy Pfotenhauer. In your response, please include responses to the following questions.
 - a. From 2001 to 2005, was Nancy Pfotenhauer the President and CEO of IWF?
 - b. Prior to joining IWF, was Nancy Pfotenhauer the Director of the Washington office for Koch Industries?
 - c. In 2003, did Nancy Pfotenhauer also take over as president of Americans for Prosperity, managing both IWF and Americans for Prosperity at the same time?

3. Has IWLC, IWF, or IWV ever done any work for, or received funding from, the 85 Fund (a.k.a. “Judicial Education Project” and “Honest Elections Project”), the Freedom and Opportunity Fund, or the Concord Fund (a.k.a. “Judicial Crisis Network” and formerly “Judicial Confirmation Network”)? Please describe (a) which organization received the funding (IWF, IWV, or IWLC); (b) which donor organization supplied the funding; (c) the amount of the funding and the year received; and (d) the project completed or work done for the donor organization.
4. Has IWLC, IWF, or IWV ever done any work for, or received funding from, Barre Seid or Marble Freedom Trust? Please describe (a) which organization received the funding (IWF, IWV, or IWLC); (b) which donor or donor organization supplied the funding; (c) the amount of the funding and the year received; and (d) the project completed or work done for the donor or donor organization.
5. Has IWLC, IWF, or IWV ever done any work for, or received funding from, any of the Koch family foundations or any other Koch Industries-affiliated organization? Please describe (a) which organization received the funding (IWF, IWV, or IWLC); (b) which donor organization supplied the funding; (c) the amount of the funding and the year received; and (d) the project completed or work done for the donor organization.
6. Has IWLC, IWF, or IWV ever done any work for, or received funding from, the Lynde and Harry Bradley Foundation? Please describe (a) which organization received the funding (IWF, IWV, or IWLC); (b) the amount of the funding and the year received; and (c) the project completed or work done for the donor organization.
7. Has IWLC, IWF, or IWV ever contracted with CRC Advisors? If so, please describe (a) which organization contracted with CRC Advisors (IWF, IWV, or IWLC); (b) the contract amount per year of contract; and (c) the project completed or work done by CRC Advisors.
8. Does IWLC, IWF, or IWV accept donations from any major private or public for-profit corporations? If so, please list them and the amount of donation by each entity in the last five years.
9. Does IWLC, IWF, or IWV accept donations from any political action committees? If so, please list them and the amount of donation by each entity in the last five years.
10. IWF recently launched the Center for Energy & Conservation, to be led by Mandy Gunasekara. Please identify all donors to the Center for Energy & Conservation.

Questions for the Record**From:** Senator Lee**To:** Jennifer Braceras, Director, Independent Women's Law Center**Re:** Senate Judiciary Committee Hearing: "The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution" held on February 28, 2023

1. At the hearing, there was some confusion about the substantive concerns surrounding the Equal Rights Amendment. To be clear, if the ERA is ratified and adopted into the constitution, what will happen to the privacy of women who wish to enjoy segregated spaces?

- Will it be permissible under the law to have separate bathrooms and locker rooms for biological women?
- What about women's prisons and shelters? Will it be permissible under the law to have separate prisons and shelters for biological women?

2. At the hearing, a senator appeared to find the concerns of your daughters and other young women engaged in competitive sports that the ERA would lead to the loss of competitive opportunities and sports scholarships for young women frivolous when compared to the unnamed and unidentified burdens threatening women because the ERA has not been ratified. Given the battles which have been fought to help create and advance opportunities in athletics for women, it seems a step backward to knowingly make it more difficult for biological girls to have safe spaces to compete. If the ERA is ratified, what will happen to the competitive athletic opportunities of biological females?

3. What is the current state of equality under the law between men and women? Where are the egregious wrongs that we are trying to right through the ERA? Where wrongs do exist in law, would they not be more easily and appropriately remedied with the scalpel of legislative action rather than with the sledgehammer of amending the Constitution?

4. Why does the standard of review matter here?

5. When the 1972 ERA Resolution passed through the Senate "sex" obviously referenced biology. What are some of the potential pitfalls of passing a resolution of this magnitude which fails to define the word "sex"?

Questions for Jennifer C. Braceras
**Hearing Entitled, “*The Equal Rights Amendment: How Congress Can Recognize*
Ratification and Enshrine Equality in Our Constitution”**
Submitted March 7, 2023

QUESTIONS FROM SENATOR COTTON

1. Does the 14th Amendment’s Equal Protection Clause already protect women from discrimination on the basis of sex?
2. Do federal laws, such as Title IX of the Education Amendments Act of 1972, already explicitly prohibit sex discrimination for programs receiving federal funds?
3. Does Title VII of the Civil Rights Act already prohibit private employers from discriminating against women?
4. As you mentioned in your testimony, in 1997 former Justice Ruth Bader Ginsburg said that there was “no practical difference” between what has evolved in federal law and the original intent of the so-called Equal Rights Amendment. Given all of the sex discrimination protections that are already enshrined in federal law, why do you think a small group of activists are so intent on passing the ERA as a new amendment to the Constitution?
5. In your testimony, you mention that the ERA could actually hurt women by requiring that colleges and graduate schools discriminate against women in order to balance the makeup of men and women in their classes. Can you elaborate on the unintended effects of the ERA?
6. In January 1984, the Senate Judiciary Committee held a hearing on the ERA and abortion. In 2019, the ACLU sent a letter to the House Judiciary Committee, in which it suggested that ratifying the ERA would enshrine abortion in the Constitution. In your view, would ratifying the ERA give activist judges grounds to claim that new abortion rights were added to the Constitution?

Questions for the Record
Senator John N. Kennedy

1. The text of the ERA reads, in part, that: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”
 - a. Title IX provides men and women with equal opportunity in academics and athletics. It makes a distinction between biological men and biological women when providing this opportunity. If ratified, do you believe the ERA would erode protections provided by Title IX?
 - b. If the ERA is ratified, would a biological male identifying as a transgender woman have a constitutional right to participate in women’s collegiate athletics?
 - c. If the ERA is ratified, would a public school be permitted to separate students on the basis of biological sex via bathrooms, locker rooms, or otherwise?
 - d. If the ERA is ratified, would women be required to register for Selective Service with the U.S. military?
 - e. If the ERA is ratified, would a public health care facility owned or funded by the government be required to perform sex reassignment surgeries?
2. If the ERA is ratified, do you believe that the recent Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization* remains good law?
 - a. Could the ERA, if ratified, be a constitutional source of the right to abortion?
 - b. Would any law that places restrictions on abortion survive scrutiny under the ERA?
 - c. If the ERA is ratified, would it constitutionally impact the viability of the Hyde Amendment?



March 23, 2023

Senator Sheldon Whitehouse
 Hart Senate Office Building, Room 530
 Washington, DC 20510

Dear Senator Whitehouse:

I write as president of Independent Women's Forum ("IWF") in response to your questioning of Jennifer C. Braceras, Director of IWF's Independent Women's Law Center. On February 28, 2023, Ms. Braceras testified before the Senate Judiciary Committee on the question of whether Congress has the authority retroactively to lift the ERA's 7-year ratification deadline, which expired in 1979.

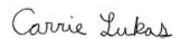
The questions you asked Ms. Braceras had nothing to do with the topic of the hearing. Virtually all of your questions are easily answered by reviewing IWF's and IWV's websites and publicly available tax returns.

1. The two groups have separate boards, maintain financial independence, and otherwise maintain corporate separateness. As is common for many related 501(c)(3) and 501(c)(4) organizations, however, IWF and IWV share overhead costs and staff as permitted by the IRS. I am certain that if you wanted to learn more about how these arrangements work, you could ask some of the similarly structured left-leaning organizations that provide support for the causes you favor.
2. As Ms. Braceras noted in her testimony, neither organization has office space, having pioneered the virtual work environment that many companies were quick to adopt during the Covid-19 pandemic. This model allows for greater flexibility and participation by the women who serve IWF and IWV.
3. As you should know, neither IWF nor IWV is required to disclose its donors. Indeed, the United States Constitution shields donors from harassment by public and private officials. Your line of questioning demonstrates why this is so necessary. Again, I am certain that you could ask the 1630 Fund or Arabella Advisors to better explain how "dark money" works. This article in the Atlantic (<https://www.theatlantic.com/politics/archive/2021/11/arabella-advisors-money-democrats/620553/>) is a good place to start.
4. You asked specifically about overlapping officers. That information is all publicly available, at: <https://www.iwf.org/the-women-of-iwf/>; <https://www.iwv.org/staff/>; <https://www.iwf.org/board-of-directors/>

5. You also asked about IWF's relationship to the Koch family. As has been widely reported, there were some connections between IWF personnel and the Kochs in the early 2000s, but those ties were severed years ago. Along with a wide variety of donors, some organizations affiliated with the Koch family have contributed financially to IWF and to IWV over the years, although in total, the percentage of donations that we received from Koch-affiliated organizations in any given year is small. We are proud to be supported by these investors – as, I am sure, are PBS and the variety of hospitals and other charities supported by the generosity of the Koch family.
6. You asked about IWF's work on judicial nominations. IWF defends the democratic decision-making process and our structural constitution and supports judicial nominees who understand that the role of a judge is to interpret the law as written, not to legislate policies that erase women or limit freedom. We support nominees who share these core values, irrespective of political party or the partisan affiliation of the appointing authority. Finally, you asked whether anyone at IWF called the allegations made by Christine Blasey Ford a "publicity stunt." I believe you are referring to a blog that I wrote regarding the decision by Sports Illustrated to recognize Christine Blasey Ford in addition to the very brave gymnasts who stood up after years of abuse to accuse Dr. Larry Nassar. I thought it was a shame that, rather than just recognize the gymnasts, SI included Blasey Ford (who is not relevant in a sports context), thus politicizing a very serious issue. At IWF, we take sexual assault and accusations of sexual assault seriously, and we were saddened by what ended up being a witch hunt against Justice Brett Kavanaugh, which allowed completely unsubstantiated claims to be made and to forever tar someone's reputation, and was a disservice to sexual assault survivors as well as to the American people.

I trust that this letter is responsive to your questions.

Sincerely,



Carrie Lukas
President
Independent Women's Forum



**Written Statement
of
Elizabeth Price Foley
Professor of Law
Florida International University, College of Law**

Hearing on the Equal Rights Amendment

**Committee on the Judiciary
United States Senate**

February 28, 2023

Chairman Durbin, Ranking Member Graham, and members of the Committee, thank you for the opportunity to discuss the ratification process for the Equal Rights Amendment ("ERA"). I am a tenured, full Professor of Law at Florida International University College of Law, a public law school located in Miami, where I teach constitutional law. I also serve Of Counsel with the Washington, D.C. office of BakerHostetler, LLP, where I practice constitutional and appellate law.

I. Background on Ratification of the Equal Rights Amendment

An Equal Rights Amendment was first proposed in 1923.¹ However, the proposal did not receive approval of the required two-thirds supermajority of the House and Senate until March 22, 1972. The text of the proposal reads as follows:

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"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."²

The ERA's lead sponsor, Representative Martha Griffiths, explained that the seven-year deadline was included to assuage "one of the objections" that had raised against the proposed amendment—namely, that it "should not be hanging over our head forever."³ The Senate Judiciary Committee's report echoed this explanation: "The seven year time limitation assures that ratification reflects the contemporaneous views of the people."⁴ The seven-year ratification

¹ S.J. Res. 21, 68th Cong. (1923); H.J. Res. 75, 68th Cong. (1923).

² H.J. Res. 208, 86 Stat. 1523 (1972) (bold added).

³ 117 Cong. Rec. at 35814–15.

⁴ S. Rep. No. 92-689, at 20.

deadline was thus a “compromise” that enabled the proposed amendment to achieve the two-thirds supermajority required by Article V.⁵

The seven-year ratification period expired on March 22, 1979. When that deadline arrived, only thirty-five of the required thirty-eight States (three-fourths of the fifty States) had ratified the ERA.

In 1978, sensing that the ERA would not meet the three-fourths threshold within the original ratification deadline, the 95th Congress purported to “extend” the ERA’s ratification deadline by approximately three years (to June 30, 1982), passing a joint resolution by simple majorities, signed by then-President Carter.⁶ No additional States ratified the ERA during this purported extension period.

Prior to the expiration of the ERA’s original 1979 ratification deadline, four States “rescinded” their ratification: Idaho, Kentucky, Nebraska, and Tennessee. A fifth State, South Dakota, voted on March 1, 1979—21 days before the original ratification deadline—to “sunset” its earlier 1973 ratification, declaring it “null and void” in protest of Congress’s unilateral three-year extension of the ratification deadline via a majoritarian joint resolution. The South Dakota legislature declared, “Congress *ex post facto* has sought unilaterally to alter the terms and conditions in such a way as to materially affect the congressionally established time period for ratification”⁷ It protested that allowing Congress unilaterally to alter a previously-imposed ratification deadline created a “perpetual possibility of a sudden change in the Constitution of the United States due to a shift of opinion in a small number of states.”⁸

Since 2017, three additional States have purported to “ratify” the ERA after both the original 1979 ratification deadline and the purported three-year extension: Nevada (2017), Illinois (2018) and Virginia (2020). Some now claim that “ratification” by these three States means that the ERA has crossed the three-fourths threshold (thirty-eight States) and should be recognized as part of the Constitution. Indeed, in the 118th Congress, a joint resolution has been introduced in the Senate, S.J. Res. 4,⁹ which purports to formally recognize the ERA as the Twenty-Eighth Amendment:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding any time limit contained in House Joint Resolution 208, 92nd Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution is valid to all intents and purposes as part of the Constitution, having been ratified by the legislatures of three-fourths of the several States.

⁵ *Accord Virginia v. Ferriero*, 525 F. Supp. 3d 36, 42 (D.D.C. 2021).

⁶ H.J. Res. 638, 95th Cong., 2d Sess. (1978).

⁷ 125 Cong. Rec. 4862 (Mar. 13, 1979).

⁸ *Id.*

⁹ See also H.J. Res. 25 (same) (Rep. Pressley).

As elaborated below, however, this joint resolution, even if enacted, would have no legal effect.

II. The Role of Congress in Constitutional Amendments

Congress's role under Article V of the Constitution is to "propose" Amendments by a two-thirds supermajority of both houses or, alternatively, to "call a Convention for proposing Amendments" if two-thirds of the States' legislatures make an "Application" to Congress for such a convention.¹⁰ "[I]n either case"—i.e., whether an amendment is proposed by Congress or by convention—a proposed amendment "shall be valid . . . when ratified" by three-fourths of States' legislatures or States' constitutional conventions, "as the one or the other Mode of Ratification may be proposed by the Congress."¹¹ Thus, as part of its Article V power to "propose" constitutional amendments, Congress may propose a "Mode of Ratification."

Once Congress has proposed a constitutional amendment via Article V, its power under that Article ends. The fate of a proposed amendment thereafter rests with the States, which have the sole power to ratify it via the "Mode of Ratification" specified by Congress.

A. The History of Ratification Deadlines

Eight of last nine amendments proposed by Congress have contained a ratification deadline. Specifically, the Eighteenth through Twenty-Sixth Amendments—with the exception of the Nineteenth Amendment (women's suffrage)—have contained a seven-year ratification deadline, either in their text or preamble. Of these eight modern amendments, four contain the seven-year deadline in their text;¹² the other four (the most recent proposals) are found within the proposal's preamble.¹³ According to the Congressional Research Service, Congress determined that "inclusion of the time limit within [the amendment's] body 'cluttered up' the proposal" and consequently Congress "placed the limit in the preamble or authorizing resolution, rather than in the body of the amendment itself" which was "seemingly uncontroversial at the time . . ."¹⁴

The only constitutional amendment ratified since the Nineteenth Amendment that lacked a seven-year deadline is the Twenty-Seventh Amendment (requiring an intervening election before a congressional pay raise can take effect). The Twenty-Seventh Amendment is often called the "Madison Amendment" because it was one of the original twelve amendments James Madison proposed to Congress for its consideration in 1789, ten of which were quickly ratified and dubbed the "Bill of Rights." As was typical with early amendment proposals, none of these twelve proposed amendments contained a ratification deadline. The Madison Amendment was quickly ratified by seven States within three years and ratified by Ohio over eighty years later, in

¹⁰ U.S. Const. art. V.

¹¹ *Id.*

¹² Amendments Eighteen, Twenty, Twenty-One and Twenty-Two have the seven-year ratification deadlines in their text.

¹³ Amendments Twenty-Three, Twenty-Four, Twenty-Five and Twenty-Six have the seven-year deadline in their preamble.

¹⁴ Thomas H. Neale, Cong. Research Serv., R42979, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues* 13-14, (July 18, 2018). *Accord. Ferrero*, 35 F. Supp.3d at 58.

1873. It then laid moribund for another century, until ratified by Wyoming in 1978, after which it slowly gained momentum again. In May 1992, the Twenty-Seventh Amendment was ratified by the thirty-eighth State, becoming part of the Constitution.

Like the Madison Amendment, there are four additional "older" proposed amendments that contain no ratification deadline and thus are still technically pending for ratification: (1) another "Madison Amendment," regulating House apportionment;¹⁵ (2) an amendment that would strip U.S. citizenship from anyone accepting a title of nobility or emolument from a foreign power;¹⁶ (3) the "Corwin Amendment," which would prohibit Congress from banning or interfering with slavery;¹⁷ and (4) the Child Labor Amendment, which would give Congress the power to regulate child labor.¹⁸

In addition, there is one modern constitutional amendment—the D.C. Voting Rights Amendment¹⁹—proposed by Congress in 1978 which, like the ERA, contained a seven-year ratification deadline²⁰ but was not ratified by the requisite three-quarters of States within that period.²¹ Presumably, if Congress lacks authority to impose a judicially-enforceable ratification deadline, the DC Voting Rights Amendment, like the ERA, could be ratified ten, fifty, or a hundred years from now.

B. Legal Precedent Regarding Ratification Deadlines

¹⁵ This second "Madison Amendment" has been ratified by eleven States. With eleven state ratifications, the Apportionment Amendment was one State shy of the three-quarters threshold needed for ratification in 1791. With the addition of more States, however, the threshold climbed to thirty-eight States, and it is now twenty-seven States shy of the threshold. If this second "Madison Amendment" ever reaches the three-quarters threshold for ratification, there would be more than 6,000 representatives in the House, compared to the 435 that exist today.

¹⁶ This amendment was proposed in 1810 (on the cusp of the war of 1812) and has been ratified by twelve States. At the time it was proposed, ratification by thirteen states was required to meet the three-quarters threshold; it fell one State short. Consequently, there was some confusion and some versions of the Constitution—including the one contained in the Statutes at Large and distributed to members of Congress—contained the amendment as the "Thirteenth Amendment." See Nat'l Archives, *Unratified Amendments: Titles of Nobility*, available at <https://prologue.blogs.archives.gov/2020/01/30/unratified-amendments-titles-of-nobility/>.

¹⁷ The Corwin Amendment was proposed in 1861 and has been ratified by five States. Given ratification of the Thirteenth Amendment prohibiting slavery, any future ratifications of the Corwin Amendment—even if it crossed the three-fourths threshold—would presumably have no significant legal effect.

¹⁸ The Child Labor Amendment was proposed in 1924 and has been ratified by twenty-eight States. It is presumably no longer necessary since the post-1937 Supreme Court has capaciously construed the Commerce Clause to regulate labor conditions.

¹⁹ The D.C. Voting Rights Amendment would not have officially made D.C. a "State," but it would have given D.C. residents full voting representation in Congress, full Electoral College representation, and a role in approving proposed constitutional amendments. It would have also repealed the Twenty-Third Amendment, which grants the District representation in the Electoral College not to exceed that of the "least populous state."

²⁰ H.J. Res. 554, 95th Cong. (1978). The D.C. Voting Rights Amendment's seven-year deadline appeared in the text of the proposal.

²¹ The seven-year ratification for the proposed amendment granting D.C. Statehood expired August 21, 1985, by which time only sixteen States had ratified it.

The salient legal questions are: (1) whether Congress has the authority to impose a ratification deadline; (2) if it does, whether such ratification deadline is judicially enforceable; and (3) if it is enforceable, whether a ratification deadline contained in the proposed amendment's preamble (rather than its text) also judicially enforceable. As elaborated below, the answer to all three questions is most likely "yes" based on two decisions by the Supreme Court and two additional district court decisions applying those Supreme Court precedents. Thus, Congress may impose a ratification deadline pursuant to its Article V power and may do so either in the proposed amendment's text or preamble. Once such a deadline is established by Congress, the deadline is judicially enforceable and cannot be altered by future Congresses. If Congress wishes to extend the time for ratification, therefore, it must begin the Article V process anew, proposing a new constitutional amendment, with or without a ratification deadline.

With its ERA proposal, Congress included a seven-year ratification deadline that was not met; consequently, the only legal way to ratify the ERA now is to start over, proposing a new ERA with the support of at least two-thirds of both houses of Congress. A new ERA proposal (either with or without a ratification deadline) could then be submitted to the States for ratification.

1. *Dillon v. Gloss* (U.S. 1921)

The first relevant Supreme Court precedent is *Dillon v. Gloss*,²² in which a criminal defendant challenged his conviction under federal prohibition law on the basis that the Eighteenth Amendment (authorizing prohibition) was invalid because it contained a seven-year ratification deadline. Specifically, the defendant argued that constitutional amendments, to be valid, had to be "open-ended," time-wise, for ratification. The Supreme Court, in a *unanimous opinion*, rejected Mr. Dillon's argument stating, "Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification *we entertain no doubt*."²³

The Court acknowledged that Article V does not expressly mention the power to impose a ratification deadline, but this "is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed."²⁴ It then concluded, "An examination of article 5 discloses that it is intended to invest Congress with a wide range of power in *proposing amendments*."²⁵ Article V's express grant of power to Congress to "propose Amendments" and its accompanying express power to propose a "Mode of Ratification" thus implies a power to impose a "wide range" of ratification conditions, including ratification deadlines.

Dillon acknowledged that Congress is not *required* to specify a ratification deadline when it proposes amendments, only that it may constitutionally do so, and that the seven-year deadline Congress imposed for ratification of the Eighteenth Amendment was judicially enforceable

²² 256 U.S. 358 (1921).

²³ *Id.* at 375-76 (emphasis added).

²⁴ *Id.* at 373.

²⁵ *Id.* (emphasis added).

because it was “reasonable.” “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.*”²⁶

The *Dillon* Court further reasoned that the “fair implication” of Article V is that ratification “must be sufficiently contemporaneous . . . to reflect the will of the people in all sections [of the country] at relatively the same period, which of course ratification scattered through a long series of years would not do.”²⁷ It accordingly held “that the fair inference or implication from article 5 is that the ratification must be within some *reasonable time* after the proposal.”²⁸ *Dillon’s* logic is that Congress’s Article V power to *propose amendments* includes the power to specify a “reasonable time” for ratification. When Congress specifies a ratification deadline, it prevents “speculation on what is a reasonable time” (and thus litigation over that phrase),²⁹ and solves the Court’s concern about ratification by generations long-removed from events prompting the amendment’s proposal.

Dillon thus established two clear legal rules and implied one additional rule. First, because Congress’s power to specify a ratification deadline emanates from its power to *propose amendments* under Article V, not Article I, any proposal relating to a constitutional amendment—including ratification deadlines—must be passed via Article V’s super-majoritarian process, not the simple-majority process for ordinary legislation. Pursuant to this rule, Congress’s three-year extension of the ERA’s original ratification deadline (via simple majoritarian process) was constitutionally improper. Second, any ratification deadline established by Congress pursuant to its Article V power is *judicially enforceable*. This is rather obvious because the *Dillon* Court expressly rejected *Dillon’s* argument that the Eighteenth Amendment was “invalid, because the congressional resolution proposing the amendment declared that it should be inoperative unless ratified within seven years”³⁰ If the seven-year deadline for the Eighteenth Amendment was judicially unenforceable, *Dillon’s* conviction would not have stood.

Third, *Dillon* implies (though it did not decide) that there is no meaningful distinction between a ratification deadline contained in the text of a proposed amendment versus its preamble. This is so because Congress’s power to establish a ratification deadline is derived from its Article V power to *propose amendments*. Logically, therefore, any ratification deadline must be contained in the *proposal* sent to the States for ratification, ensuring that States have clear notice of the “Mode of Ratification” selected by Congress. An amendment’s *proposal* contains both the amendment’s text and its preamble. Whether a ratification deadline appears in the text or preamble, therefore, either way it will appear in the *proposal* sent to the States for ratification,

²⁶ *Id.* at 376 (emphasis added).

²⁷ *Id.* at 375.

²⁸ *Id.* (emphasis added).

²⁹ *Id.*

³⁰ *Id.* at 370-71.

thereby serving the key function of notifying States about the mode of ratification selected by Congress. That should be all that is necessary.

2. *Coleman v. Miller* (U.S. 1939)

In *Coleman v. Miller*,³¹ the Supreme Court did not question *Dillon*'s holding that Congress has power, under Article V, to specify a ratification deadline. In *Coleman*, a group of Kansas legislators sought to halt their State's ratification of the Child Labor Amendment, an amendment proposed by Congress in 1924 which contained *no ratification deadline*. In 1925, the Kansas legislature rejected the Amendment but almost thirteen years later, in 1937, it narrowly ratified it, with twenty (out of forty) State Senators supporting it and the tie vote broken by the Lieutenant Governor. The state legislator-plaintiffs challenged the amendment's ratification, *inter alia*, on grounds that the amendment's ratification, almost thirteen years after its proposal by Congress, was not within a "reasonable time" as required by *Dillon*.

Like *Dillon*, the *Coleman* Court reaffirmed that Congress may specify a ratification deadline, stating in dicta that it may do so "either in the proposed amendment or in the resolution of submission."³² It also stated that *Dillon* had articulated "cogent reasons for the decision . . . that the Congress had the power to fix a reasonable time for ratification."³³ The Court observed, however, that "it does not follow that, whenever Congress has *not exercised that power* [of imposing a ratification deadline], the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications."³⁴ Thus, in proposing the Child Labor Amendment—unlike the Eighteenth Amendment at issue in *Dillon*—Congress had provided "[n]o limitation of time for ratification" in either the text or preamble,³⁵ and the *Coleman* Court refused to police the "reasonableness" of Kansas's ratification thirteen years after the amendment's proposal by Congress. *Coleman*, in other words, disagreed with *Dillon*'s dicta that in the absence of a ratification deadline, the judiciary can invalidate a State's ratification of a constitutional amendment on grounds that it is untimely.

Under the reasoning of both *Dillon* and *Coleman*, therefore, it is clear that Congress has the Article V power to specify a ratification deadline that is judicially enforceable. If it fails to do so (as with the proposed Child Labor Amendment), the *courts* will not impose one via a free-floating "reasonableness" rule.³⁶ Stated another way, whatever Congress decides about ratification deadliness—imposing them or not imposing them—the Court will enforce.

Those who claim that recent ratifications of the ERA by Nevada, Illinois and Virginia are effective rely heavily on Justice Black's plurality concurrence in *Coleman*, presumably because it

³¹ 307 U.S. 433 (1939).

³² *Id.* at 452.

³³ *Id.*

³⁴ *Id.* at 452-53 (emphasis added).

³⁵ *Id.* at 452.

³⁶ This presumably explains why ratification of the "Madison Amendment" (Twenty-Seventh Amendment) has not been challenged as untimely.

states, “Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn insurance by the Congress that ratification has taken place as the Constitution commands.”³⁷ Thus, the argument goes, all questions relating to ratification are *non-justiciable* under the political question doctrine. Accordingly, a mere “proclamation” by Congress that “an amendment has been ratified” will be determinative and courts are powerless to say otherwise. Presumably, under this logic, the converse would be true as well: i.e., if Congress issued a proclamation that an existing amendment was *not* properly ratified—even one as important as, say, the Fourteenth Amendment—any challenge to the legitimacy of such proclamation would be non-justiciable. But of course this is nonsense, and for good reason.

Justice Black’s concurrence in *Coleman* has no precedential value. It is merely a *plurality* concurrence, garnering support of only four Justices.³⁸ The other *five Justices*³⁹—a majority of the *Coleman* Court—reaffirmed *Dillon*’s central holding that Congress may impose an enforceable ratification deadline pursuant to its Article V authority to propose amendments. The five-Justice *Coleman* majority consisted of Chief Justice Hughes (who authored the *Coleman* opinion) and Justices Stone and Reed, plus two dissenting Justices, Justices Butler and McReynolds. The two dissenters agreed that per *Dillon*, Congress can establish a ratification deadline, but unlike Hughes, Stone and Reed, they wanted to reaffirm *Dillon*’s conclusion that if Congress does *not* specify a ratification deadline, courts can invalidate a ratification that occurs beyond a “reasonable” time. Indeed, the two dissenters concluded that “more than a reasonable time had elapsed”—almost thirteen years—between the time Congress proposed the Child Labor Amendment and Kansas had ratified it, rendering Kansas’s ratification invalid. *Id.* at 473-74 (Butler, J., dissenting).

As *Dillon* and *Coleman* demonstrate, Congress’s constitutional role relating to amendments emanates from Article V, not its ordinary legislative power. Congress’s Article V power, moreover, is only one to *propose* amendments, which are then sent to the States for possible ratification. Put succinctly, Congress’s Article V power to propose amendments is necessarily *antecedent* to ratification. Consequently, once Congress *proposes* a constitutional amendment, its constitutional power *ends* and the power of the States (to ratify) *begins*. If Congress wishes to impose a ratification deadline, it may do so, but it must place the ratification deadline in the *proposal* it sends to the States. As *Coleman*’s dicta acknowledged, a ratification deadline may be

³⁷ *Id.* at 457 (Black, J., concurring).

³⁸ Justice Black’s *Coleman* concurrence was joined by Justices Roberts, Frankfurter and Douglas. See also *Ferriero*, 525 F. Supp.3d at 50 (“*Coleman* does not establish that *all* questions related to the amendment process are political ones. Even though four concurring members took that broad view, they failed to convince a majority.”) (emphasis in original).

³⁹ The five Justices in *Coleman* are Chief Justice Hughes, and Justices Reed, Stone, Butler and McReynolds. Chief Justice Hughes, Stone and Reed joined the Court’s majority opinion. Justices Butler and McReynolds dissented, asserting that because Congress had not established a ratification deadline, the Court remained empowered to determine whether a nearly thirteen-year lapse between the Child Labor Amendment’s proposal and Kansas’s ratification was a “reasonable” time consistent with Article V. See *Coleman*, 307 U.S. at 470-74 (Butler, J., dissenting). The two *Coleman* dissenters thus agreed with the majority that Congress could set a deadline for ratification but believed that when it did *not* establish a deadline, the Court retained power to declare a ratification unconstitutional if it occurred after a “reasonable” time.

placed “either in the proposed amendment or the resolution of submission.”⁴⁰ In reliance on this, Congress has placed seven-year ratification deadlines in the *preambles* of the last four amendments it has proposed (Amendments Twenty-Three through Twenty-Six).

Any action by Congress *after* an amendment is proposed to the States is therefore of no legal effect. Thus, because the ERA as proposed by Congress under its Article V power contained a seven-year ratification deadline, *Dillon* and *Coleman* confirm that this deadline is judicially enforceable and cannot be altered or affected by post-proposal, ordinary legislative process. As elaborated below, the two lower federal courts to that have addressed these issues have agreed with this construction of *Dillon* and *Coleman*.

3. *Idaho v. Freeman* (D. Idaho 1981)

In *Idaho v. Freeman*,⁴¹ ERA supporters argued that because the ERA's seven-year ratification deadline was contained in the *preamble* rather than its text, Congress was free to alter the ratification deadline at will, since doing so would “not change the essential nature of the amendment” itself but was merely a “matter of detail” over which Congress has authority pursuant to *Dillon*.⁴²

The *Freeman* court rejected this argument, reasoning that *Dillon* endorsed congressional authority to establish a ratification deadline as part of its Article V power because it would “infuse certainty into an area which is inherently vague.”⁴³ It concluded that “the congressional determination of a reasonable period *once made and proposed to the states cannot be altered.*” *Id.* (emphasis added). Specifically, “If Congress determines that a particular amendment requires ongoing assessment as to its viability or monitoring of the time period, it can do so, not by defeating the certainty implied by the *Dillon* case, but by *not setting a time period* at the outset . . .” *Id.* (emphasis added). The court held that Congress could not change its initially-specified ratification date “any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa. *Once the proposal is made, Congress is not at liberty to change it.*”⁴⁴

In 1982, after the second (extended) ERA ratification deadline had expired, the Supreme Court, “[u]pon consideration of the memorandum for the Administrator of General Services suggesting mootness,” agreed that the dispute was permanently mooted.⁴⁵ The GSA’s memo, upon which the Supreme Court relied, stated, “Even if all the ratifications remain valid, the rescissions are disregarded, and Congress is conceded the power to extend the ratification period as it did here, only 35 of the necessary states can be regarded as having ratified the Amendment. If appellee-

⁴⁰ *Coleman*, 307 U.S. at 452.

⁴¹ 529 F. Supp. 1107 (D. Idaho 1981).

⁴² *Id.* at 1151.

⁴³ *Id.* at 1152.

⁴⁴ *Id.* at 1153 (emphasis added).

⁴⁵ *Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982).

respondents were to prevail on all issues, fewer than 35 states would be counted as having ratified the Amendment, and the Amendment would be regarded having failed of adoption”⁴⁶ In other words, even assuming *arguendo* that Congress’s second, extended ERA ratification deadline was legally permissible, only thirty-five States had ratified the ERA by that deadline, rendering the ERA failed. If the ERA was *not* failed, the Supreme Court could not have deemed the *Freeman* controversy moot.⁴⁷ The necessary implication, therefore, is that the Supreme Court considered the ERA’s preamble-based ratification deadline to be valid and judicially enforceable.

4. *Virginia v. Ferriero* (D.D.C. 2021).

In 2021, Judge Contreras of the Federal District Court for the District of Columbia, an Obama appointee, decided *Virginia v. Ferriero*,⁴⁸ a lawsuit filed by Nevada, Illinois and Virginia against the U.S. Archivist, seeking to force the Archivist to publish and certify the ERA as part of the Constitution following those States’ ratifications in 2017-2020. The five States that had rescinded the ERA prior to its original 1979 ratification deadline intervened, arguing that the plaintiff-States’ ratifications were invalid because they occurred after the original ratification deadline. Like the district court in *Freeman*, the *Ferriero* court held that the ERA’s original seven-year ratification deadline, contained in the preamble, was judicially enforceable for four reasons.

First, the *Ferriero* court reasoned that under the holding of *Dillon*, Congress’s Article V power to propose amendments includes the power to propose a “Mode of Ratification,” which may include a ratification deadline.⁴⁹

Second, the court observed that there is a longstanding tradition of specifying the “Mode of Ratification” in a proposed amendment’s preamble: “Congress has routinely put ratification conditions in the preambles of proposing resolutions since the Founding.”⁵⁰ For example, Judge Contreras noted that when proposing the first ten Amendments—the Bill of Rights—to the States, Congress included a preamble specifying that the “Mode of Ratification” must be via State legislatures, not conventions.⁵¹ “With that, Congress began the practice of dictating an amendment’s ‘Mode of Ratification’ through language in the proposing resolution’s prefatory

⁴⁶ Mem. for the Admin. of Gen. Servs. Suggesting Mootness, *Nat’l Org. for Women, Inc. v. Idaho* (July 1982), available at <https://eagleforum.org/era/now-v-idaho-memo.html>.

⁴⁷ Judge Contreras recently agreed with this analysis in *Ferriero*, 525 F. Supp.3d at 58-59.

⁴⁸ 525 F. Supp.3d 36 (D.D.C. 2021). An appeal is presently pending in the D.C. Circuit. On February 18, 2023, Virginia voluntarily withdrew from the case, leaving only Nevada and Illinois as plaintiffs. See Veronica Stracqualursi, *Virginia’s AG Withdraws State From Legal Effort to Have Equal Rights Amendment Recognized*, CNN.com (Feb. 19, 2022), available at <https://www.cnn.com/2022/02/19/politics/virginia-withdraws-era-appeals-case/index.html>.

⁴⁹ *Id.* at 56.

⁵⁰ *Id.* at 57.

⁵¹ *Id.*

clause.”⁵² Moreover, with the exception of the Nineteenth Amendment, every proposed amendment since the Eighteenth has contained a ratification deadline, and every proposed amendment since the Twenty-Second in 1960 has placed the ratification deadline *in the proposal’s preamble*.⁵³ “[T]he practice has persisted for sixty years,” said the court, and such practice was entitled to “due weight.”⁵⁴ Thus, whatever mode of ratification Congress chooses, “[S]tates have always followed Congress’s direction without question—even the one time Congress called for ratification by [State] convention” in the Twenty-First Amendment (repeal of prohibition).⁵⁵ Thus, the court concluded, “If Congress can dictate the mode of ratification in the prefatory language accompanying a proposed amendment, then it should be able to dictate a ratification deadline in the same fashion,” since ratification deadlines are merely another “mode of ratification” that Congress has Article V power to impose.⁵⁶

Third, the *Ferriero* court believed that both the Supreme Court’s dicta in *Coleman* and its vacatur as moot of *Freeman* reasonably imply that the Supreme Court considers preamble-based ratification deadlines to be judicially enforceable. The dicta in *Coleman* “suggested that it did not matter where Congress put a ratification deadline.”⁵⁷ And when the Supreme Court vacated *Freeman* as moot, “the Court must have assumed that the ERA’s deadline barred further ratifications” because otherwise, “a live controversy would have remained because additional states ratifications could have still pushed the ERA over the three-fourths threshold.”⁵⁸

Fourth, *Ferriero* observed that the ERA’s preamble-based deadline was an *operative* portion of the proposal, both in the eyes of the States and Congress itself. There is “little doubt that the states were aware of the ERA’s deadline,”⁵⁹ which was a “compromise that helped Congress successfully propose the ERA where previous attempts to pass a proposal had failed.”⁶⁰ That the deadline appeared in the preamble did not render it inoperative, unlike the preamble of a statute or the Constitution. When Congress specifies a mode of ratification (including a deadline) in a proposed amendment, reasoned Judge Contreras, that mode is inherently operative, having “substantive effect.”⁶¹ The preamble of a statute or the Constitution, by contrast, “are statements of general purpose” that “do not lay out discernible rules or standards one would expect to have substantive effect.”⁶² Congress’s selected mode of ratification “draw[s] unmistakable lines for

⁵² *Id.*

⁵³ *Id.* at 57-58.

⁵⁴ *Id.* at 58.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 58; see also *Coleman*, 307 U.S. at 452 (noting that unlike the Eighteenth Amendment at issue in *Dillon*, “[n]o limitation of a time for ratification is provided in the [Child Labor Amendment], either in the proposed amendment or in the resolution of submission.”).

⁵⁸ *Ferriero*, 525 F. Supp.3d at 59.

⁵⁹ *Id.* at 60.

⁶⁰ *Id.*

⁶¹ *Id.* at 60-61.

⁶² *Id.*

states to follow and for the public to rely on. There is no doubt that Congress intended them to be binding. And few have questioned that they are.”⁶³ Accordingly, the *Ferriero* court refused to “pull the rug out from under Congress’s long-accepted practice” of placing ratification deadlines in the preamble.⁶⁴

The *Ferriero* court also concluded that the State-Plaintiffs lacked standing because the Archivist’s decision to publish and certify an amendment is “of no legal effect” and thus, “his refusal to publish and certify . . . does not cause [plaintiffs] a concrete injury that could be remedied by ordering him to act.”⁶⁵ Judge Contreras acknowledged that “the Court could end its analysis after concluding that Plaintiffs lack standing,” he nonetheless went on to decide (and confirm) the validity of the ERA’s preamble-based deadline, which he expressly characterized “as an *alternative holding* to streamline appellate review.”⁶⁶ He repeated this “alternative holding” characterization twice.⁶⁷

Ferriero’s conclusion that the ERA’s preamble-based ratification deadline is valid and judicially enforceable is thus a *holding*, not mere *dicta* as some ERA proponents claim. It is well-settled blackletter law that where a decision rests on alternate grounds, none of them can be characterized as *dicta*.⁶⁸ As the D.C. Circuit stated in *Association of Battery Recyclers v. EPA*,⁶⁹ where a court rests its decision on two alternate grounds “and it adopts both, ‘the ruling on neither is *obiter dictum*. But each is the judgment of the court, and of equal validity with the other.’”⁷⁰ Accordingly, neither of Judge Contreras’s “alternate holdings”—either that Plaintiffs lacked standing or that the ERA’s preamble-based ratification deadline is valid and judicially enforceable—is *dicta*. Both are clearly holdings.

5. Summary of Existing Precedents

As demonstrated above, courts uniformly have agreed that Congress may establish a judicially-enforceable ratification deadline as part of its Article V power to specify a “Mode of Ratification” when proposing a constitutional amendment. When Congress specifies the mode of ratification, States justifiably rely on Congress’s specification, including any ratification deadline. A ratification deadline—whether in the proposed amendment’s text or preamble—signals to States that time is of the essence and they had better act within the specified period if they wish to assent. If a later Congress may simply “recognize” or “proclaim” that a State’s ratification occurring *after* the deadline is valid, this would allow Congress to alter, for any

⁶³ *Id.* at 61.

⁶⁴ *Id.*

⁶⁵ *Id.* at 45.

⁶⁶ *Id.* (emphasis added).

⁶⁷ *Id.*; see also *id.* at 49.

⁶⁸ See, e.g., *United States v. Wallace*, 964 F.3d 386, 390 (5th Cir. 2020); *Boogard v. Nat’l Hockey League*, 891 F.3d 289, 295 (7th Cir. 2018); *Gestamp v. South Carolina*, 769 F.3d 254, 262 n.4 94th Cir. 2014; *Hitchcock v. Fla. Dep’t of Corrs.*, 745 F.3d 476, 484 n.3 (11th Cir. 2014).

⁶⁹ 716 F.3d 667 (D.C. Cir. 2013) (per curiam).

⁷⁰ *Id.* at 673 (quoting *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924)).

reason, any aspect of the initially-selected “Mode of Ratification,” including not only the ratification deadline but also the choice of ratification by State legislatures versus State conventions.

Imagine for example that Congress proposes an amendment, with its preamble specifying a seven-year ratification deadline and ratification by State legislatures. Six years later, after over thirty State legislatures had ratified the proposed amendment, a Congress hostile to the proposed amendment enacts a joint resolution (by simple majoritarian process) purporting to “switch” the mode of ratification to state conventions. The seven-year ratification deadline then expires without reaching the three-fourths threshold. Seventy years later, a group rediscovers the amendment, thinking it useful for a purpose never contemplated when it was originally proposed. The group convinces Congress to pass a joint resolution (by simple majoritarian process) declaring that the amendment may once again be ratified only by State legislatures, not State conventions. Several State legislatures thereafter ratify the amendment, and the total number of ratifications—both via State legislatures and conventions—crosses the three-fourths threshold, seventy-five years after the amendment was initially proposed and sixty-eight years after the expiration of the seven-year ratification deadline. Proponents of the amendment then convince Congress to pass yet another joint resolution, declaring the amendment “ratified” despite the seven-year ratification deadline. Under the logic of current ERA proponents, the amendment is ratified because Congress has said so, and courts would lack power to adjudicate the propriety of any of the significant procedural alterations and irregularities that took place.

Such an outcome would be chaotic, fundamentally unfair, and undermine the rule of law. The rules for *ratification* of pending amendments could swing wildly from Congress-to-Congress, rendering ratification an ever-changing target, even though Congress has no authority under Article V to affect ratification other than *proposing* a “Mode of Ratification” as part of its *proposal* of an amendment. This would be tremendously disrespectful to the States, as States alone have the power under Article V to *ratify* an amendment pursuant to the “Mode of Ratification” contained in the proposal received from Congress. If those pushing the “three-State strategy” and S.J. Res. 4 are correct, Congress can tell States initially that ratification must occur according to one set of rules contained in the proposal, only to be told in another year (or decade or century) that those rules no longer apply. Allowing future Congresses to alter the mode of ratification *after an amendment has been proposed* for ratification by the States is thus the antithesis of due process of law. It would grant Congress the vast new power to be a “perpetual modifier” of *ratification process*, which is arguably the most important legal process of all. And even worse, this vast new power could be wielded by simple majorities, altering ratification process at the whim of every new Congress. This, in turn, would effectively gut Article V, which plainly states that Congress has the power only to “propose” constitutional amendments (including their “Mode of Ratification”) by two-thirds supermajorities and once a proposal has been submitted to the States for ratification, Congress’s power over amendments has ended.

S.J. Res. 4 thus arrogates to Congress vast power to undermine Article V, due process, and States’ ability to trust Congress as a good faith, stable partner in the amendment process. Fortunately, courts have made clear that if enacted, S.J. Res. 4 will amount to nothing more than a senseless political gesture with no legal effect. Congress’s power to propose a particular amendment (and its “Mode of Ratification”) comes but once, the power to propose amendments

is not an open-ended power to oversee and continually alter the ratification process. Under existing legal precedent, Congress's imposition of a seven-year ratification deadline in the ERA's proposal is judicially enforceable and cannot be altered by a mere majoritarian joint resolution of Congress.

III. Can States Rescind an Earlier Ratification?

Coleman held that “the efficacy of ratifications by state legislatures, in the light of *previous rejection or withdrawal*, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.” *Coleman*, 307 U.S. at 450 (emphasis added). Thus, the Kansas legislature’s ratification of the Child Labor Amendment, many years *after* its prior rejection thereof, was a non-justiciable political question. *Coleman* thus addressed the rejection-then-ratification scenario, not the opposite one of ratification-then-rescission. The “last word,” so to speak, of the Kansas legislature was one of approval of the Child Labor Amendment, and the *Coleman* Court wisely refused to second-guess Kansas’s most recent decision.

By contrast, when a State *first ratifies, then rescinds* its ratification of an amendment, the legal question is materially different, since the question is whether the later rescission should likewise be considered the non-justiciable “last word” of the State. Presumably (though there is no case law on this point), a rescission occurring *after* the requisite three-quarters threshold has been reached would be ineffective, as the amendment would already be “ratified” within the meaning of Article V. Similarly, a rescission occurring *after* a ratification deadline would presumably be ineffective, as it would not comport with the “Mode of Ratification” specified in Congress’s proposal.

The more difficult question, however, is ascertaining the effect of a rescission occurring *before* the three-fourths threshold has been met and *before* expiration of any ratification deadline. Unfortunately, there is no clear answer from case precedent but there are some historical precedents that may prove informative.

For example, the Fourteenth Amendment was proposed by Congress in 1866, after the Civil War. The Union States had all ratified the amendment by 1868 but the former Confederate States had not, except Tennessee. It was unclear, however, whether the former Confederate States “counted” in the denominator for calculating the three-fourths threshold. Senator Charles Sumner of Massachusetts believed they did not, introducing a joint resolution proclaiming that twenty-two states had ratified the Fourteenth Amendment and it was a valid part of the Constitution.⁷¹ Shortly thereafter, however, Ohio (a Union State) rescinded its ratification, followed one month later by New Jersey.

Worried that the rescissions by Ohio and New Jersey may be legally effective, Congress passed a law conditioning former Confederate States representation in Congress on their ratification of the

⁷¹ Cong. Globe, 40th Cong., 2d Sess. 453 (1868).

Fourteenth Amendment.⁷² Several former Confederate States thereafter took quick action to ratify the Amendment, and Secretary of State William Seward then certified that the Fourteenth Amendment had been ratified, but nonetheless expressing reservation as to whether Ohio and New Jersey should be counted: "It is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual"⁷³ Seward cautiously stated that "if the resolutions of Ohio and New Jersey . . . are to be deemed as remaining in full force and effect, notwithstanding the subsequent [rescission] resolutions of the legislature of those States . . . then the aforesaid Amendment has been ratified"⁷⁴ Within a week of Seward's tentative certification, however, Georgia ratified the Fourteenth Amendment and Seward issued another, now unequivocal certification of the Amendment's ratification.⁷⁵

The history of the Fourteenth Amendment's ratification thus provides no clear precedent regarding the legal effect of a State's timely rescission. Secretary of State Seward was equivocal as to whether the rescission of Ohio and New Jersey was effective and shortly thereafter, enough former Confederate States ratified the Fourteenth Amendment to offset these rescissions, removing any doubt about satisfaction of the three-fourths threshold.

The history of the Fifteenth Amendment is similarly equivocal. Although New York timely rescinded its earlier ratification, the Secretary of State certified the Amendment as duly ratified, listing New York among the ratifying States. The certification expressly noted New York's rescission but more importantly, it was *not filed* until enough States had ratified that New York's ratification was no longer necessary. Cong. Globe, 41st Cong., 2d Sess. 2290 (1869). As with the Fourteenth Amendment, the Fifteenth Amendment's history suggests that there was substantial concern that a timely rescission was legally meaningful.

Despite the equivocal history and lack of judicial precedent, however, there are persuasive reasons for acknowledging the validity of a State's rescission, provided it occurs within any congressionally-specified ratification deadline. Ratification of constitutional amendments is, by definition, made intentionally difficult by Article V. Both the two-thirds and three-fourths requirements of Article V are designed to ensure that the Constitution is not amended except by broad societal consensus—in the words of Alexander Hamilton in *Federalist No. 85*, the States must be "united in the desire of a particular amendment" to achieve ratification. To ensure broad societal consensus, a State's timely rescission *should* matter, as it represents that sovereign's "last word" on acceptance of the proposed amendment. Particularly when Congress does *not* specify a ratification deadline, changes that occur after the passage of time—even centuries in the case of the Twenty-Seventh Amendment—may cause a State to change its mind about the desirability of a proposed amendment. If the three-fourths threshold has not been satisfied, a rescission should be considered legally effective, as the period for State decision-making—the ratification

⁷² 14 Stat. 428, 429, 39th Cong., 2d Sess. (1867).

⁷³ 15 Stat. 706-07.

⁷⁴ *Id.*

⁷⁵ 15 Stat. 708-11 (1868).

period—is still “live.” Under this logic, the ERA rescissions by the four (or five)⁷⁶ States that occurred *prior* to expiration of the original 1979 deadline would be effective.

It should be noted that as part of its Article V power to *propose* amendments and their mode of ratification, Congress could presumably specify, in addition to a ratification deadline, whether rescissions are possible within the ratification deadline (or perhaps even a narrower window of time). If Congress expressly allowed for rescissions, this could make achieving the requisite three-fourths threshold (and thus, ratification) more difficult. But the same is true of a ratification deadline. Of course Congress need not say anything at all about rescissions; indeed, Congress has never addressed rescissions in any prior amendment proposals. In the *absence* of any congressional specification about rescissions in a proposed amendment, therefore, it is unclear whether courts would consider timely rescissions effective. If Congress wishes to address rescissions, it would be well-advised to consider including a statement about them, in either the text or preamble of any future amendments it proposes. Under the logic of *Coleman*, a rescission rule contained in an amendment proposal would likely be upheld as an exercise of Congress’s power to specify a “Mode of Ratification.”

⁷⁶ The four States are Idaho, Kentucky, Nebraska, and Tennessee. A fifth State, South Dakota, ratified the ERA in 1973 but voted on March 1, 1979—21 days before the original ratification deadline—to “sunset” its ratification, declaring it “null and void.” It is unclear whether a “sunset” vote would be considered equivalent to a rescission.

Questions for the Record

From: Senator Lee

To: Professor Elizabeth Price Foley, Florida International University
College of Law

Re: Senate Judiciary Committee Hearing: “The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution” held on February 28, 2023

1. Article V of the Constitution was designed to require significant and substantial agreement from all parts of this great nation before altering the Constitution. It directs that “[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution.”

- **Do two thirds of both Houses currently “deem it necessary” to propose this amendment?**

No. Congress’s role under Article V of the Constitution is to “propose” Amendments by a two-thirds supermajority of both houses or, alternatively, to “call a Convention for proposing Amendments” if two-thirds of the States’ legislatures make an application to Congress for such a convention.

Once Congress has proposed an amendment, therefore, its power under Article V ends. It cannot thereafter change the terms of a proposed amendment with less than a supermajority—i.e., unless it re-proposes the amendment via the super-majoritarian process of Article V. This conclusion is supported by the Supreme Court’s decision in *Dillon v. Gloss*, 256 U.S. 358 (1921), which held that, as part of its Article V power to propose amendments, Congress may specify a ratification deadline “as an incident to its power to designate the mode of ratification” of the proposed amendment. *Id.* at 376.

This construction of *Dillon* has been confirmed by the two lower federal courts that have considered the ERA’s deadline. In *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), the court held that Congress could not change its initially-specified ratification date “any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa. *Once the proposal is made, Congress is not at*

liberty to change it." *Id.* at 1153 (emphasis added). Likewise, more recently in *Virginia v. Ferriero*, 525 F. Supp.3d 36 (D.D.C. 2021), the court held that the ERA's original seven-year ratification deadline, contained in the preamble, was judicially enforceable, reasoning that under *Dillon*, Congress's Article V power to propose amendments includes the power to propose a "Mode of Ratification," which may include a ratification deadline. *Id.* at 56.

Accordingly, all courts to consider the question have uniformly concluded that because a proposed amendment—including its ratification deadline—is an exercise of Congress's Article V power and not its ordinary legislative power, any *modification* of a proposed amendment can only be accomplished by the super-majoritarian process of Article V (i.e., a new amendment proposal).

2. In *Dillon v. Gloss*, 256 U.S. 368, 375-76 (1921), the Court indicated that under Article V, ratification by the States needed to be "sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period." Do we now have, or have we ever had, such consensus about the ERA across the nation with two-thirds of the states ratifying the resolution at relatively the same time?

Congress is not required to specify a ratification deadline when it proposes amendments, but as *Dillon* held, it may constitutionally do so. As the *Dillon* Court explained, "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." *Dillon*, 256 U.S. at 376.

Dillon also reasoned that the "fair implication" of Article V is that ratification "must be sufficiently contemporaneous . . . to reflect the will of the people in all sections [of the country] at relatively the same period, which of course ratification scattered through a long series of years would not do." *Id.* at 375. It accordingly held "that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal." *Id.*

In *Coleman v. Miller*, 307 U.S. 433 (1939), the Supreme Court reaffirmed that Congress may specify a ratification deadline, stating that it may do so “either in the proposed amendment or in the resolution of submission.” *Id.* at 452. The Court observed, however, that “it does not follow that, whenever Congress has not exercised that power [of imposing a ratification deadline], the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications.” *Id.* at 452-53 (emphasis added). Thus, in proposing the Child Labor Amendment—unlike the Eighteenth Amendment at issue in *Dillon*—Congress had provided “[n]o limitation of time for ratification” in either the text or preamble, and the *Coleman* Court refused to police the “reasonableness” of Kansas’s ratification thirteen years after the amendment’s proposal by Congress. *Coleman*, in other words, disagreed with *Dillon*’s dicta that in the absence of a ratification deadline, the judiciary can invalidate a State’s ratification of a constitutional amendment on grounds that it is untimely.

Nonetheless, under the reasoning of both *Dillon* and *Coleman*, it is clear that Congress may choose to specify a ratification deadline that will be judicially enforceable.

3. If Congress were to ignore the requirements of Article V and the interpretation of those requirements as handed down by the Court, how would that impact the integrity of our Constitution and the amendment ratification process?

When Congress chooses to specify a ratification deadline (as it did with the ERA), it reflects a policy choice of ensuring that ratification is not *ad infinitum* and thus unambiguously reflects a broad societal consensus. An amendment lacking a ratification deadline that is consequently ratified is over a period of hundreds (or even theoretically thousands) of years—as is the case, for example, with the Twenty-Seventh Amendment—does not reflect broad societal consensus in the same palpable way as an amendment ratified within a seven-year period. The “society” ratifying an amendment in 1791 is not the same “society” ratifying it in 1991 or 2091. The longer the time for ratification, in other words, the less likely the amendment reflects the sort of broad societal consensus that lends legitimacy in the eyes of the people. If the amendment is controversial, in particular, a long period of ratification is potentially destabilizing.

If a later Congress may simply “recognize” or “proclaim” that a State’s ratification occurring *after* the deadline is valid, this would allow Congress to alter, for any reason, any aspect of the initially-selected “Mode of Ratification,” including not only the ratification deadline but also the choice of ratification by State legislatures versus State conventions.

Such an outcome would be chaotic, fundamentally unfair, and undermine the rule of law. The rules for *ratification* of pending amendments could swing wildly from Congress-to-Congress, rendering ratification an ever-changing target, even though Congress has no authority under Article V to affect ratification other than *proposing* a “Mode of Ratification” as part of its *proposal* of an amendment. This would be tremendously disrespectful to the States, as States alone have the power under Article V to *ratify* an amendment pursuant to the “Mode of Ratification” contained in the proposal received from Congress.

Allowing future Congresses to alter the mode of ratification after an amendment has been proposed for ratification by the States is thus the antithesis of due process of law. It would grant Congress the vast new power to be a “perpetual modifier” of *ratification process*, which is arguably the most important legal process of all. And even worse, this vast new power could be wielded by simple majorities, altering ratification process at the whim of every new Congress. This, in turn, would effectively gut Article V, which plainly states that Congress has the power only to “propose” constitutional amendments (including their “Mode of Ratification”) by two-thirds supermajorities and once a proposal has been submitted to the States for ratification, Congress’s power over amendments has ended.

4. If the 1974 ERA resolution were adopted into the Constitution, what standard of review would the Court likely apply to cases under this amendment?

- **What would be the impact on women, programs designed for women, privacy protections for women, and opportunities reserved for women, if the Court were to apply a strict scrutiny or even a more absolutist standard of review?**

If the ERA is ratified, the Constitution would have an *express* provision stating, “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” This shift from the generic “equal protection” and “liberty” guarantees of the Fourteenth Amendment to a specific, express “equality of rights . . . on account of sex” guarantee would undoubtedly force courts to apply “strict scrutiny” to any gender-based distinctions.

Strict scrutiny is commonly referred to by the old adage, “strict in theory, fatal in fact,” meaning that the demands of strict scrutiny almost invariably result in the invalidation of the law. This is so because to satisfy strict scrutiny, the government must prove that the law is “necessary” to achieve a “compelling” government interest and even more difficult, that the law is “narrowly tailored” to achieve that compelling interest—meaning there are no less restrictive means to achieve the compelling interest. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005) (strict scrutiny applied to race-based classifications).

A shift from intermediate to strict scrutiny for gender-based classifications would likely have significant consequences, invalidating most (if not all) gender-based distinctions in law. Thus, the application of Selective Service registration and concomitant military draft only to men will likely be unconstitutional if the ERA is ratified. Similarly, laws that draw distinctions between male and female sports and bathrooms will also likely be unconstitutional, as would public school sex-based segregation of certain classes, such as girl-only STEM classes or sex education classes.

Specifically, a “compelling” government interest has jurisprudentially been limited to things such as national security or public health. In the instance of military draft, for example, even assuming *arguendo* that not drafting females would serve the interest of “national security” (which is highly doubtful in itself), excluding females entirely from the draft would most certainly not be “narrowly tailored” to serve that interest, as women could be drafted and serve in certain roles.

Similarly, laws segregating sports, bathrooms and certain classes by sex would not seem to serve any “compelling” government interest at all, as there would be no national security or public health reasons to do so. One might imagine that proponents of continued sex-based segregation of bathrooms would assert that “privacy” of each sex should be recognized as a

compelling government interest, but there is presently no case law that would support this assertion, and this argument would not justify sex-based segregation of sports nor sex education classes. Moreover, even if the Supreme Court were to one day acknowledge that protecting each sex's separate privacy is a compelling government interest in the context of sex-segregated bathrooms, there would likely be less restrictive means by which to achieve such privacy, such as requiring bathroom stalls with doors.

Moreover, because the ERA would expressly enshrine that "equality of rights under the law shall not be denied or abridged . . . on account of sex," this would not only cause a shift from intermediate to strict scrutiny for equality-based challenges to sex-segregation (discussed above), but strict scrutiny for "liberty"-based challenges to abortion laws.

Specifically, in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court concluded that the asserted right to abortion was not a "fundamental right" protected by the word "liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments. It did so because Due Process Clause jurisprudence makes clear that "fundamental rights" under that Clause are limited to rights that are "deeply rooted in [our] history and tradition" and "essential to our Nation's scheme of ordered liberty." *Id.* at 2246. If an asserted liberty is "deeply rooted" in our nation's history, strict scrutiny applies; if it is not deeply rooted, rational basis review applies (and the law is presumptively constitutional). *Id.* at 2246, 2283. The *Dobbs* Court concluded that "a right to abortion is not deeply rooted in our Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until [*Roe v. Wade* in] 1973." *Id.* at 2253. Accordingly, the *Dobbs* Court concluded that laws regulating abortion "like other health and welfare laws, [are] entitled to a strong presumption of validity" and subject only to rational basis review. *Id.* at 2283, 2284.

All of this would change if the ERA is ratified. By enshrining a right to sexual equality in the Constitution, there would no longer be a need to *imply* a right to abortion through the ambiguous word "liberty" in the Due Process Clauses. Instead, there would be a new, *express* constitutional guarantee, thus enshrining a textual, *fundamental* right of sexual equality. While the contours of the new fundamental right to sexual equality would not be clear immediately, the express textual commitment to sexual

equality would undoubtedly elevate all laws implicating “sexual equality,” including abortion, to strict scrutiny. If abortion laws are subject to strict scrutiny, the result would be (as it was in *Roe*), see *Roe v. Wade*, 410 U.S. 113, 155, that most laws regulating abortion would be presumptively unconstitutional—a 180 degree reversal of *Dobbs*.

Questions for Elizabeth Price Foley
Hearing Entitled, “The Equal Rights Amendment: How Congress Can Recognize
Ratification and Enshrine Equality in Our Constitution”
Submitted March 7, 2023

QUESTIONS FROM SENATOR COTTON

1. Article V of the Constitution requires a supermajority of Congress, rather than a simple majority, to propose a constitutional amendment to the states. Can Congress go back and change the terms of a proposed amendment with less than a supermajority?

No. Congress’s role under Article V of the Constitution is to “propose” Amendments by a two-thirds supermajority of both houses or, alternatively, to “call a Convention for proposing Amendments” if two-thirds of the States’ legislatures make an application to Congress for such a convention.

Once Congress has proposed an amendment, therefore, its power under Article V ends. It cannot thereafter change the terms of a proposed amendment with less than a supermajority—i.e., unless it re-proposes the amendment via the super-majoritarian process of Article V. This conclusion is supported by the Supreme Court’s decision in *Dillon v. Gloss*, 256 U.S. 358 (1921), which held that, as part of its Article V power to propose amendments, Congress may specify a ratification deadline “as an incident to its power to designate the mode of ratification” of the proposed amendment. *Id.* at 376.

This construction of *Dillon* has been confirmed by the two lower federal courts that have considered the ERA’s deadline. In *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), the court held that Congress could not change its initially-specified ratification date “any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa. *Once the proposal is made, Congress is not at liberty to change it.*” *Id.* at 1153 (emphasis added). Likewise, more recently in *Virginia v. Ferriero*, 525 F. Supp.3d 36 (D.D.C. 2021), the court held that the ERA’s original seven-year ratification deadline, contained in the preamble, was judicially enforceable, reasoning that under *Dillon*, Congress’s Article V power to propose amendments includes the power to propose a “Mode of Ratification,” which may include a ratification deadline. *Id.* at 56.

Accordingly, all courts to consider the question have uniformly concluded that because a proposed amendment—including its ratification deadline—is an exercise of Congress’s Article V power and not its ordinary legislative power, any *modification* of a proposed amendment can only be accomplished by the super-majoritarian process of Article V (i.e., a new amendment proposal).

2. If Congress includes terms in a proposed amendment, such as a ratification deadline, are states entitled to rely on those terms when deciding whether to ratify the amendment?

Yes. History shows that States do rely on the terms specified by Congress in its resolution of proposal. With the exception of the Nineteenth Amendment, every proposed amendment since the Eighteenth (proposed in 1917) has contained a ratification deadline, and every proposed amendment since the Twenty-Second in 1960 has placed the ratification deadline in the proposal's preamble. "[S]tates have always followed Congress's direction without question—even the one time Congress called for ratification by [State] convention" in the Twenty-First Amendment (repeal of prohibition). *Ferriero*, 525 F. Supp.3d at 58. Moreover, there is "little doubt that the states were aware of the ERA's deadline," which was a political "compromise that helped Congress successfully proposed the ERA where previous attempts to pass a proposal had failed." *Id.* at 60.

Imagine for example that Congress proposes an amendment, with its preamble specifying a seven-year ratification deadline and ratification by State legislatures. Six years later, after over thirty State legislatures had ratified the proposed amendment, a Congress hostile to the proposed amendment enacts a joint resolution (by simple majoritarian process) purporting to "switch" the mode of ratification to state conventions. The seven-year ratification deadline then expires without reaching the three-fourths threshold. Seventy years later, a group rediscovers the amendment, thinking it useful for a purpose never contemplated when it was originally proposed. The group convinces Congress to pass a joint resolution (by simple majoritarian process) declaring that the amendment may once again be ratified only by State legislatures, not State conventions. Several State legislatures thereafter ratify the amendment, and the total number of ratifications—both via State legislatures and conventions—crosses the three-fourths threshold, seventy-five years after the amendment was initially proposed and sixty-eight years after the expiration of the seven-year ratification deadline. Proponents of the amendment then convince Congress to pass yet another joint resolution, declaring the amendment "ratified" despite the seven-year ratification deadline. Under the logic of current ERA proponents, the amendment is ratified because Congress has said so, and courts would lack power to adjudicate the propriety of any of the significant procedural alterations and irregularities that took place.

Such an outcome would be chaotic, fundamentally unfair, and undermine the rule of law. The rules for *ratification* of pending amendments could swing wildly from Congress-to-Congress, rendering ratification an ever-changing target, even though Congress has no authority under Article V to affect ratification other than *proposing* a "Mode of Ratification" as part of its *proposal* of an amendment. This would be tremendously disrespectful to the States, as States alone have the power under Article V to *ratify* an amendment pursuant to the "Mode of

Ratification' contained in the proposal received from Congress. If those pushing the "three-State strategy" and S.J. Res. 4 are correct, Congress can tell States initially that ratification must occur according to one set of rules contained in the proposal, only to be told in another year (or decade or century) that those rules no longer apply. Allowing future Congresses to alter the mode of ratification *after an amendment has been proposed* for ratification by the States is thus the antithesis of due process of law. It would grant Congress the vast new power to be a "perpetual modifier" of *ratification process*, which is arguably the most important legal process of all. And even worse, this vast new power could be wielded by simple majorities, altering ratification process at the whim of every new Congress. This, in turn, would effectively gut Article V, which plainly states that Congress has the power only to "propose" constitutional amendments (including their "Mode of Ratification") by two-thirds supermajorities and once a proposal has been submitted to the States for ratification, Congress's power over amendments has ended.

S.J. Res. 4 thus arrogates to Congress vast power to undermine Article V, due process, and States' ability to trust Congress as a good faith, stable partner in the amendment process.

3. As you mention in your testimony, Alexander Hamilton wrote in Federalist No. 85 that the states must be "united in the desire of a particular amendment" for it to be ratified and joined to the Constitution. What did he mean by that?

Article V requires that become part of the Constitution, any amendment proposed by Congress must be ratified by three-quarters of the States, a significant super-majority. The three-fourths hurdle thus ensures that States are, indeed, "united in the desire for a particular amendment," and thus, the proposed amendment is not controversial or politically divisive. If three-quarters of the States agree on a proposed amendment, there is comfort that the amendment is desired by a wide cross-section of society. After all, a constitutional amendment is not ordinary legislation; once ratified, an amendment becomes part of the fabric of our social charter, the Constitution. It is essential, therefore, that any constitutional amendment be the product of Article V's super-majoritarian process. Any attempt to bypass these super-majoritarian processes is dangerous to the stability of our social charter and the broad social consensus it inherently represents.

4. Why is it important that three-quarters of the states actually support ratification of a constitutional amendment at the same time?

Congress is not required to specify a ratification deadline when it proposes amendments, but as *Dillon* held, it may constitutionally do so. As the *Dillon* Court explained, "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." *Dillon*, 256 U.S. at 376.

Dillon also reasoned that the "fair implication" of Article V is that ratification "must be sufficiently contemporaneous . . . to reflect the will of the people in all sections [of the country] at relatively the same period, which of course ratification scattered through a long series of years would not do." *Id.* at 375. It accordingly held " that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal." *Id.*

In *Coleman v. Miller*, 307 U.S. 433 (1939), the Supreme Court reaffirmed that Congress may specify a ratification deadline, stating that it may do so "either in the proposed amendment or in the resolution of submission." *Id.* at 452. The Court observed, however, that "it does not follow that, whenever Congress has not exercised that power [of imposing a ratification deadline], the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications." *Id.* at 452-53 (emphasis added). Thus, in proposing the Child Labor Amendment—unlike the Eighteenth Amendment at issue in *Dillon*—Congress had provided "[n]o limitation of time for ratification" in either the text or preamble, and the *Coleman* Court refused to police the "reasonableness" of Kansas's ratification thirteen years after the amendment's proposal by Congress. *Coleman*, in other words, disagreed with *Dillon*'s dicta that in the absence of a ratification deadline, the judiciary can invalidate a State's ratification of a constitutional amendment on grounds that it is untimely.

Nonetheless, under the reasoning of both *Dillon* and *Coleman*, it is clear that Congress may choose to specify a ratification deadline that will be judicially enforceable. When Congress chooses to specify a ratification deadline (as it did with the ERA), it reflects a policy choice of ensuring that ratification is not *ad infinitum* and thus unambiguously reflects a broad societal consensus. An amendment lacking a ratification deadline that is consequently ratified is over a period of hundreds (or even theoretically thousands) of years—as is the case, for example, with the Twenty-Seventh Amendment—does not reflect broad societal consensus in the same palpable way as an amendment ratified within a seven-year period. The "society" ratifying an amendment in 1791 is not the same "society" ratifying it in 1991 or 2091. The longer the time for ratification, in other words, the less likely the amendment reflects the sort of broad societal consensus that lends legitimacy in the eyes of the people. If the amendment is controversial, in particular, a long period of ratification is potentially destabilizing.

5. Should it be difficult to amend the Constitution? Why or why not?

Yes. The super-majoritarian process required by Article V was a necessary compromise, allowing future generations to modify their social charter to reflect society's evolving needs, but without the ease of enacting ordinary legislation (i.e., majoritarian process), which would lead to constitutional instability. As James Madison stated in *Federalist No. 43*, Article V's super-majoritarian process "guards equally against that extreme facility which would render the

constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.”

The super-majoritarian process ensures that any change to our social charter is broadly supported by the people, not the whims or passions of an extant, potentially fleeting majority. This is particularly important in a diverse, pluralistic society, where passions, prejudices and preferences differ from region to region. Super-majoritarianism in constitutional amendment ensures that while shifting, passion-driven majorities may occasionally capture Congress and enact ordinary legislation that is unpopular with a significant portion of the country, changes in the Constitution itself cannot be so easily made. Indeed, it is the super-majoritarian process of Article V that has given the highly diverse United States remarkable constitutional (and thus societal) stability for over 230 years.

Questions for the Record
Senator John N. Kennedy

1. **The text of the ERA reads, in part, that: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”**
 - a. **Title IX provides men and women with equal opportunity in academics and athletics. It makes a distinction between biological men and biological women when providing this opportunity. If ratified, do you believe the ERA would erode protections provided by Title IX?**

Yes. The most likely change would be a shift in the level of judicial scrutiny applied to ordinary laws that draw gender-based distinctions. Presently, the Supreme Court uses “intermediate scrutiny” for gender-based distinctions, implied from the concept of “equal protection” of the Fourteenth Amendment. *Craig v. Boren*, 429 U.S. 190 (1976). To satisfy intermediate scrutiny (and thus uphold any gender-based distinction), the government bears the burden of proving that the distinction serves an “important” government interest and that the law is “substantially related” to that important interest. *Id.* at 197. If the ERA was ratified, by contrast, the Constitution would have an *express* provision stating, “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” This shift from the generic “equal protection” guarantee of the Fourteenth Amendment to the specific “equality of rights . . . on account of sex” guarantee of the ERA would undoubtedly force courts to jettison intermediate scrutiny and apply instead “strict scrutiny” to any gender-based distinctions.

Strict scrutiny is commonly referred to by the old adage, “strict in theory, fatal in fact,” meaning that the demands of strict scrutiny almost invariably result in the invalidation of the law. This is so because to satisfy strict scrutiny, the government must prove that the law is “necessary” to achieve a “compelling” government interest and even more difficult, that the law is “narrowly tailored” to achieve that compelling interest—meaning there are no less restrictive means to achieve the compelling interest. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005) (strict scrutiny applied to race-based classifications).

A shift from intermediate to strict scrutiny for gender-based classifications would likely have significant consequences, invalidating most (if not all) gender-based distinctions in law. Thus, the application of Selective Service registration and concomitant military draft only to men will likely be unconstitutional if the ERA is ratified. Similarly, laws that draw distinctions between male and female sports and bathrooms will also likely be unconstitutional, as would public school sex-based segregation of certain classes, such as girl-only STEM classes or sex education classes.

Specifically, laws segregating sports, bathrooms and certain classes by sex would not seem to serve any “compelling” government interest at all, as there would be no national security or public health reasons to do so. One might imagine that proponents of continued sex-

based segregation of bathrooms would assert that “privacy” of each sex should be recognized as a compelling government interest, but there is presently no case law that would support this assertion, and this argument would not justify sex-based segregation of sports nor sex education classes. Moreover, even if the Supreme Court were to one day acknowledge that protecting each sex’s separate privacy is a compelling government interest in the context of sex-segregated bathrooms, there would likely be less restrictive means by which to achieve such privacy, such as requiring bathroom stalls with doors.

b. If the ERA is ratified, would a biological male identifying as a transgender woman have a constitutional right to participate in women’s collegiate athletics?

Yes. See the answer to 1(a) above.

c. If the ERA is ratified, would a public school be permitted to separate students on the basis of biological sex via bathrooms, locker rooms, or otherwise?

No. See the answer to 1(a) above.

d. If the ERA is ratified, would women be required to register for Selective Service with the U.S. military?

Yes. See the answer to 1(a) above.

e. If the ERA is ratified, would a public health care facility owned or funded by the government be required to perform sex reassignment surgeries?

Yes. See the answer to 1(a) above.

2. If the ERA is ratified, do you believe that the recent Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization* remains good law?

a. Could the ERA, if ratified, be a constitutional source of the right to abortion?

Yes. Because the ERA would expressly enshrine that “equality of rights under the law shall not be denied or abridged . . . on account of sex,” this would not only cause a shift from intermediate to strict scrutiny for equality-based challenges to sex-segregation (discussed in question 1 above), but also strict scrutiny for “liberty”-based challenges to abortion laws.

Specifically, in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court concluded that the asserted right to abortion was not a “fundamental right” protected by the word “liberty” in the Due Process Clauses of the Fifth and

Fourteenth Amendments. It did so because Due Process Clause jurisprudence makes clear that “fundamental rights” under that Clause are limited to rights that are “deeply rooted in [our] history and tradition” and “essential to our Nation’s scheme of ordered liberty.” *Id.* at 2246. If an asserted liberty is “deeply rooted” in our nation’s history, strict scrutiny applies; if it is not deeply rooted, rational basis review applies (and the law is presumptively constitutional). *Id.* at 2246, 2283. The *Dobbs* Court concluded that “a right to abortion is not deeply rooted in our Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until [*Roe v. Wade* in] 1973.” *Id.* at 2253. Accordingly, the *Dobbs* Court concluded that laws regulating abortion “like other health and welfare laws, [are] entitled to a strong presumption of validity” and subject only to rational basis review. *Id.* at 2283, 2284.

All of this would change if the ERA is ratified. By enshrining a right to sexual equality in the Constitution, there would no longer be a need to *imply* a right to abortion through the ambiguous word “liberty” in the Due Process Clauses. Instead, there would be a new, *express* constitutional guarantee enshrining a *fundamental* right of sexual equality. While the contours of the new fundamental right to sexual equality would not be clear immediately, the express textual commitment to sexual equality would undoubtedly elevate all laws implicating “sexual equality,” including abortion, to strict scrutiny. If abortion laws are subject to strict scrutiny, the result would be (as it was in *Roe*), *see Roe v. Wade*, 410 U.S. 113, 155, that most laws regulating abortion would be presumptively unconstitutional—a 180 degree reversal of *Dobbs*.

b. Would any law that places restrictions on abortion survive scrutiny under the ERA?

Probably. Under *Roe*’s strict scrutiny regime, the Supreme Court recognized that laws reasonably designed to protect the health of the mother may be imposed *after* the first trimester. *Roe*, 410 U.S. at 164. It also recognized that post-fetal viability, the government’s interest in “the potentiality of human life” becomes “compelling,” thus allowing government to regulate and proscribe abortion after that point. *Id.*

c. If the ERA is ratified, would it constitutionally impact the viability of the Hyde Amendment?

Unlikely. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Supreme Court held that the “spending power is of course not unlimited,” *id.* at 207, and that “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.” *Id.* at 208. *See also Lawrence Cty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269-70 (1985) (“Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar.”).

Despite this, however, the Supreme Court upheld the Hyde amendment against a substantive due process (“liberty”) challenge in *Harris v. McRae*, 448 U.S. 297 (1980).

The *McRae* Court acknowledged that “if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution, [it] is presumptively unconstitutional.” *Id.* at 312. Yet the Court rejected the argument that the Hyde Amendment impinged the “liberty” to abortion protected by the Due Process Clause as recognized in *Roe*, because “regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to financial resources to avail herself of the full range of protected choices. . . . [A]lthough government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls into the latter category.” *Id.* at 316. Due process “does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom [conferred by the clause]. To hold otherwise would mark a drastic change in our understanding of the Constitution.” *Id.* at 317-18.

Thus, while enshrinement of an express constitutional guarantee of sexual equality will require strict scrutiny of all laws affecting such equality, including exercises of Congress’s spending power, *McRae* indicates that the existence of a fundamental right does not imply a concomitant right to have the government *pay for* access to such right. Unless the Supreme Court changes its mind about *McRae*, the Hyde Amendment would continue to be a valid exercise of the spending power should the ERA be ratified.

Senator Thom Tillis
 Questions for the Record
 SJC Hearing, “The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution.”

Questions for Professor Elizabeth Foley

1. Is the original 7-year deadline enforceable? Why or why not?

Yes. Congress’s role under Article V of the Constitution is to “propose” Amendments by a two-thirds supermajority of both houses or, alternatively, to “call a Convention for proposing Amendments” if two-thirds of the States’ legislatures make an application to Congress for such a convention.

Once Congress has proposed an amendment, therefore, its power under Article V ends. It cannot thereafter change the terms of a proposed amendment with less than a supermajority—i.e., unless it re-proposes the amendment via the super-majoritarian process of Article V. This conclusion is supported by the Supreme Court’s decision in *Dillon v. Gloss*, 256 U.S. 358 (1921), which held that, as part of its Article V power to propose amendments, Congress may specify a ratification deadline “as an incident to its power to designate the mode of ratification” of the proposed amendment. *Id.* at 376.

This construction of *Dillon* has been confirmed by the two lower federal courts that have considered the ERA’s deadline. In *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), the court held that Congress could not change its initially-specified ratification date “any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa. *Once the proposal is made, Congress is not at liberty to change it.*” *Id.* at 1153 (emphasis added). Likewise, more recently in *Virginia v. Ferriero*, 525 F. Supp.3d 36 (D.D.C. 2021), the court held that the ERA’s original seven-year ratification deadline, contained in the preamble, was judicially enforceable, reasoning that under *Dillon*, Congress’s Article V power to propose amendments includes the power to propose a “Mode of Ratification,” which may include a ratification deadline. *Id.* at 56.

Accordingly, all courts to consider the question have uniformly concluded that because a proposed amendment—including its ratification deadline—is an exercise of Congress’s Article V power and not its ordinary legislative power, any *modification* of a proposed amendment can only be accomplished by the super-majoritarian process of Article V (i.e., a new amendment proposal).

2. Is the 3-year “extension” enforceable? Are extensions available for constitutional amendments at all? If so, can a simple majority of Congress extend the deadline for a constitutional amendment, or does an extension also require a two-thirds majority in order to be constitutionally sound?

See the answer to question one above. The three-year extension is not enforceable per the rationale of the Supreme Court in *Dillon*. Extension are available if Congress effectively “re-proposes” the amendment via the super-majoritarian process of Article V.

3. Should the votes of States after the deadline passed count towards the tally for the ERA? Is there a rational and/or reasonable justification for permitting states’ votes to count towards ratification after the deadline has passed?

No, because ratification deadlines are within Congress’s Article V power, States are bound by any deadline specified by Congress in its joint resolution of proposal.

States have the power under Article V to ratify an amendment pursuant to the “Mode of Ratification” contained in the joint resolution proposal received from Congress. History shows that States rely on the terms specified by Congress in its proposal. With the exception of the Nineteenth Amendment, every proposed amendment since the Eighteenth (proposed in 1917) has contained a ratification deadline, and every proposed amendment since the Twenty-Second in 1960 has placed the ratification deadline in the proposal’s preamble. “[S]tates have always followed Congress’s direction without question—even the one time Congress called for ratification by [State] convention” in the Twenty-First Amendment (repeal of prohibition). *Ferriero*, 525 F. Supp.3d at 58. Moreover, there is “little doubt that the states were aware of the ERA’s deadline,” which was a political “compromise that helped Congress successfully proposed the ERA where previous attempts to pass a proposal had failed.” *Id.* at 60.

4. Should the votes of States that later rescinded their support count towards the tally for the ERA? Is there a rational and/or reasonable justification for counting States after the deadline, but not rescinding the votes of States that have voted to do so?

There are no Supreme Court precedents addressing the legitimacy of amendment rescissions, so answering this question requires a degree of educated speculation. *Coleman* held that “the efficacy of ratifications by state legislatures, in the light of *previous rejection or withdrawal*, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.” *Coleman*, 307 U.S. at 450 (emphasis added). Thus, the Kansas legislature’s ratification of the Child Labor Amendment, many years *after* its prior rejection thereof, was a non-justiciable political question. *Coleman* thus addressed the rejection-then-ratification scenario, not the opposite one of ratification-then-rescission. The “last word,” so to speak, of the Kansas legislature was one of approval of the Child Labor Amendment, and the *Coleman* Court wisely refused to second-guess Kansas’s most recent decision.

By contrast, when a State *first ratifies, then rescinds* its ratification of an amendment, the legal question is materially different, since the question is whether the later rescission should likewise be considered the non-justiciable “last word” of the State. Presumably (though there is no case law on this point), a rescission occurring *after* the requisite three-quarters threshold has been reached would be ineffective, as the amendment would already be “ratified” within the meaning of Article V. Similarly, a rescission occurring *after* a ratification deadline would presumably be

ineffective, as it would not comport with the "Mode of Ratification" specified in Congress's proposal.

The more difficult question, however, is ascertaining the effect of a rescission occurring *before* the three-fourths threshold has been met and *before* expiration of any ratification deadline. Unfortunately, there is no clear answer from case precedent but there are some historical precedents that may prove informative.

For example, the Fourteenth Amendment was proposed by Congress in 1866, after the Civil War. The Union States had all ratified the amendment by 1868 but the former Confederate States had not, except Tennessee. It was unclear, however, whether the former Confederate States "counted" in the denominator for calculating the three-fourths threshold. Senator Charles Sumner of Massachusetts believed they did not, introducing a joint resolution proclaiming that twenty-two states had ratified the Fourteenth Amendment and it was a valid part of the Constitution. Cong. Globe, 40th Cong., 2d Sess. 453 (1868). Shortly thereafter, however, Ohio (a Union State) rescinded its ratification, followed one month later by New Jersey.

Worried that the rescissions by Ohio and New Jersey may be legally effective, Congress passed a law conditioning former Confederate States representation in Congress on their ratification of the Fourteenth Amendment. 14 Stat. 428, 429, 39th Cong., 2d Sess. (1867). Several former Confederate States thereafter took quick action to ratify the Amendment, and Secretary of State William Seward then certified that the Fourteenth Amendment had been ratified, but nonetheless expressing reservation as to whether Ohio and New Jersey should be counted: "It is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual . . ." 15 Stat. 706-07. Seward cautiously stated that "if the resolutions of Ohio and New Jersey . . . are to be deemed as remaining in full force and effect, notwithstanding the subsequent [rescission] resolutions of the legislature of those States . . . then the aforesaid Amendment has been ratified . . ." *Id.* Within a week of Seward's tentative certification, however, Georgia ratified the Fourteenth Amendment and Seward issued another, now unequivocal certification of the Amendment's ratification. 15 Stat. 708-11 (1868).

The history of the Fourteenth Amendment's ratification thus provides no clear precedent regarding the legal effect of a State's timely rescission. Secretary of State Seward was equivocal as to whether the rescission of Ohio and New Jersey was effective and shortly thereafter, enough former Confederate States ratified the Fourteenth Amendment to offset these rescissions, removing any doubt about satisfaction of the three-fourths threshold.

The history of the Fifteenth Amendment is similarly equivocal. Although New York timely rescinded its earlier ratification, the Secretary of State certified the Amendment as duly ratified, listing New York among the ratifying States. The certification expressly noted New York's rescission but more importantly, it was *not filed* until enough States had ratified that New York's ratification was no longer necessary. Cong. Globe, 41st Cong., 2d Sess. 2290 (1869). As with the Fourteenth Amendment, the Fifteenth Amendment's history suggests that there was substantial concern that a timely rescission was legally meaningful.

Despite the equivocal history and lack of judicial precedent, however, there are persuasive reasons for acknowledging the validity of a State's rescission, provided it occurs within any congressionally-specified ratification deadline. Ratification of constitutional amendments is, by definition, made intentionally difficult by Article V. Both the two-thirds and three-fourths requirements of Article V are designed to ensure that the Constitution is not amended except by broad societal consensus—in the words of Alexander Hamilton in *Federalist No. 85*, the States must be "united in the desire of a particular amendment" to achieve ratification.

To ensure broad societal consensus, a State's timely rescission *should* matter, as it represents that sovereign's "last word" on acceptance of the proposed amendment. Particularly when Congress does *not* specify a ratification deadline, changes that occur after the passage of time—even centuries in the case of the Twenty-Seventh Amendment—may cause a State to change its mind about the desirability of a proposed amendment. If the three-fourths threshold has not been satisfied, a rescission should be considered legally effective, as the period for State decision-making—the ratification period—is still "live." Under this logic, the ERA rescissions by the four (or five) States that occurred *prior* to expiration of the original 1979 deadline would be effective.

5. Putting aside all of these significant constitutional concerns, if the ERA were to be ratified, what would be the impact on our laws? How would treatment of women change under the law?

The most likely change would be a shift in the level of judicial scrutiny applied to ordinary laws that draw gender-based distinctions. Presently, the Supreme Court uses "intermediate scrutiny" for gender-based distinctions, implied from the concept of "equal protection" of the Fourteenth Amendment. *Craig v. Boren*, 429 U.S. 190 (1976). To satisfy intermediate scrutiny (and thus uphold any gender-based distinction), the government bears the burden of proving that the distinction serves an "important" government interest and that the law is "substantially related" to that important interest. *Id.* at 197. If the ERA was ratified, by contrast, the Constitution would have an *express* provision stating, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." This shift from the generic "equal protection" guarantee of the Fourteenth Amendment to the specific "equality of rights . . . on account of sex" guarantee of the ERA would undoubtedly force courts to jettison intermediate scrutiny and apply instead "strict scrutiny" to any gender-based distinctions.

Strict scrutiny is commonly referred to by the old adage, "strict in theory, fatal in fact," meaning that the demands of strict scrutiny almost invariably result in the invalidation of the law. This is so because to satisfy strict scrutiny, the government must prove that the law is "necessary" to achieve a "compelling" government interest and even more difficult, that the law is "narrowly tailored" to achieve that compelling interest—meaning there are no less restrictive means to achieve the compelling interest. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005) (strict scrutiny applied to race-based classifications).

A shift from intermediate to strict scrutiny for gender-based classifications would likely have significant consequences, invalidating most (if not all) gender-based distinctions in law. Thus, the application of Selective Service registration and concomitant military draft only to men will

likely be unconstitutional if the ERA is ratified. Similarly, laws that draw distinctions between male and female sports and bathrooms will also likely be unconstitutional, as would public school sex-based segregation of certain classes, such as girl-only STEM classes or sex education classes.

6. Under the current legal standard of intermediate scrutiny, our legal system is able to acknowledge differences based on sex in ways that are intended to benefit women. If the ERA were to be ratified, would laws intended to benefit women pass strict scrutiny? Why or why not?

No. As elaborated above, strict scrutiny is just that—exceedingly strict judicial scrutiny. The government must prove a “compelling” government interest, which has jurisprudentially been limited to things such as national security or public health. Even more significantly, the existence of a compelling interest will not save the law from invalidation, as the government must also prove that the law is “narrowly tailored” to serve that compelling interest, meaning that there are no less restrictive alternatives available. In the instance of military draft, for example, even assuming *arguendo* that not drafting females would serve the interest of “national security” (which is highly doubtful in itself), excluding females entirely from the draft would most certainly not be “narrowly tailored” to serve that interest.

Similarly, laws segregating sports, bathrooms and certain classes by sex would not seem to serve any “compelling” government interest at all, as there would be no national security or public health reasons to do so. One might imagine that proponents of continued sex-based segregation of bathrooms would assert that “privacy” of each sex should be recognized as a compelling government interest, but there is presently no case law that would support this assertion, and this argument would not justify sex-based segregation of sports nor sex education classes. Moreover, even if the Supreme Court were to one day acknowledge that protecting each sex’s separate privacy is a compelling government interest in the context of sex-segregated bathrooms, there would likely be less restrictive means by which to achieve such privacy, such as requiring bathroom stalls with doors.

7. Do you agree or disagree with the legal theory that the ERA could be used to either find or create abortion rights under the Constitution? Why or why not, and what would be the potential impact on the *Dobbs* ruling if the ERA were ratified? What would be the impact to state laws passed in light of the *Dobbs* ruling?

Yes, I agree. Because the ERA would expressly enshrine that “equality of rights under the law shall not be denied or abridged . . . on account of sex,” this would not only cause a shift from intermediate to strict scrutiny for equality-based challenges to sex-segregation (discussed in question 6 above), but strict scrutiny for “liberty”-based challenges to abortion laws. Specifically, in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), the Supreme Court concluded that the asserted right to abortion was not a “fundamental right” protected by the word “liberty” in the Due Process Clauses of the Fifth and Fourteenth Amendments. It did so because Due Process Clause jurisprudence makes clear that “fundamental rights” under that Clause are limited to rights that are “deeply rooted in [our] history and tradition” and “essential to our Nation’s scheme of ordered liberty.” *Id.* at 2246. If an asserted

liberty is “deeply rooted” in our nation’s history, strict scrutiny applies; if it is not deeply rooted, rational basis review applies (and the law is presumptively constitutional). *Id.* at 2246, 2283. The *Dobbs* Court concluded that “a right to abortion is not deeply rooted in our Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until [*Roe v. Wade* in] 1973.” *Id.* at 2253. Accordingly, the *Dobbs* Court concluded that laws regulating abortion “like other health and welfare laws, [are] entitled to a strong presumption of validity” and subject only to rational basis review. *Id.* at 2283, 2284.

All of this would change if the ERA is ratified. By enshrining a right to sexual equality in the Constitution, there would no longer be a need to *imply* a right to abortion through the ambiguous word “liberty” in the Due Process Clauses. Instead, there would be a new, *express* constitutional guarantee, thus enshrining a textual, *fundamental* right of sexual equality. While the contours of the new fundamental right to sexual equality would not be clear immediately, the express textual commitment to sexual equality would undoubtedly elevate all laws implicating “sexual equality,” including abortion, to strict scrutiny. If abortion laws are subject to strict scrutiny, the result would be (as it was in *Roe*), see *Roe v. Wade*, 410 U.S. 113, 155, that most laws regulating abortion would be presumptively unconstitutional—a 180 degree reversal of *Dobbs*.

February 28, 2023

**Illinois Lieutenant Governor Juliana Stratton's Written Testimony to the U.S.
Senate Judiciary Committee**

***"The Equal Rights Amendment: How Congress Can Recognize Ratification and
Enshrine Equality in Our Constitution"***

Good morning and thank you to Chairman Durbin, Ranking Member Graham, and the distinguished members of the Senate Judiciary Committee for the opportunity to testify before you today.

My name is Juliana Stratton. I am the Lieutenant Governor of the great state of Illinois; I am the mother of four daughters, and I use she/her pronouns.

I am honored to be here today, on this final day of Black History Month and on the eve of Women's History Month, to do my part in a fight that started long before me. I stand upon the shoulders of women like Sojourner Truth, Ida B. Wells, Fannie Lou Hamer, and so many others who paved the way for the rights of all women.

They sacrificed so much to push us forward, and yet we still live in a country that does not guarantee we should be protected from discrimination in the Constitution. An explicit assertion that we are all equals is still missing, despite the women lawmakers across the nation who stood up to finish the work our foremothers started.

In May 2018, I was one of those women. As a State Representative, I joined a bipartisan vote for Illinois to ratify the Equal Rights Amendment. I made it clear to my colleagues in the Illinois House that gender equality and racial equality are not a zero-sum game, that we are all uplifted when everyone's rights are protected.

We live with the stark reality that despite being the most educated demographic in the United States, Black women are [only paid 64 cents](#) for every dollar paid to white men.

There should be stronger remedies to make sure women, all women, are paid an equal wage based on their abilities and qualifications and without discrimination based on sex. These protections will be of particular significance to women of color who face more workplace discrimination than their white counterparts.

And despite impressive recovery efforts, the COVID-19 pandemic has deepened economic disparities that have already harmed women for generations. The recovery for jobs traditionally held by women have [lagged](#) woefully behind the jobs often worked by men. Also, women are [twice as likely](#) as men to work in low-paying occupations, and this rate is even higher for Black women and Latinas.

On top of this, we are seeing the eroding of women's rights and their ability to determine what is best for their futures. Recent events have shown us all too well how easily

decades of progress can be erased when our rights are not guaranteed by the Constitution.

Every parent wants their child to have a better life. That was certainly true for my late mother, Velma, who spent every day doing what she could to ensure doors of opportunity were open to me and her four children.

And now, I have a responsibility to my daughters—Tyler, Cassidy, Ryan and Mackenzie—to honor my mother's legacy and ensure they can go even farther on this journey toward equality and justice. Not just for them, but for young women and girls everywhere who deserve nothing less.

Make no mistake: Should the ERA pass, it will not guarantee that women will be treated equally overnight. We all know, for example, that the struggle continues for racial justice and equal rights for Black people and other people of color under the 14th Amendment and women will also need to remain vigilant.

We need a firm foundation for equality that is long overdue. Finishing this work is as important as ever to acknowledge the rights that women, who make up over half of our population, so deserve.

So, I urge Congress when taking action to consider your mothers, your daughters, and the women in your districts.

It is time to make real a vision 100 years in the making, so that our daughters, and our granddaughters, and the next generation of women are seen as exactly who they are: equals.

Thank you.

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**Questions for the Record
Senator John N. Kennedy**

Responses of Juliana Stratton, Illinois Lieutenant Governor

1. **The text of the ERA reads, in part, that: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”**
 - a. **Title IX provides men and women with equal opportunity in academics and athletics. It makes a distinction between biological men and biological women when providing this opportunity. If ratified, do you believe the ERA would erode protections provided by Title IX?** If passed, both the ERA and Title IX would ensure equal opportunity in academics and athletics, regardless of sex. Like other federal and state protections, including the Illinois Civil Rights Act, Title IX prohibits discrimination on the basis of sex. The ERA would incorporate the principle of equality in the U.S. Constitution.
 - b. **If the ERA is ratified, would a biological male identifying as a transgender woman have a constitutional right to participate in women’s collegiate athletics?** Existing law, including Title IX and the Illinois Civil Rights Act, ensure equal opportunity on the basis of sex. Courts have the responsibility to decide questions of how to interpret these laws, and, likewise, will have the responsibility of interpreting the ERA.
 - c. **If the ERA is ratified, would a public school be permitted to separate students on the basis of biological sex via bathrooms, locker rooms, or otherwise?** Many states, like Illinois, already have an ERA in their constitution and do not mandate that students use unisex bathrooms.
 - d. **If the ERA is ratified, would women be required to register for Selective Service with the U.S. military?** The Supreme Court previously held that a draft of only men was constitutional because, at the time, women were not allowed to serve in combat positions. Future courts may decide, either on equal protection grounds, or the ERA, that a male-only draft is no longer justified. Courts have, and certainly will consider the expert views of military leaders in such a case.
 - e. **If the ERA is ratified, would a public health care facility owned or funded by the government be required to perform sex reassignment surgeries?** Courts will be responsible for assessing whether the ERA – or other existing statutes and constitutional provisions that require equality – may require coverage on a case-by-case basis.
2. **If the ERA is ratified, do you believe that the recent Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization* remains good law?** The ERA addresses questions of equality, not privacy, which was the focus of the *Dobbs* decision. The ERA would not impact the legal reasoning of the *Dobbs* decision regarding privacy.

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- a. **Could the ERA, if ratified, be a constitutional source of the right to abortion?** Courts will be responsible for assessing whether the ERA creates a constitutional source of a right to abortion.
- b. **Would any law that places restrictions on abortion survive scrutiny under the ERA?** Courts will be responsible for assessing whether the ERA creates a constitutional source of a right to abortion.
- c. **If the ERA is ratified, would it constitutionally impact the viability of the Hyde Amendment?** The Supreme Court has previously rejected challenges to the Hyde Amendment. Courts will be responsible for assessing whether the ERA – or other existing statutes and constitutional provisions that require equality – may require coverage on a case-by-case basis.

Testimony of Kathleen M. Sullivan
U.S. Senate
Committee on the Judiciary
Hearing on Congress's Role in Ratifying the Equal Rights Amendment
February 28, 2023

Chairman Durbin and Members of the Committee:

Thank you for the honor of allowing me to testify in support of the Equal Rights Amendment (“ERA”), which provides that “[e]quality of rights under the law shall not be denied ... on account of sex.” Both Houses of Congress promulgated the amendment in 1972 by more than the two-thirds vote required by Article V, and 38 States have now ratified the amendment, as provided for in the co-equal role assigned to the States by Article V. The ERA is thus eligible to be added to the Constitution as the Twenty-Eighth Amendment without further action on the part of Congress or the States. I commend the bicameral and bipartisan efforts of Members of this Branch to further secure the ERA’s place in our founding document through a joint resolution that would provide that the ERA “is valid to all intents and purposes as part of the Constitution, having been ratified by the legislatures of three-fourths of the several States, and that this is so “notwithstanding any time limit contained” in the prior joint resolution by which Congress proposed the ERA in 1972. S.J. Res. 4 (118th Cong. 2023-24).

I would like to focus today on three points. *First*, the ERA is the result of a century of extraordinary bipartisan cooperation. Authored by Alice Paul and Crystal Eastman after ratification of the Nineteenth Amendment in 1920, the ERA was introduced in Congress in 1923. In the 1960s and 70s, Republican Congresswomen Florence Dwyer (NJ), Charlotte Reid (IL), Margaret Heckler (MA), and Catherine Dean May (WA) worked across the aisle with Democratic Congresswomen Martha Griffiths (MI), Bella Abzug (NY), Patsy Mink (HI), Shirley Chisholm (NY), Louise Day Hicks (MA), and Edith Green (OR) to advocate for the ERA, with

Congresswomen Chisholm and Mink—the first women of color to serve in Congress—articulating the importance of the ERA to women of color. The ratification process was similarly bipartisan. For instance, Indiana’s ratification in 1977 was a result of a bipartisan coalition, Hoosiers for the Equal Rights Amendment; ten of the 30 states that ratified the ERA within the first year of its proposal had legislatures controlled by Republican lawmakers; in another five, Republicans controlled or were tied for control in one house. The three latest states to ratify (Illinois, Nevada and Virginia) similarly did so by bipartisan vote.

The Members of this Branch would do great honor to this bipartisan history by taking steps now to enshrine the principle of women’s equality and an explicit prohibition against sex discrimination in the nation’s foundational document.

Second, the ERA should be enacted as an express constitutional provision notwithstanding existing judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment and Fifth Amendment Due Process Clause as impliedly prohibiting some forms of sex discrimination by the States and Federal Government. *See United States v. Virginia*, 518 U.S. 515 (1996). The judicial interpretation of those clauses is no substitute for an amendment to the Constitution formally guaranteeing sex equality as one of our enduring and foundational principles. Supreme Court decisions are necessarily the product of transient and shifting judicial majorities, and thus are dependent on the Court’s makeup through the political process of presidential nomination and Senate confirmation at any given time. We the People speak through our Constitution with more permanence than any Court majority through its decisions.

Moreover, a Supreme Court ruling does not endure for ages to come; the constitutional law the Supreme Court makes can easily be unmade by that Court, with little regard for the principle of *stare decisis*. The Congress need look no further than *Dobbs v. Jackson Women’s Health*

Organization, 142 S. Ct. 2228 (2022), which overruled the right to abortion provided for in *Roe v. Wade*, 410 U.S. 113 (1973), to see how precarious the judicial protection of women’s constitutional rights may be. And indeed, before the 1970s, the Supreme Court had upheld against constitutional challenge state laws excluding women from jury service, admission to the bar as lawyers and even employment as bartenders. *Hoyt v. Florida*, 368 U.S. 57 (1961); *Bradwell v. Illinois*, 83 U.S. 130 (1872); *Goesaert v. Cleary*, 335 U.S. 464 (1948). The Court had also upheld the exclusion of women from voting, *Minor v. Happersett*, 88 U.S. 162 (1874), an inequality that our Nation did not redress until the 1920 ratification of the Nineteenth Amendment to the Constitution, which provides that “the right of a citizen of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”

Thus, even though landmark decisions culminating in the current case law on equality for women were achieved by brilliant advocacy and had momentous importance in helping to dislodge entrenched sex discrimination from our Nation’s state and federal laws, they lack the strength, endurance, and efficacy of an express constitutional amendment.

Third, the Congress clearly has the constitutional authority to eliminate the deadlines it previously set for ratification of the ERA by 1979 and later 1982, and thus deadline-removal proposals like S.J. Res. 4 are entirely proper and constitutional. Prior Congresses had authority to set the earlier deadlines just as the current Congress has the authority to remove those deadlines. As the Office of Legal Counsel correctly opined in 1977, Congress may lift or extend a ratification deadline by majority vote of both Houses. Memo to Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Att’y Gen., Off. L. Counsel, *Re: Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment* (Oct. 31, 1977).

Importantly, the earlier deadlines were not part of the text of the proposed ERA as Congress sent it out to the States for ratification, but rather only part of the preamble. As preamble, they were not a part of the ERA itself, and not part of the constitutional text the ratifying States voted to ratify. By contrast, earlier ratification deadlines, such as those in the 18th, 20th, and 22nd Amendments, make those Amendments “inoperative” as a matter of text unless ratified within a particular time. It follows that Congress can amend or remove the deadlines by majority vote rather than an Article V supermajority, and also that those deadlines are not binding on the States, who ratified the text and not the preamble.

Moreover, it makes no difference that Congress proposed the ERA fifty years ago or that 35 States ratified in the 1970s while Nevada, Illinois and Virginia brought the tally to 38 in the past several years. There is no “contemporaneity” requirement in Article V. Consider the Twenty-Seventh Amendment, proposed in the First Congress, long thought dead, but then ratified over 200 years later to become embodied in our Constitution’s text as the law of the land. That amendment, which provides that Congress may not raise salaries for Senators and Representatives “until an election of Representatives shall have intervened,” was proposed by the First Congress in 1789 as part of the original Bill of Rights authored by Framers James Madison. But that Amendment, often called the “Madison Amendment,” was not ratified until over two hundred years later, after it was revived among the States for ratification in 1982 and ultimately adopted in 1992 when Michigan became the thirty-eighth State to vote to ratify. See T. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, Congressional Research Service Report 20-23 (July 18, 2018). And this Branch affirmed the legitimacy of the Twenty-Seventh Amendment, voting almost unanimously to “concur” in the Archivist’s certification.

If the Twenty-Seventh Amendment confirms that Article V places no time limits on the ratification process, so does the text of Article V, which provides that “[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, ... which ... shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States.” This plain text places no time limits on the States’ ratification process. Nothing in Article V says that ratification must be synchronous, contemporaneous, or bounded within any particular time frame. To the contrary, Article V says simply that “[an amendment is valid ‘when ratified.’ There is no further step.” W. Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 398 (1983). Of course, the Framers knew how to impose deadlines or otherwise allow for time limits when they wished to. *See, e.g.*, U.S. Const. Art. I, Sec. 7 (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law...”); Art. I, Sec. 2 (census every ten years); Art. I, Sec. 3 (senatorial term limit of six years); Art. I, Sec. 8 (military budget term of two years); Art. I, Sec. 8. (copyright term will be set); Art. II, Sec. 1 (presidential term of four years). But the Framers made no mention of time limits or return deadlines in Article V.

For all these reasons, the deadline-removal proposal in S.J. Res. 4 is proper and constitutional, and merits swift passage.

Thank you very much for allowing me to share these remarks with the Committee.

Hearing before the Senate Committee on the Judiciary

“The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in our Constitution”

February 28, 2023

QUESTIONS FROM SENATOR BLUMENTHAL**Questions for Ms. Kathleen Sullivan**

- 1. How would Congress’s power to enforce the Equal Rights Amendment under Section 2 compare to Congress’s power to enforce the Equal Protection Clause under Section 5 of the Fourteenth Amendment?** Section 2 of the Equal Rights Amendment would clarify and expand the power of Congress to “enforce” the prohibition of discrimination on account of sex by “appropriate legislation.” While Section 5 of the Fourteenth Amendment similarly gives Congress the power to enforce the Equal Protection Clause by appropriate legislation, the Supreme Court has interpreted that power very restrictively when it comes to women’s rights. For example, the Court held that Congress had exceeded its Section 5 powers by enacting civil remedies against gender-based violence. Section 2 of the ERA would give Congress new opportunities to enact appropriate legislation unencumbered by such precedent.
- 2. What kinds of laws might Congress be able to pass pursuant to the Equal Rights Amendment?** Congress might exercise its Section 2 powers in many ways to enforce the equality of men and women under the law. In the area of law enforcement, Congress might pass laws reinforcing protections against domestic violence, rape and bodily mutilation. In the area of health care, Congress might pass laws enhancing the provision of prenatal care, child care and family leave. And in the area of employment, Congress might pass laws ensuring more equal pay for equal work.
- 3. Which Supreme Court decisions, if any, would be called into question if the Equal Rights Amendment were added to the Constitution in 2023?** The ERA would enshrine in our Constitution many of the same principles of sex equality the Supreme Court has already recognized in cases since the 1970s that interpret the Equal Protection Clause of the Fourteenth Amendment and the equal protection guarantee of the Fifth Amendment Due Process Clause to largely bar governmental discrimination based on sex. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996). But the ERA would do so in a way that could not be overturned by the shifting votes of future judicial majorities. The ERA is needed now more than ever because the current Supreme Court has adopted an approach that looks to the law as it was in 1789 or 1868 when existing amendments were adopted. But women did not enjoy equality of rights under the law in 1789 or 1868, when we could still be denied the right to vote, see *Minor v. Happersett*, 88 U.S. 162 (1874), or the right to practice law, see *Bradwell v. Illinois*, 83 U.S. 130 (1872). The ERA would ensure that those days are gone not just for now but for the ages to come.

Questions for the Record
Senator John N. Kennedy

Responses of Ms. Kathleen Sullivan

1. **The text of the ERA reads, in part, that: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”**
 - a. **Title IX provides men and women with equal opportunity in academics and athletics. It makes a distinction between biological men and biological women when providing this opportunity. If ratified, do you believe the ERA would erode protections provided by Title IX?** The ERA would not erode the protections Title IX provides. Title IX is one of numerous federal statutes by which Congress has prohibited the denial of equal opportunity on account of sex. The ERA would enshrine such equality as a foundational principle in our Constitution, making such equality more rather than less secure.
 - b. **If the ERA is ratified, would a biological male identifying as a transgender woman have a constitutional right to participate in women’s collegiate athletics?** Courts in the future will resolve such questions, whether under existing Equal Protection law and existing Title IX regulations *or* under the ERA. Such judicial consideration will not foreclose considerations of science and fairness, including the interest of fairness in athletic competition.
 - c. **If the ERA is ratified, would a public school be permitted to separate students on the basis of biological sex via bathrooms, locker rooms, or otherwise?** No nation or State with an ERA in its constitution has ever required universal unisex bathrooms. Prohibiting discrimination on account of sex would not foreclose judicial consideration of countervailing interests in personal privacy.
 - d. **If the ERA is ratified, would women be required to register for Selective Service with the U.S. military?** Courts in the future might interpret either the ERA or the existing equal protection guarantee of the Fifth Amendment to prohibit a male-only draft. The Supreme Court previously upheld the male-only draft on the ground that women service members were excluded from combat and thus not similarly situated to draft-eligible men. See *Rostker v. Goldberg*, 453 U.S. 57 (1981). With women now eligible for combat positions, that justification may be subject to reconsideration. Any such decision would consider the expert views of our Nation’s military leaders. Notably, while the vast majority of the Nations of the world have an ERA in their written constitutions, less than a handful have a gender-neutral military conscription or universal service system.
 - e. **If the ERA is ratified, would a public health care facility owned or funded by the government be required to perform sex reassignment surgeries?** The ERA, like existing guarantees of sex equality under current judicial interpretation of the Fifth and Fourteenth Amendments, bars government from treating men and women

unequally. Such equality guarantees do not require public entities to provide any particular medical procedure.

2. **If the ERA is ratified, do you believe that the recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* remains good law?** *Dobbs* held that the implicit right to privacy recognized in *Roe v. Wade* does not protect the right to abortion. The right to privacy and the right to equality are two different things, so the ERA would not affect the legal status of the *Dobbs* ruling.
 - a. **Could the ERA, if ratified, be a constitutional source of the right to abortion?** While no court has ever found that the Equal Protection Clause or any of the 26 state ERAs protects a right to abortion, advocates might make such arguments in the future. Whether such a right would be recognized would depend on how future courts treat any such right in relation to other interests at stake in abortion.
 - b. **Would any law that places restrictions on abortion survive scrutiny under the ERA?** The ERA does not enact any standard of scrutiny. While no court has ever found that the Equal Protection Clause or any of the 26 state ERAs protects a right to abortion, advocates might make such arguments in the future. Whether such a right would be recognized would depend on how future courts treat any such right in relation to other interests at stake in abortion.
 - c. **If the ERA is ratified, would it constitutionally impact the viability of the Hyde Amendment?** The Supreme Court has previously rejected challenges that would have required the government to fund abortion under Medicaid. See *Harris v. McRae*, 448 U.S. 297 (1980). Any argument for changing this precedent, whether under existing equal protection guarantees *or* the ERA, would be resolved case by case, taking into account a host of factors including what other medically indicated or necessary procedures are publicly funded and what grounds are given for refusing to extend funded coverage.

Senator Thom Tillis
 Questions for the Record
 SJC Hearing, “The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution.”

Questions for Ms. Kathleen Sullivan

1. **Is the original 7-year deadline enforceable? Why or why not?** The original 7-year deadline was mooted when Congress lawfully enacted a 3-year extension to the initial 7-year deadline. Congress is of course free to set forth a target date for ratification by the States. But when Congress sets a target date in the *preamble* to the proposing resolution, as it did with the ERA, that deadline is merely advisory. Unlike a deadline in the *text* of a proposed amendment that is sent out to the States for an up-or-down vote, a preambular deadline is not binding on the States, is not judicially enforceable against the States, and may be changed by subsequent sessions of Congress by simple majority vote.
2. **Is the 3-year “extension” enforceable? Are extensions available for constitutional amendments at all? If so, can a simple majority of Congress extend the deadline for a constitutional amendment, or does an extension also require a two-thirds majority in order to be constitutionally sound?** Congress’s 3-year extension of the original ERA ratification deadline by simple majority vote was valid, and so would be an extension or repeal of that extended deadline today. Congress is free to set forth a target date for ratification and is likewise free to later extend or repeal that date by simple majority vote so long as the date appears in the *preamble* of the proposing resolution and does not appear in the *text* of the amendment as sent to the States for an up-or-down vote. But such a preambular deadline is not binding on the States, is not judicially enforceable against the States, and may be changed by subsequent sessions of Congress by simple majority vote.
3. **Should the votes of States after the deadline passed count towards the tally for the ERA? Is there a rational and/or reasonable justification for permitting states’ votes to count towards ratification after the deadline has passed?** Yes, the votes of States that ratified after the extended congressional target date passed should count toward the tally for the ERA. The text of Article V of the Constitution sets forth no limitation on the time by which ratification must take place. The Twenty-Seventh Amendment, for example, was ratified 203 years after the First Congress proposed it. Moreover, the structure of Article V gives Congress and the States co-equal power in the constitutional amendment process. Congress therefore may not assert primacy over the ratifying States without violating basic principles of originalism, textualism and federalism.
4. **Should the votes of States that later rescinded their support count towards the tally for the ERA? Is there a rational and/or reasonable justification for counting States after the deadline, but not rescinding the votes of States that have voted to do so?** Yes, the votes of States that ratified the ERA and then purported to rescind their support should count toward the tally for the ERA. No court has ever recognized any State’s attempted rescission of a constitutional amendment, and Congress has rejected every

attempted rescission, including several States' attempt to rescind their votes to ratify the Fourteenth Amendment. And with good reason, for Article V speaks only of ratification and is silent on rescission. Basic principles of originalism and textualism therefore support counting ratifications but not rescissions in an amendment ratification tally.

5. **Putting aside all of these significant constitutional concerns, if the ERA were to be ratified, what would be the impact on our laws? How would treatment of women change under the law?** Recognizing the ERA as a part of our Constitution would enshrine the principle that, in our Nation, men and women are equal under the law. Over 160 nations and over half our States already enshrine this principle in their written constitutions. Constitutionalizing women's equality means that unelected judges could no longer take that basic right away in the future, as would now be possible under judge-made interpretations of the Equal Protection Clause. Section 2 of the ERA would also give Congress the power to "enforce" equality on account of sex "by appropriate legislation" that would be subject to democratic discussion and debate.
6. **Under the current legal standard of intermediate scrutiny, our legal system is able to acknowledge differences based on sex in ways that are intended to benefit women. If the ERA were to be ratified, would laws intended to benefit women pass strict scrutiny? Why or why not?** The ERA does not enact any standard of scrutiny. "Strict" and "intermediate" standards of scrutiny are judge-made constructs under the existing Fifth and Fourteenth Amendment equality guarantees. The Framers of those Amendments did not enact any "standard of scrutiny," and neither would Congress in recognizing the ratification of the ERA. Because the ERA requires equality between men and women under our laws, it follows that, where laws are intended to benefit women by taking steps toward equality with men, for example by remedying past discrimination against women, those laws would be constitutional under the ERA.
7. **Do you agree or disagree with the legal theory that the ERA could be used to either find or create abortion rights under the Constitution? Why or why not, and what would be the potential impact on the *Dobbs* ruling if the ERA were ratified? What would be the impact to state laws passed in light of the *Dobbs* ruling?** *Dobbs* held that the implicit right to privacy recognized in *Roe v. Wade*, 410 U.S. 113 (1973), does not protect the right to abortion. The right to privacy and the right to equality are two different things, so the ERA would have no impact on the legal status of the *Dobbs* ruling. While no court has ever found that the Equal Protection Clause or any of the 26 state ERAs protects a right to abortion, advocates might make such arguments in the future, and if so, whether such a right would be recognized would depend on how future courts treat any such right in relation to other interests at stake in abortion.

Written Testimony for Thursday Williams

College Student and ERA Coalition Board Member

Submitted to the Committee on the Judiciary for the Hearing

“Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine
Equality in Our Constitution”

Good morning, Chairman Durbin, Ranking Member Graham, and members of the Committee on the Judiciary. My name is Thursday Williams. I am currently a senior at Trinity College in Connecticut, and I serve on the board of the ERA Coalition. It is such an honor to be here today testifying on behalf of the Equal Rights Amendment.

Thank you, Senator Durbin, for inviting me to share my story of why the Equal Rights Amendment is important to me, my peers, and my generation. We are at a tipping point; the future of our democracy is at stake. The ERA holds the promise of a brighter future for us all.

My family came to this country from Jamaica, seeking the American dream of education and productivity—and my mission is to fulfill that dream. I proudly became a citizen, was accepted into a competitive college, took on leadership roles, became president of Trinity College Black Women’s Organization, and engaged in spirited debates about rights and freedom.

I fell in love with the United States Constitution in high school when I participated in Constitutional debates through the Legal Outreach Program. I argued multiple constitutional issues at NYU and Brooklyn Law School, including the equal protection clause, the Fourth Amendment, and voting rights. What I love the most about the Constitution is how brilliantly it

was designed to adapt to the changing needs of its people. Our founding fathers were visionaries. They understood that we needed a document that could endure throughout generations. That's when I knew, this was the thing for me. I wanted to study law. I wanted to be one of the change makers.

During my senior year of high school, I had the opportunity to perform in an award-winning Broadway play, *What the Constitution Means to Me*. Each night I debated why we should keep the Constitution. There was a part in the play where I was talking about inequality, and I was thinking about the fact that not so long ago I would've been considered property. Not so long ago I wouldn't even have had the opportunity to stand on stage as a Black woman. In my closing argument during one performance, I stopped mid-show, and just stood there crying my eyes out at the idea. Here I am defending a Constitution that at one point considered me three-fifths of a person, a Constitution that doesn't explicitly recognize women in it, a Constitution that in 2023 still doesn't explicitly state that I'm equal to a man. For the first time, it was clear to me that this document was not written for me. Nevertheless, I will continue to defend this Constitution and fight for my rightful place in it.

This is why I am here today. I am here to defend an amendment that will finally guarantee me equality. After graduating in May, I will be starting my professional career at one of the most prestigious law firms in the country. As exciting as this should be, I proceed with caution because I am aware that although I am as capable as any man, the system is stacked against me. As a woman of color, I am more likely to be offered less than a man for the same work. I am more likely to be overlooked for raises and promotions. I will have to work twice as hard to get the same recognition as my male colleagues and right now I will have limited recourse to fight against it. This is why it is important for myself, my peers, and future generations to have the

Equal Rights Amendment. We deserve a Constitution that guarantees equality regardless of sex.
A Constitution that we can use as a tool to fight discrimination.

The Equal Rights Amendment has fulfilled all requirements to be added to the Constitution, now it's time for it to be recognized. If we continue to hold back more than half of our people from accessing equal opportunities, what does that say about us as a country? How can we be the beacon of freedom and democracy we claim to be if we do not declare that sex discrimination contradicts the American dream? The ERA will make the Constitution a more perfect document, so we can have a more perfect union. It is time we stop disappointing the future generation.

Senate Judiciary Committee Hearing
“The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine
Equality in Our Constitution”
Tuesday, February 28, 2023
Questions for the Record
for Thursday Williams

QUESTIONS FROM SENATOR JOHN N. KENNEDY

1. The text of the ERA reads, in part, that: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”

- a. Title IX provides men and women with equal opportunity in academics and athletics. It makes a distinction between biological men and biological women when providing this opportunity. If ratified, do you believe the ERA would erode protections provided by Title IX?

As a college student, I support the ERA because it will protect **everyone** from being discriminated against on the basis of sex and ensures that they will be given an equal opportunity in academics and athletics. Specific questions on the legal impacts of the ERA, however, would be best directed to my fellow witness and constitutional scholar, Kathleen Sullivan.

- b. If the ERA is ratified, would a biological male identifying as a transgender woman have a constitutional right to participate in women’s collegiate athletics?

I strongly value the effort and commitment required to participate in college sports. However, I personally do not think that this is a major concern when weighed against the protections the ERA could provide against the epidemic of gender-based violence, workplace discrimination, and threats of roll backs to previously guaranteed rights.

- c. If the ERA is ratified, would a public school be permitted to separate students on the basis of biological sex via bathrooms, locker rooms, or otherwise?

I am not a lawyer, and questions on the legal impacts of the ERA would be best directed to my fellow witness and constitutional scholar, Kathleen Sullivan.

- d. If the ERA is ratified, would women be required to register for Selective Service with the U.S. military?**

I am not a lawyer, and questions on the legal impacts of the ERA would be best directed to my fellow witness and constitutional scholar, Kathleen Sullivan.

- e. If the ERA is ratified, would a public health care facility owned or funded by the government be required to perform sex reassignment surgeries?**

I am not a lawyer, and questions on the legal impacts of the ERA would be best directed to my fellow witness and constitutional scholar, Kathleen Sullivan.

- 2. If the ERA is ratified, do you believe that the recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* remains good law?**

- a. Could the ERA, if ratified, be a constitutional source of the right to abortion?**

I am not a lawyer, and questions on the legal impacts of the ERA would be best directed to my fellow witness and constitutional scholar, Kathleen Sullivan.

- b. Would any law that places restrictions on abortion survive scrutiny under the ERA?**

I am not a lawyer, and questions on the legal impacts of the ERA would be best directed to my fellow witness and constitutional scholar, Kathleen Sullivan.

- c. If the ERA is ratified, would it constitutionally impact the viability of the Hyde Amendment?**

I am not a lawyer, and questions on the legal impacts of the ERA would be best directed to my fellow witness and constitutional scholar, Kathleen Sullivan.

**STATEMENT FOR THE RECORD FROM
ORGANIZATIONS OF THE #FAITH4ERA CAMPAIGN**

**THE COMMITTEE ON THE JUDICIARY
U.S. SENATE**

**AT A HEARING ENTITLED
“The Equal Rights Amendment: How Congress Can Recognize Ratification
And Enshrine Equality in Our Constitution”
FEBRUARY 28, 2023**

Chairman Durbin and Ranking Member Graham, and Members of the Committee, thank you for convening this hearing on Senate Joint Resolution 4, the bipartisan resolution that affirms the Equal Rights Amendment to be part of the U.S. Constitution, now that it has met the rigorous requirements of Article V. We are pleased to submit this statement for the record, emphasizing the urgency and importance of recognizing the ERA as the 28th Amendment.

The #Faith4ERA campaign is a national, nonpartisan, interfaith coalition of diverse religious organizations and leaders who support the Equal Rights Amendment. We are led by a dozen national organizations and joined by hundreds of individual faith leaders, including Buddhist, Catholic, Ecumenical, Evangelical, Jewish, Muslim, Protestant, and Sikh leaders from at least forty-four states. Collectively, our organizations represent over 400,000 constituents nationwide.

While our religious traditions are rich in diversity, we share a profound regard for the whole of humanity and a steadfast hope for greater justice and human flourishing, in this nation and beyond. We prayerfully anticipate the day when the equal human dignity and rights of all people, irrespective of sex or gender, will be respected. The Equal Rights Amendment is essential to this vision. We are thus eager to see this Congress recognize the ratification of the Equal Rights Amendment, and to affirm that gender equality is truly the law of this land.

The U.S. Constitution is the highest statement of our nation’s principles and values. To affirm gender equality within this revered document is to affirm and respect the deeper truth of equal human dignity and worth of all people. This reform is a necessary and vital step toward correcting for the wrongful subjugation, oppression, and degradation of women and other gender minorities. As people of faith, we believe that recognizing the ERA as the 28th Amendment is fundamentally the right thing to do—from the perspective of American democratic values, human rights ideals, and the conviction that all people are equal in dignity and worth before God.

Yet today, over half of all Americans still hold unrequited aspirations of meaningful equality, freedom, and safety from rights violations. Women and LGBTQ+ Americans continue to petition for equal citizenship stature and equal protection under the law. Without the ERA, our constitutional framework has proven inadequate to overcome the myriad forms of injustice that

women suffer disproportionately in this country, including widespread sexual and domestic violence, pregnancy and pay discrimination, needlessly high rates of maternal mortality, and more. These harms affect not only the immediate victims but also their families and communities. As religious leaders, we often bear witness to or hear first-hand testimonies of the pain and suffering caused by gendered violence and the feminization of poverty—problems the ERA would empower Congress and the courts to address.

We urge Congress to pass Senate Joint Resolution 4, to affirm that the ERA is indeed valid as part of the Constitution now that it has met the requirements set forth in Article V, including passage by two-thirds of Congress and ratification by three-fourths of states.

Time Is No Barrier to Equality

We believe there should be no time limit on equality. The arbitrary seven-year time limit imposed by Congress on ERA ratification was manifestly unjust and unconscionable from the outset, given the centuries of gender-based injustice which the ERA is needed to rectify. The principle of full inclusion and equality for all Americans is ultimately a far weightier concern than the questionable procedural objections raised by ERA opponents. Our ethical commitment to the ERA as a matter of human rights and equal justice moves us to support the consummation of this reform through all legal means.

Leading constitutional law scholars such as Harvard professors Laurence H. Tribe and Martha Minow, American Constitution Society President Russ Feingold, and many others have detailed why the ERA remains viable and valid. The attorneys general of Illinois and Nevada argue in the federal case of *Illinois v. Ferriero* that the ERA is valid and should be published. There is clearly a compelling, good-faith legal argument that this reform should be consummated.

Against this backdrop, we understand that a vote for or against SJ Res 4 to recognize the ratification of the ERA is a vote for or against equal citizenship and human rights.

Violence Against Women

The urgent national problem of violence against women impacts one in three U.S. women,ⁱ and this country needs constitutional reform to address it. In *U.S. v. Morrison*, the Supreme Court struck down the civil rights remedy of the Violence Against Women Act (VAWA), finding Congress lacked the constitutional authority to create a civil remedy.ⁱⁱ This decision meant that Christy Brzonkala, who was a freshman in college when she was raped, could not sue her assailants under VAWA, and it left all survivors without a crucial federal avenue to seek justice.

Consider the tragic case of Jessica Lenahan, whose three young daughters were abducted by Jessica's violent, unstable husband, in violation of a court restraining order against him.ⁱⁱⁱ Despite a mandatory arrest law for this type of violation, police ignored Jessica's repeated pleas for help. As a result, the girls were murdered by gunshot wounds to the head. The Supreme Court held in *Castle Rock v. Gonzalez* that Jessica had no right to protection and the police bore no responsibility for the murders. It denied her justice entirely.

These tragic cases are currently the federal word on violence against women, leading a human rights expert to observe, "there is little protection afforded to domestic violence victims."^{iv} In the words of legal scholar Catharine MacKinnon, "Women have been shut out of the legal system on this issue."^v The ERA would grant Congress the further constitutional authority to pass much-needed laws to protect women against pervasive, sometimes lethal sexual and intimate partner violence.^{vi} In a country where intimate partner homicide against women is on the rise, claiming four lives each day, this reform is urgent.^{vii}

Pregnancy Discrimination

Pregnant workers have no constitutional right against workplace discrimination, and they can lose wages, their job, or their child without a legal remedy.^{viii} The Supreme Court ruled that pregnancy discrimination is not discrimination "on the basis of sex" under the Equal Protection Clause because women are not denied protection available to men.^{ix} Justice Brennan dissented, saying "surely it offends common sense"^x to fail to treat pregnancy discrimination as sex-based.

Congress responded by passing the Pregnancy Discrimination Act (PDA); however, the Court's interpretation of the PDA allows many employers to refuse basic accommodations to pregnant employees, like carrying water bottles, extra bathroom breaks, and lighter lifting duties.^{xi} Pregnant workers also suffer because the U.S. is the only high-income country that does not guarantee any paid maternity leave,^{xii} contributing to the country's egregious status as having the highest rate of maternal mortality in the developed world.^{xiii} Many pregnant women in physically strenuous, low-paying jobs face a choice between physical health or financial stability.

The ERA would provide the basis for "fundamental and substantive" equality, giving women equal regard in view of their biological capacities for childbearing rather than neglecting mothers' needs based on an unfair comparison to a male norm.^{xiv} The ERA should be a priority for any lawmaker concerned about mothers' well-being and ability to care for their children.

Pay Discrimination

Women in the United States are consistently paid less than their male counterparts for the same work. A working woman today can expect over her career to earn \$500,000 to \$800,000 less than men in similar jobs.^{xv} The pay gap contributes to women having higher rates of poverty: one

study found that women's poverty rate would be cut in half if the gender pay gap was eliminated.^{xvi} Mothers are especially hard hit by the disparity in pay, with around a quarter of single mothers living in poverty.^{xvii} One study found that "if single working mothers received equal pay ... two-thirds would receive an increase in their pay, and their 'very high poverty rate' would also be cut in half."^{xviii}

The court-imposed standard for proving pay discrimination on the basis of sex is extraordinarily high, essentially requiring an explicit, stated policy that uses gender as a factor for pay. In the case of *Wal-Mart v. Dukes*, female Wal-Mart employees sued the company for sex discrimination under Title VII, providing statistical evidence of men being paid more and promoted more often than women. The Supreme Court held that even if the allegations of sex discrimination were true the employees would not have a claim because while Wal-Mart may have allowed a culture of sex discrimination, it did not have an identifiable policy of discrimination. This demonstrates the power corporations enjoy to promote a discriminatory culture.^{xix} Likewise, the Equal Pay Act creates a high burden for plaintiffs challenging discrimination and allows employers to avoid accountability with the most pretextual of defenses. Employers can claim defenses such as merit, seniority, productivity, and a catchall, "any factor other than sex." Employers can also use prior pay of employees as a defense, leading to a situation in which "[e]mployers can continue paying women less than men because other employers have paid women less than men."^{xx} The ERA would provide a new standard to guide the Court's approach to pay discrimination, with potential to overcome the broad interpretation the Court has given to employers' defenses.^{xxi}

The ERA will empower Congress to enact legislation that safeguards against sexual and domestic violence, pregnancy discrimination, unequal pay, child marriage, female genital cutting, and other forms of gender-based injustice.^{xxii} For example, the federal civil remedy in the Violence Against Women Act (VAWA)^{xxiii} and the 1996 statute criminalizing female genital cutting,^{xxiv} both of which were struck down for lack of constitutional foundation, would have been supported by the ERA.

Respect for Human Rights Requires Full Equality

The United States has made numerous, legally binding commitments to respect the principles of equality and non-discrimination, which are foundational to human rights. Every major human rights instrument our nation has endorsed, including the landmark 1948 Universal Declaration of Human Rights (UDHR), obligates our government to forsake discrimination based on sex, as well as discrimination based on race, religion, and other factors.^{xxv}

Eighty-five percent of countries worldwide explicitly protect women's rights or prohibit gender discrimination in their constitutions, but the United States is not among them.^{xxvi} The lack of an

Equal Rights Amendment undercuts U.S. leadership and credibility on women's human rights globally.

As people of faith, proponents of human rights, and believers in American democracy, we stand united in urging Congress to recognize the ratification of the Equal Rights Amendment. This is the honorable and ethical course of action, to respect the equal human dignity and worth of over half of our nation's citizens. It will serve to safeguard women and all Americans against innumerable injustices and harms, and in this way advance the common good of our nation.

Thank you for your serious attention to this vital and urgent concern.

Participating Organizations

Justice Revival® is a diverse, inclusive Christian human rights organization. Our mission is to inspire, educate, and mobilize U.S. Christian communities to fulfill the call to justice by standing in solidarity with the oppressed and defending the human rights of all. We provide pioneering Christian education on human rights to churches and seminaries across the country. Justice Revival also serves as convener of the #Faith4ERA campaign for the Equal Rights Amendment.

We support constitutional equality for women and for all Americans based on our faith convictions. We understand through the sacred text of Genesis that humankind is made in the divine image irrespective of gender, and that women, like men, possess sacred and equal human dignity and worth. (Gen. 1:27), which is the foundation for human rights.

Jesus of Nazareth, whose life and teaching serve as our highest ethical example, welcomed and included women in his ministry, and offered them respect that far exceeded the culture of his time. Women played important leadership roles in the early Christian movement as apostles, priests, and martyrs; over the centuries they have been counted among the saints, reformers, and defenders of our faith.^{xxvii} Today, women serve as ministers, pastors, deacons, and bishops through many of our traditions.^{xxviii}

At the heart of Christian faith is an ethical injunction to love one's neighbor as oneself. Jesus named this as part of the "Great Command," inextricably intertwined with love and devotion to God. Theologian Soren Kierkegaard explained that love of neighbor should lead inevitably to full equality:

"The neighbor is the absolutely true expression for human equality. In case everyone were in truth to love his neighbor as himself, complete human equality would be attained. Everyone who loves his neighbor in truth, expresses unconditionally human equality."^{xxix}

To continue to deny women full equality under the U.S. Constitution is to continue to perpetuate a fundamental injustice—one that offends the widely shared belief that all human people are equality in dignity and worth, and thus deserving of equal human rights. The ERA is indispensable to a just society where human rights are respected and upheld. We urge Congress to take swift action to affirm this vital reform.

Sojourners is an ecumenical Christian organization. For over 50 years our mission has been to articulate the biblical call to social justice, inspiring hope and building a movement to transform individuals, communities, the church, and the world. Sojourners is a source of inspiration and resources for millions of people, including clergy, seminarians, and journalists in secular and faith-based media. We help people put their faith in action through mobilizing campaigns, educational resources, events, coalitions, national faith networks, and our print and online publications. Our readers, activists, networks, and partners span the breadth of the diversity of the church, including Catholics; mainline Protestants; evangelicals; Black, Asian American, and Latina churches; and people who consider themselves spiritual but not religious. Sojourners regularly reaches more than 300,000 faith-inspired clergy and lay leaders in all 50 states, and we reach millions more through our website, social media, and earned media in both secular and faith-based outlets.

From our beginnings, Sojourners has been inspired by the Genesis 1:27 commitment to imago dei, the core Judeo-Christian belief that every person is made in the image and likeness of God, which means that each person possesses inherent dignity and worth. Sojourners is grounded in protecting human dignity and demonstrating a particular concern for the most vulnerable, principles exemplified in Catholic social teaching, in the historic Black Church experience, in immigrant churches, and the best of our progressive church revival history. We believe every person deserves equal protection under the law. We urge Congress to recognize the ratification of the Equal Rights Amendment.

The Women's Alliance for Theology, Ethics, and Ritual (WATER) in Silver Spring, Maryland, is a non-profit educational organization made up of justice-seeking people who use feminist religious insights and values to promote social change.

Our more than two thousand colleagues come from a range of religious traditions and no faith whatsoever. A unifying element in our Alliance is the firm belief, whether religious or otherwise, that women and non-binary people are full and equal human beings with all rights accorded to men. Therefore, our commitment to the Equal Rights Amendment is unflinching, and has been part of our social change agenda since our founding in the 1980s.

At the spirited push for the ERA in June 1982, religious women were among those who

fasted, lobbied, and demonstrated for the ERA in Springfield, Illinois. A Catholic nun, Loretto Sister Maureen Fiedler, and Mormon leader Sonia Johnson were two of seven women who spent 37 days fasting to express the centrality of the ERA for women's well-being. Feminist religious colleagues walked the halls of Congress explaining to legislators that equality was an article of faith in most religious traditions. After the vote, the women and their supporters gathered for an interfaith prayer service committing themselves to work until the job was done. It is up to the Congress to officially finish the work that was 'completed' so long ago.

Religions for Peace USA is the largest and most broadly-based representative multi-religious forum in the United States, with participants from about 50 religious communities, representing each of the major faith traditions. The organization identifies shared commitments among religious communities in the United States, enhances mutual understanding among these communities, and facilitates collaboration to address issues of common concern. Our national member organizations are listed at <https://rfpusa.org/executive-council-council-of-presidents/>.

Our multi-religious organization works only on issues based on faith values deeply held and widely shared by our member religious communities. One of the issue we focus on is gender equity, including equal rights for women. For this reason, our organization has endorsed and advanced the Equal Rights Amendment.

Freedom Road, LLC is a national consulting and influencing group based in Philadelphia, Pennsylvania. We are dedicated to shrinking the narrative gap in our nation and in the church. We consult, coach, train and design experiences that help institutions in multiple sectors to do justice in just ways. The Narrative Gap, as coined by Lisa Sharon Harper, is the distance between the stories that we tell ourselves about ourselves and the truth of how we got here and what it will take to make things right. Narrative shapes worldview, as a result it shapes the world.

Our base of more than 100,000 social media followers represent a range of Christian faith, primarily evangelical or post-evangelical. Freedom Road's "Ally Tour" 2022 spent one week reflecting on the biblical mandate for women's equality and the need for recognition that the ERA has met all requirements to be adopted as an Amendment to the U.S. Constitution. Thousands of women faith leaders across the U.S. engaged in profound conversation on the ERA and vowed to support it.

In addition, December 2017 to January 2018, Freedom Road helped lead the "Silence Is Not Spiritual" hashtag campaign in the wake of the #MeToo movement. This campaign laid foundations for more than 6,000 evangelical churches and leaders to enter the #MeToo/#ChurchToo movement. Each one pledged to create protected space for women to share their stories of violence and space to heal. The Equal Rights Amendment would create constitutional boundaries to protect against women's pain and subjugation, by strengthening the legal response to violence. In so doing, The Constitution would finally align with the biblical

declaration that all people are created in the image of God and are therefore worthy of equal protection of the law.

Muslims for Progressive Values (MPV) was founded in 2007 to build a worldwide progressive Muslim movement. Through this movement we advocate for an Islam that protects the human rights of all, including the rights of women and LGBTQIA individuals. We also advocate for the separation of religion and state, freedom of expression, and freedom of religion or belief. In advancing these human rights values, MPV provides a progressive voice to these issues by participating in civil discourse, engaging with the media and government, public educational forums as well as cultural events, and by partnering with both Muslim and non-Muslim progressive organizations.

The basis of all of our advocacy efforts is rooted in Islamic values, which, are inherently inclusive and oriented around human rights for all. The primary source we turn to for our understanding of how Islam decrees gender equality is the Qur'an, which explicitly states "Any believer, male or female, who acts righteously, will enter Paradise and will not suffer the least bit of injustice" (4:124). As Muslims, we are commanded to follow the directive of God, who according to this verse from the Qur'an treats all genders as equals, meaning that Muslims too must do the same. Within Islam's holy text and the supporting sources of Islamic jurisprudence, the Hadith and the Sunnah, numerous values that support equal rights among genders emerge, including *insaf* (equality) and *karamah* (the equal dignity of both men and women). It is these values from which MPV advocates for equal rights, for we cannot achieve equal dignity for genders if we do not have equal rights.

As the oldest progressive Muslim organization in the United States, MPV has been at the forefront of pulling the American Muslim community back to the egalitarian values practiced by Prophet Muhammad (PBUH) and his companions. Among these values are the right for Muslim women to live a life free from violence both within and outside of the home. Far too often Muslim men misinterpret and manipulate a single verse in the Qur'an, verse, 4:34, to mean that hitting their wives as punishment for disobedience is acceptable in Islam. Domestic violence across the Muslim community is still prevalent and without the guarantees the Equal Rights Amendment offer women, this violence and injustice can be expected to continue.

ⁱ See American College of Obstetricians & Gynecologists. *Intimate partner violence*. Committee Opinion No. 518. *Obstet Gynecol* 2012; 119:412–7. <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2012/02/intimate-partner%20violence#:~:text=Research%20confirms%20the%20long%2Dterm,in%20the%20United%20States%201>. U.S. women face similar odds of workplace sexual assault. See Center for Talent Innovation. *What #MeToo Means for Corporate America*. Key Findings. 2018. <https://coqual.org/wp-content/uploads/2020/09/CoqualWhatMeTooMeansKeyFindings090720.pdf>. U.S. women have a one in five chance

of experiencing rape or attempted rape in their lifetimes. See Black, M.C., Basile, K.C., Breiding, M.J., Smith, S.G., Walters, M.L., Merrick, M.T., Chen, J., & Stevens, M.R. (2011). *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*. NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, CENTER FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

ⁱⁱ Sally F. Goldfarb, *The Supreme Court, The Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 69 (2002).

ⁱⁱⁱ *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 754 (2005).

^{iv} *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, UNITED NATIONS HUMAN RIGHTS COUNCIL, https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.26.Add.5_AEV.pdf (last accessed Jun. 29, 2021).

^v Catharine A MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, EQUAL HARVARD JOURNAL OF LAW & GENDER 37 (2013-2014) at 576.

^{vi} See JESSICA NEUWIRTH, EQUAL MEANS EQUAL 69 (2015).

^{vii} Since 2014, the number of women killed by an intimate partner increased from 3 women per day to nearly 4 women per day. Carol A Lambert, MSW, *The Number of Women Murdered by a Partner Is Rising*, PSYCHOLOGY TODAY (September 3, 2019). <https://www.psychologytoday.com/us/blog/mind-games/201909/the-number-women-murdered-partner-is-rising>.

^{viii} See Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES, <https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html> (last accessed July 22, 2021).

^{ix} See JESSICA NEUWIRTH, EQUAL MEANS EQUAL 38-39 (2015).

^x *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

^{xi} See Dina Bakst, Elizabeth Gedmark, and Sarah Brafman, *Long Overdue: It is Time for the Federal Pregnant Workers Fairness Act*, A BETTER BALANCE: THE WORK AND FAMILY LEGAL CENTER,

<https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf> (last accessed July 23, 2021) (“In an extensive review of post-*Young* pregnancy accommodation cases conducted for this report, A Better Balance found that in over two-thirds of cases, despite the new *Young* standard, courts held employers were permitted to deny pregnant workers accommodations under the PDA”); Lara Grow, *Pregnancy Discrimination in the Wake of Young v. UPS*, 19 U. PA. J. L. & SOC. CHANGE 133, 135 (2016) (“[T]he Court’s new formulation nevertheless fails to clarify how a plaintiff identifies the appropriate comparator . . . Moreover, following *Young*, it remains unclear precisely how dramatic the differential between an employer’s treatment of pregnant and nonpregnant workers must be for a plaintiff to successfully prove that the employer’s policy significantly burdens pregnant employees”).

^{xii} Joia Crear-Perry, *Paid Maternity Leave Saves Lives*, BLOOMBERG OPINION, <https://www.bloomberg.com/opinion/articles/2021-06-24/paid-maternity-leave-would-help-relieve-america-s-maternal-mortality-crisis> (last accessed July 2, 2021).

^{xiii} Roosa Tikkanen, Munira Z. Gunja, Molly FitzGerald, Laurie Zephyrin, *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, THE COMMONWEALTH FUND, <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries> (last accessed July 2, 2021).

^{xiv} NEUWIRTH, *supra* note 9, at 49; see also Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L. J. 771 (2010) (argues the ERA would move the Supreme Court away from the framework they adopted in *Geduldig*, which holds pregnancy discrimination does not constitute sex discrimination).

^{xv} Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 599 (2018).

^{xvi} *Id.*

^{xvii} Robin Bleiweis, Diana Boesch, and Alexandra Cawthorne Gaines, *The Basic Facts About Women in Poverty*, CENTER FOR AMERICAN PROGRESS, <https://www.americanprogress.org/issues/women/reports/2020/08/03/488536/basic-facts-women-poverty/> (last accessed July 29, 2021).

^{xviii} Bornstein, *supra* note xv, at 599.

- ^{xxix} See Brief for Respondents at 21-22, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (No. 10-277); JESSICA NEUWIRTH, *EQUAL MEANS EQUAL* 23 (2015).
- ^{xxx} NEUWIRTH, *supra* note ix, at 19. In *Kouba v. Allstate Insurance Company*, a woman was paid \$175 less a month than her male colleagues, but Allstate claimed that using prior salary as a factor for current pay was a “factor other than sex,” and therefore, “a legitimate reason under the law to pay women differently than men.” *Id.* at 18. The Ninth Circuit ruled in Allstate’s favor. *Id.* at 18-19. See also Bornstein, *supra* note xv, at 606-07.
- ^{xxxi} The Court has said that it is not their job to “roll aside all history” and “take over the job of leveling out centuries of discrimination.” NEUWIRTH, *supra* note ix, at 31. The ERA, however, could provide the basis for the Court to address discrimination. *Id.* The Court has interpreted employers’ defenses so broadly “that it has effectively become a loophole that allows some employers to successfully defend discriminatory pay practices that sound impartial or gender neutral on the surface.” Robin Blewis, *The Equal Rights Amendment: What You Need to Know*, CENTER FOR AMERICAN PROGRESS, <https://www.americanprogress.org/issues/women/reports/2020/01/29/479917/equal-rights-amendment-need-know/> (last accessed Aug. 19, 2021). The ERA “could strengthen arguments to close this loophole.” *Id.*
- ^{xxxii} Section 2 of the ERA provides, “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” *Proposed Amendment to the United States Constitution*, H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972). As the House Judiciary Committee Report recognized in 2020, “[T]he ERA would empower Congress to enforce its provisions through legislation.” From the House Judiciary Committee Report “Removing the Deadline for the Ratification of The Equal Rights Amendment,” H.R. Rep. No. 116-378, 116th Congress, at 6 (2020), available at <https://www.congress.gov/116/crpt/hrpt378/CRPT-116hprt378.pdf>.
- ^{xxxiii} See *United States v. Morrison*, 529 U.S. 598 (2000).
- ^{xxxiv} See *United States v. Nagarwala*, 350 F. Supp. 3d 613, 630-31 (2018).
- ^{xxxv} Universal Declaration of Human Rights, Dec. 8, 1948, G.A. Res. 217A (III), at art. 12 [hereinafter UDHR], at art. 1, 2, 7, 10, 16, 23.
- ^{xxxvi} World Policy Analysis Center, *Constitutional Equal Rights Across Gender and Sex*, World Policy Center (2020), <https://www.worldpolicycenter.org/sites/default/files/Fact%20Sheet%203%20-%20Constitutional%20Equal%20Rights%20Across%20Gender%20and%20Sex.pdf>.
- ^{xxxvii} See, e.g., Elizabeth Gillan Muir, *A Women’s History of the Christian Church: Two Thousand Years of Female Leadership* (2019); Karen J. Torjesen, *When Women Were Priests: Women’s Leadership in the Early Church & the Scandal of their Subordination in the Rise of Christianity* (1993); Eldon Jay Epp, *Junia: The First Woman Apostle* (2005).
- ^{xxxviii} See Muir, *supra* note xxvii, at 345-362.
- ^{xxxix} Duncan B. Forrester, *On Human Worth: A Christian Vindication of Equality* 97-98 (2001).



**Statement by Russ Feingold, President of the American Constitution Society
Before the Senate Judiciary Committee
“The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine
Equality in Our Constitution”
February 28, 2023**

Thank you, Chairman Durbin, Ranking Member Graham, and Members of the Committee for the opportunity to submit this comment about the Equal Rights Amendment. I am submitting this statement on behalf of the American Constitution Society, a 501(c)(3) non-profit, non-partisan organization.

The Equal Rights Amendment (ERA) has met all constitutional requirements for ratification and should be considered the 28th Amendment to the Constitution. As women face mounting threats to their reproductive and bodily autonomy, recognizing – and enforcing – the ERA is more important than ever.

Article V of the U.S. Constitution lays out two methods by which the Constitution can be amended. Every amendment to the Constitution has utilized the same method. Two-thirds of each chamber of Congress proposed an amendment to the Constitution and that amendment was subsequently ratified by the legislatures of three-fourths of the states. The ERA has satisfied each of these steps.

On March 22, 1972, the 92nd Congress passed House Joint Resolution 208, proposing the ERA and sending it to state legislatures for ratification. By a vote of 354-24 in the House and 84-8 in the Senate, each chamber comfortably surpassed the required two-thirds threshold.

On January 27, 2020, Virginia became the 38th state to ratify the ERA. As a result of Virginia’s ratification, the ERA achieved the three-fourths of states threshold and thereby satisfied all requirements prescribed in Article V to become the 28th Amendment to the Constitution.

Opponents to the ERA [claim](#) it is “dead” and point to “a seven-year deadline for ratification” as proof. This deadline, however, only shows up in one place in H. J. Res. 208 – the preamble. While some may claim that the deadline is binding nonetheless, the U.S. Supreme Court has never said as much.

The U.S. Supreme Court has only once examined Congress’s power to include a deadline within a proposed amendment and whether such a deadline is binding on the states. In *Dillon v. Gloss*, the Court held that it is not unconstitutional for Congress to require that a constitutional amendment be ratified within a specified period of time.

The problem for those arguing that the ERA is dead, however, is that the seven-year time limit fixed by Congress in the resolution at issue in *Dillon* was included within the text of the proposed amendment itself – not the preamble. This distinguishes the situation in *Dillon* from



that of the ERA, wherein the deadline only shows up in the preamble, not the actual text of the amendment.

The Supreme Court has not addressed the constitutionality of a deadline found in prefatory text and later extended before expiration. While some folks claim that the ERA formally died after its extended deadline of June 30, 1982 passed, there is no legally binding source that claims the same. There is a [valid argument](#) that neither the original deadline, included only in the preamble, nor the deadline extension are binding on the states.

Separate from the issue of a deadline, there is a claim that some states have rescinded their ratification. The problem with this claim is, again, there is no legally binding source that says states may rescind their ratification of a constitutional amendment. The Constitution does not specify this, nor has the Supreme Court ever said as much. Moreover, previous efforts by different states to rescind their ratification of the 14th, 15th, and 19th amendments have not blocked those amendments' enforcement or placement in our Constitution.

On the other hand, Congress has had multiple opportunities to address the issue and has consistently rejected the validity of rescissions. And while Article V does not give weight to Congressional action in this regard, the precedent is worth noting, particularly in the absence of clear judicial precedent on the matter.

Lastly, critics of the ERA like to point to comments made by Justice Ruth Bader Ginsburg, who suggested that the ratification process should "start over." As Julie Suk expertly [explained](#), however, Justice Ginsburg made these comments in the abstract, not based on a lawsuit before her with all the facts and legal arguments. Justice Ginsburg devoted significant advocacy and scholarship in support of the ERA over the course of her career. One isolated public comment is not grounds for any legal conclusion regarding the status of the ERA.

It is encouraging to see Congress call attention to the ERA, including with this hearing and particularly as we confront more proposals and laws by state legislatures striving to erode or eliminate fundamental freedoms. Now more than ever, we must do everything we can to ensure publication of the ERA as the 28th amendment.

The founders did not consider the Constitution written in stone and, in fact, predicted that it would be readily amended. This is why they included Article V, to provide a means by which to amend the Constitution and keep it relevant as the country evolved. The ERA is critical to addressing a founding failure of our Constitution - its silence on gender equality. Thirty-eight states have acknowledged this founding failure and ratified the ERA in accordance with the procedure provided in Article V. It is part of the Constitution and should be treated as such.


AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Eric Bunn Sr.
National Secretary-Treasurer

Dr. Everett B. Kelley
National President

Jeremy A. Lannan
NVP for Women & Fair Practices

March 6, 2023

The Honorable Dick Durbin
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Durbin, Ranking Member Graham, and Members of the Committee:

On behalf of the American Federation of Government Employees, AFL-CIO (AFGE), which represents approximately 750,000 federal and D.C. government employees in over 70 agencies, I urge you to support S.J.Res. 4, a joint resolution introduced by Senator Ben Cardin (Maryland), removing the deadline for the ratification of the Equal Rights Amendment (ERA), following the Committee on the Judiciary's recent hearing, "The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution."

The Equal Rights Amendment would constitutionally prohibit discrimination on account of sex and create a level playing field for women and girls and in particular women of color and other historically marginalized groups. AFGE represents hundreds of thousands of government workers across the country who would benefit greatly from the ERA.

In 2021, the House passed a bill to remove the ratification time limit in the preamble of the 1972 ERA to clear any barriers to its adoption. The Senate did not act on the bill before the end of the 117th Congress. There is nothing in the U.S. Constitution that sets a time limit for state ratifications, and Congressional action to remove the time limit will clear the way for adopting the ratified Equal Rights Amendment.

AFGE urges you to support S.J.Res. 4, to remove the deadline for the ratification of the Equal Rights Amendment to ensure workers and all people are treated with dignity, fairness, and respect and not discriminated against based on sex. For questions or more information please contact Fiona Kohrman at Fiona.Kohrman@afge.org.

Sincerely,

Julie N. Tippens
Legislative Director



STATEMENT OF LIZ SHULER, PRESIDENT OF THE AFL-CIO
Hearing Before the U.S. Senate Committee on the Judiciary
on
How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution

FEBRUARY 28, 2023

Chairman Durbin, Ranking Member Graham and members of the Committee on the Judiciary, my name is Liz Shuler, and I am President of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO). I am submitting this statement for the record of the hearing on the Equal Rights Amendment (ERA): How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution.

In 2022, I became the first woman elected as President of the AFL-CIO. With over 6.5 million women members, the labor movement is the largest women's organization in the United States. The AFL-CIO has long supported the ERA and our organization believes that, for too many women workers, justice delayed is justice denied. We therefore call on the Senate to swiftly pass S.J. Res. 4, a bipartisan resolution affirming ratification of the ERA to provide constitutional protection against discrimination based on sex.

Women have fought long and hard against every kind of discrimination on the basis of sex: the right to vote; the right to own land and manage one's finances; the right to an education; the right to bodily autonomy; the right to work while pregnant without endangering one's health; the right to employment free of discrimination and harassment in any occupation; the right to earn a fair and transparent wage; and the right to love whom you love. These burdens have fallen disproportionately on women of color who have long endured the weight of racial biases.

The past year has demonstrated once again the painful reality that defense of our rights cannot be taken for granted, and protection of those rights can be denied at every level of government without constitutional safeguards. Instead of a patchwork of protections across the U.S., ratification of the ERA is an unequivocal statement that all people—female, male, and non-binary and regardless of where they live—are seen as equal under the Constitution.

S.J. Res. 4 confirms the ERA as ratified. Thirty-eight states have ratified the ERA, and despite efforts to reverse course, those state ratifications cannot be undone. Moreover, the American public overwhelmingly supports a constitutional amendment providing equality on the basis of sex.

Working women and their families have much at stake with the ratification of the ERA. Continuing discrimination, and its economic impact, is a weight the U.S. can no longer bear. Every person has the right to go as far as their aspirations and abilities will take them, and no person should be held back under the yoke of discrimination. I urge the Senate to pass S.J. Res. 4, recognizing the ERA as an amendment to the Constitution without delay.

Greetings Chair Durbin and members of the Judiciary Committee:

My name is Anne Angus. I am from Bozeman, MT and speak on behalf of myself in full support of the Equal Rights Amendment (ERA).

After nearly a century of work, I am hopeful that ALL will finally be recognized as full persons within the eyes of the law of the United States of America. As an American woman, I am exhausted; I am sick of living in a country where my personhood is implied, but never fully protected. I am angry that I have to perform well beyond my male peers to justify receiving the same pay. I am aggrieved that my voice is dismissed because it does not come from a male experience. And I am livid that politicians assume that they know better than my doctor as to what is best for my family.

I am tired, just so tired, of fighting to have my basic personhood recognized.

But with the ERA - I am hopeful. With the ERA ratified, I am hopeful that maybe now I can rest. With the ERA ratified, I can fully give back to my community without worrying about supporting my family. With the ERA ratified, my voice can be heard on issues that matter. With the ERA ratified, I can raise a healthy and happy family of future Americans. With the ERA ratified, I, as an American woman, am guaranteed to be able to live the true and full American Dream.

And with the ERA ratified, I am better able to perpetuate this dream for my children, because this isn't just my America; it is *their* America. Our children, as Americans, deserve the right to be able to determine their future. Our children, as Americans, deserve to be able to realize their full potential in building the future of this country.

Ratifying the ERA enshrines the right of our children to continue the legacy of the greatest nation on Earth. I urge you to pass the Equal Rights Amendment, both for current and future posterity.

Thank you.

Testimony for Hearing on SJ Res 4 - February 28, 2023

I am a citizen extremely concerned about women's rights. I speak to you as a woman and as a healthcare quality professional.

For my 54 years, I have been watching women's requests for Constitutional equality be denied and ignored.

I have been watching women not be able to access basic healthcare, while men do not have those barriers--services that are lifesaving and critical to basic quality of life (not just abortion). I have been watching as women get treated differently--worse--than male patients.

I have been watching women not get equal treatment in domestic violence and sexual assault situations. I have been watching horrifying discrimination against consenting adults who just want to get married.

I have been watching women not get equal pay and job opportunities as their male counterparts.

I have been watching as the United States speaks to the United Nations about gender equality, while denying it to her own citizens.

I have been advocating for the Equal Rights Amendment for most of my life, standing on the shoulders of those who precede me.

I ask the Senate: How long must we wait for liberty?

For 100 years, we have endured silence, refusals, mocking and imaginary legal barriers. Enough. Please do whatever it takes for us, your constituents, to have Constitutional equality in 2023. Do it for your sisters, your mothers, your wives, your friends.

Finalize the Equal Rights Amendment now.

Sincerely,

Audrey Benenati, MHA

Certified Professional in Healthcare Quality

Counselor Emeritus, NYS Office of Alcoholism and Substance Abuse

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HOUSE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME AND FEDERAL
GOVERNMENT SURVEILLANCE

SUBCOMMITTEE ON CONSTITUTION
AND LIMITED GOVERNMENT

HOUSE COMMITTEE ON OVERSIGHT
AND ACCOUNTABILITY

RANKING MEMBER-SUBCOMMITTEE ON
ECONOMIC GROWTH, ENERGY POLICY,
AND REGULATORY AFFAIRS

SUBCOMMITTEE ON NATIONAL SECURITY

Written Testimony of Representative Cori Bush (MO-01)

**“The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine
Equality in Our Constitution”**

**Dirksen Senate Office Building Room 106
United States Senate Committee on the Judiciary**

February 28, 2023

10:00 AM

Chair Durbin and esteemed Judiciary Committee Members, thank you for the opportunity to submit this written testimony and for your careful attention to the issue of constitutional equality.

The Equal Rights Amendment (ERA) was first unveiled in Seneca Falls, New York July 21st, 1923. July 21st also happens to be my birthday. On my birthday this year we will be marking a full century in this fight.

100 years is far too long to wait for equality.

It is appropriate that you are holding this hearing during Black History Month and at the cusp of March which is Women’s History Month. Black women and LGBTQ+ people have always been on the forefront of the fight for the ERA. Though we have never been on the front page of its coverage in the media.

Pioneering transgender attorney, ordained clergy, and civil rights activist Pauli Murray identified the twin evils of racism and sex discrimination we face as Black women by coining the phrase “Jane Crow” and later became a vocal advocate for an important tool to eradicate racialized gender discrimination—the Equal Rights Amendment. Murray argued, “Negro women as a group have the most to gain from the adoption of the Equal Rights Amendment . . . [It] strikes a blow at the powerlessness which all women share, but which Negro women experience in intensified form.” Murray’s influential perspective predicted that we would need the ERA as an anchor in the constitution to actualize the promise of equality.

Murray was not alone in their advocacy for the ERA. In 1970 Shirley Chisholm, the first Black woman elected to Congress, delivered a speech on the House Floor entitled, “I Am For the Equal Rights Amendment.” She urged her fellow members of Congress to vote for the ERA to complete the unfinished business of the so-called Founding Fathers.

Barbara Jordan, the first Black woman from the South elected to Congress, was also an ardent proponent of the ERA. She was a fierce defender of the U.S. Constitution and served on the House Judiciary Committee, an honor I share today. Jordan implored us to expand a rigid definition of “we of the people” to one that includes everybody. She forcefully testified in a congressional hearing to extend the deadline on the ERA, “The Equal Rights Amendment is a mandate for change.” Jordan recognized that the U.S. Constitution does not mandate a time limit on changes to a living, breathing document that governs the lives of millions. Like her, I believe that there can be no time limit on equality or our collective liberation. We’ve got to make progress, not put arbitrary limits on fundamental freedoms. I stand with the Black women and queer leaders who’ve come before me in unapologetically and unequivocally pushing for the ERA.

Black women have never given up on enshrining gender equality in our constitution. Even when the deadlines imposed by Congress in the proposing clause of the ERA timed out in 1982, three states short of ratification – we never gave up. In the modern era, three new states have ratified the ERA: Nevada, Illinois, and Virginia. In all of those states, Black legislators and organizers have led the way. In 2017, queer Black Senator Pat Spearman resurrected the ERA fight and got it ratified in Nevada. In Illinois, in 2018, Lieutenant Governor Juliana Stratton and others followed suit and ratified the ERA there. I’m glad to see she is a witness in today’s historic hearing. And, in Virginia in 2020, Senator Jennifer McClellan, who last week was elected as the first Black woman from the state to serve in Congress, got ERA ratification over the finish line. Across the states and across generations—Black women have led the way.

I am energized and inspired by the tenacity of Black women and LGBTQ+ leaders who have never given up on constitutional change. In the century since its introduction in 1923 we have met the requirements outlined in Article V of the Constitution—the ERA was passed by 2/3rds of Congress and it has now been ratified by 38 states. It is the 28th amendment. We did it. Our movement worked hard to affirm the full citizenship of women and people of all marginalized genders. I refuse to let the century of organizing, galvanizing, and strategizing on the ERA be in vain.

When a problem starts at the root, the solution has to be a foundational fix. And, the discrimination all women and gender expansive folks face in this country starts with our exclusion from our own constitution. Domestic violence is an epidemic. Abortion bans are sweeping the nation. Black trans women and our queer siblings are being targeted by violence. We need the ERA to protect us. To keep us safe, not 100 years ago, but now.

As a Member of Congress fighting for recognition of the ERA in the modern era, I want to be perfectly clear about two of the things I do envision it covering—abortion access and trans rights. I mention those two issues specifically because at today’s hearing you will hear those who oppose equality cite these two important protections as why they are fighting it.

Anti-ERA advocates like the Heritage Foundation fear “[The ERA Has Just One Purpose Left: Abortion](#).” The ERA’s potential is not limited to protections for health care, but this might be the only time I agree with the Heritage Foundation: the ERA will absolutely protect abortion. As

someone who has had abortions, I know how vital this is. Why would we fight so hard for an amendment that wouldn't even protect our most basic human rights?

Clearly abortion bans are sex-based discrimination. In states with state-level ERAs, the amendments have been crucial to protecting abortion access. For example, in New Mexico there are no gestational limits on abortion and state funds are required to cover abortion care—all because they have an ERA. In Utah right now the only reason you can get a legal abortion is their state-level ERA. It was put in the Utah Constitution in 1896 and is protecting abortion seekers today. With the federal level ERA in place as the 28th Amendment to the U.S. Constitution, we can revisit the *Dobbs v. Jackson Women's Health Organization* case without the need to rely on the right to privacy or anything in the 14th Amendment. We will have an entirely new right in the text of the Constitution in which to ground our basic human right to bodily autonomy and abortion access.

In addition to protecting our fundamental right to access abortion, the ERA will also provide a crucial bulwark against attacks on our trans siblings all across the country. The word “women” is nowhere to be found in the text of the ERA. Instead, it prohibits discrimination on the basis of the gender neutral term, “sex.” This simple, straightforward version of the language is what passed in Congress in 1972 and has now been ratified by 38 states. Since the ERA will explicitly prohibit discrimination on the basis of sex, if there's discrimination against LGBTQ+ people on the basis of sex, it will be covered by the ERA. Just reading the text, you can see that the amendment applies to both sexual orientation and gender identity. This is even more clear after the Supreme Court's recent decision in the *Bostock v. Clayton County* case, in which the Court decided that discrimination on the basis of sexual orientation or transgender status is discrimination on the basis of sex.

Those who oppose the ERA try to use protection of trans people as a wedge to keep it from being finalized. On the contrary, I think protection of trans people is one of its greatest strengths. The ERA is an amendment for our times, and desperately needed to protect those most on the margins. This is particularly important in light of the U.S. Supreme Court's trajectory of hacking away at our rights instead of expanding them.

Though we currently lack the political will to change the composition of the Supreme Court, when the ERA is finalized—no matter who sits on the Court—they will have to abide by these 24 words: *Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.* As Pauli Murray said, Black women have the most to gain from cementing those words into the constitution. As a Black woman, I know I—alongside millions of Black women, individuals, and children—have the most to gain from an equality amendment. That is why I am fighting for the ERA. I will not rest until our rights are fully recognized and affirmed within the text of the constitution itself.

It's imperative that Congress affirm its support for the Equal Rights Amendment and recognize it as the 28th amendment without further delay.



The Honorable Richard Durbin
Chairman
Senate Judiciary Committee

March 2, 2023

Dear Chairman Durbin:

For more than 50 years, the California Commission on the Status of Women and Girls has identified and worked to eliminate inequities in state laws, practices, and conditions that affect California's women and girls. Established as a state agency with 17 appointed commissioners in 1965, the Commission regularly assesses gender equity in health, safety, employment, education, and equal representation in the military, and the media and exists to represent and serve the more than 24 million women living in California today.

We thank the Chair and the Senate Committee on the Judiciary for holding this week's hearing on SJ Res 4, the bipartisan resolution affirming that Congress views the Equal Rights Amendment (ERA) as valid, having been ratified by three-fourths of the states, as required by Article V of the U.S. Constitution.

As a non-partisan Commission, we encourage support for this bipartisan effort to finally include half of the citizens of the United States in our most sacred governing document. Despite the best efforts of a vocal minority, we know that equality for all is the future America wants and needs. In fact, ERA Coalition polling finds that 94% of respondents would support an amendment to the U.S. Constitution to guarantee equality between sexes, including 99% of millennials and Gen-Z, one member of whom has recently joined Congress.

As the hard-won rights of the past 60 years are being rolled back at an astonishing pace, now is the time to protect *everyone* equally under the law by ensuring our Constitutional equality. Most developed nations (and all new constitutions adopted in the world since World War II) provide equal rights guarantee and we believe that it is long past time the United States catches up.

The ERA has already satisfied all the requirements set forth in Article V of the Constitution. It was proposed by a vote of two-thirds of the Congress in 1972, and as of January 27, 2020, it has been ratified by the legislatures of three-quarters of the states. **Congress should act now to recognize the ERA as valid and remove the time limit preventing the publication of the ERA.** There are bipartisan resolutions pending in both Houses of Congress today that would eliminate any question that the validity of the ERA depends on the criteria in Article V, not the 1972 joint resolution. If Congress had the power to impose a time limit, it also has the power to remove it.

We want to be clear in our support for SJ Res 4, which affirms the validity of the Equal Rights Amendment and would allow Congress to finally provide an explicit guarantee of protection against discrimination on the basis of sex in the U.S. Constitution. Perhaps even more importantly, it would make a valuable statement about the American ideal of freedom and equality. Our Constitution reflects our most cherished values as a nation, but it cannot be said to



continue to do so when half of America's citizens and voters are left out of it and vulnerable to attacks based on ideas that it does not protect them.

More broadly, it sets a critical precedent for young girls growing up in America today. According to [new CDC data](#), nearly 3 in 5 (57%) U.S. teen girls felt persistently sad or hopeless in 2021—double that of boys, representing a nearly 60% increase and the highest level reported over the past decade. SJ Res 4 would send a particularly important message to these children and future voting citizens of our nation, who are growing up in a world that is more diverse, that America considers all its citizens to be equal under the law and will fight for the freedom of all people.

The ERA provides an explicit guarantee of protection against discrimination based on sex in the U.S. Constitution. It provides additional tools to protect against sex-based violence and discrimination in government employment, education, law enforcement, and the military. This joint resolution provides that the Equal Rights Amendment, which prohibits discrimination on the basis of sex, was ratified by three-fourths of the states and is therefore a valid constitutional amendment, regardless of any time limit that was in the original proposal. The California Commission on the Status of Women and Girls thanks the Committee for its consideration and reiterates that when it comes to equality, women cannot wait.

Sincerely,
The California Commission on the Status of Women and Girls

Cc:
Stephanie Trifone
Chastidy Burns



February 28, 2022

The Honorable Dick Durbin
 Chair
 Senate Committee on the Judiciary
 224 Dirksen Senate Office Building
 Washington, DC 20510

The Honorable Lindsey Graham
 Ranking Member
 Senate Committee on the Judiciary
 224 Dirksen Senate Office Building
 Washington, DC 20510

Catholics for Choice Testimony – The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution

Dear Chairman Durbin, Ranking Member Graham, and Committee Members:

On behalf of the overwhelming majority of Catholics who believe in reproductive freedom and the right to equal protections and individual liberties for all, I write to express Catholics for Choice's unequivocal support for the certification of the Equal Rights Amendment as the 28th Amendment to the United States Constitution.

At Catholics for Choice (CFC), our work to dismantle obstructions to comprehensive healthcare and to affirm the capacity of all people to make moral decisions about their lives is grounded in seven key principles of social justice. We are called to participate in public life, ensuring that we and our elected officials protect and care for all of our neighbors equally, since we are all created in the image of God. The Equal Rights Amendment (ERA) is a crucial step toward securing this reality, protecting women and gender-expansive people by banning discrimination on the basis of sex and adding an explicit guarantee of sex equality to the Constitution.

Let's be clear: the ERA has already been ratified by thirty-eight states — the result of tireless work by women and other activists who have fought for over a century to see our rights cemented in the nation's supreme law — and its publication is long overdue. The amendment was first introduced in 1923 and subsequently reintroduced in every session of Congress before passing both the House and Senate in 1972, at which point an arbitrary deadline was placed on the ratification process. No other constitutional amendment has ever been levied with such a deadline and even now, having met all constitutional requirements for ratification, what should be the 28th Amendment remains tantalizingly out of reach.

At the same time, the need to permanently remove the fate of fundamental rights like access to abortion and gender-affirming healthcare from the province of partisan politicians and capricious

In Good Conscience

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courts has never been greater. The overturning of *Roe v. Wade* and *Planned Parenthood v. Casey* has dramatically escalated an ongoing reproductive healthcare crisis in this country. Since the Supreme Court cemented the constitutional right to abortion in 1973, states have enacted over 1,300 abortion restrictions, including over 500 in the last decade and more than 100 in 2021. Now, the devastating decision in *Dobbs v. Jackson Women’s Health Organization* has permitted 26 states to ban abortion entirely, jeopardizing access for 36 million women of reproductive age in addition to trans men and non-binary people, and placing an extreme burden on providers in states still offering essential healthcare.

The ERA is the single most important step that the United States can take to safeguard the rights of women and LGBTQIA+ people. It would provide a constitutional basis for challenging abortion bans in court as a form of sex discrimination. State-level equal rights amendments have already proven effective at protecting abortion rights across the country, ensuring that care is not only accessible, but also affordable.

One powerful example is the Connecticut ERA. A state court determined that it was “clear, under the Connecticut ERA, that [a] regulation excepting medically necessary abortions from the Medicaid program discriminate[d] against women, and, indeed, poor women.”¹ The court reasoned that a funding classification based on a status unique to those capable of becoming pregnant was inherently discriminatory and that, by adopting the amendment, “Connecticut determined that the state should no longer be permitted to disadvantage women because of their sex including their reproductive capabilities.”² The New Mexico Supreme Court later cited this opinion when relying on the state’s ERA to find that the Medicaid program discriminated against women by restricting abortion funding. In holding that program must fund medically necessary abortions, the court noted that “since time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them.”³ More recently, following the *Dobbs* decision, the ERA in Utah’s state constitution blocked a complete ban on abortion care from taking effect while litigation proceeds.⁴ A case is currently pending in Pennsylvania to determine if the prohibition of state funds for abortion care violates the state ERA.⁵

The demonstrated protection provided by the ERA strikes fear in the Catholic hierarchy, so much so that the National Right to Life Committee (NRLC) — an organization that sprung from the predecessor of the U.S. Conference of Catholic Bishops (USCCB) — has a lobbyist dedicated solely to opposing the amendment. Recognizing the ERA’s power as a “legal weapon to invalidate virtually all state and federal limits on abortion,” the NRLC is dedicated to preventing this transformative amendment from being enshrined in the Constitution.⁶ The organization derisively refers to efforts to eliminate the ratification deadline as “pure political theater” and “temporal absurdity” and strongly opposes any federal ERA unless an abortion neutralization amendment is added.⁷ The USCCB Secretariat on Pro-Life Activities has also published a memo deriding the ERA by trying to raise the alarm to other anti-choice groups that it is “needed to ensure abortion access and knock down current [so-called] pro-life laws.”⁸

Despite what the USCCB would like legislators and the general public to believe, the majority of Catholics, including many past and present theologians, support access to the full range of reproductive healthcare because of our faith, not in spite of it. In fact, 75% of Catholics think that

¹ *Doe v. Maher*, 515 A.2d 159 (Conn. Super. Ct. 1986).

² *Id.*

³ *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 854 (N.M. 1998) (citing 515 A.2d at 159).

⁴ *Planned Parenthood Ass’n of Utah v. Utah*, No. 220903886 (Third Jud. Dist. Utah Jul. 11, 2022).

⁵ *Allegheny Reproductive Health Center, et al. v. PA Department of Human Services, et al.*

⁶ <https://www.cnn.com/2022/02/13/politics/equal-rights-amendment-era-explained/index.html>

⁷ <https://www.nrlc.org/wp-content/uploads/ERASpecialReport-NRLC-01-23-2023.pdf>

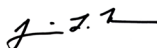
⁸ <https://www.usccb.org/resources/2021.ERA%20FactSheet%20final.pdf>

abortion should be legal either in all or certain circumstances⁹ and 68% of Catholics did not want *Roe* to be overturned.¹⁰ In contrast, the bishops' position — opposing abortion in every instance, even in cases of rape, incest or when it is necessary to preserve a pregnant person's health or life — is only shared by only 14 percent of Catholics.¹¹ One in four abortion patients in this country identifies as Catholic,¹² and their decisions were made in good conscience and with gratitude for access to equitable and compassionate abortion care.

There has never been a more urgent moment to enshrine equality for people of all genders into the Constitution. We agree with opponents of equality on only one thing — that the ERA will be used to protect abortion access. We see that as vitally important and part of the reason we urge you to finalize the amendment as soon as possible. Catholics for Choice thanks Chair Durbin and the Senate Judiciary Committee for holding a hearing on this incredibly important and timely topic and for the opportunity to provide testimony. We look forward to working with Congress to advance S.J. Res 4, H.J. Res. 25, and any other legislation that will help get the ERA across the finish line and finally cement sex equality into the Constitution.

Please do not hesitate to reach out to Shannon Russell, Director of Policy, at russell@catholicsforchoice.org with any questions or for additional information.

Respectfully submitted,



Jamie L. Manson
President, Catholics for Choice

⁹ <https://news.gallup.com/poll/244097/legalty-abortion-2018-demographic-tables.aspx>

¹⁰ <https://www.pewresearch.org/fact-tank/2020/10/20/8-key-findings-about-catholics-and-abortion/>

¹¹ *Id.*

¹² <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014>

Mr. Eric R. Dahlen



March 4, 2023

Dear Sen. Durbin,

I am writing to request your support for S.J.Res.4 - A joint resolution removing the deadline for the ratification of the Equal Rights Amendment. This joint resolution indicates that the Equal Rights Amendment was ratified by three-fourths of the states and is therefore a valid constitutional amendment, regardless of any time limit contained in the original proposal.

We still need this amendment, and I hope you will support this joint resolution.

Sincerely,



Eric R. Dahlen





**Democrats Abroad Submission of Written Testimony for SJ Res 4 –
February 28, 2023**

Democrats Abroad, the official Democratic Party arm for the 9 million U.S. citizens living outside of the United States, urges the Senate to pass SJ Res 4, the bipartisan resolution affirming that Congress acknowledges the Equal Rights Amendment (ERA) as valid. The ERA has been ratified by three-fourths of the states, thus meeting the requirements outlined in Article V of the U.S. Constitution.

Since the United States was founded, women have lived in our country knowing each day that we are not adequately or equally protected by our Constitution. The Equal Rights Amendment was first introduced in 1923. We fully understand that our constitutional rights have been challenged and chiseled away before our eyes. We are confident these attacks on the constitutional rights of women will continue until the ERA is added to our Constitution. Women will continue to fight for equality until the ERA is added our Constitution, guaranteeing equal rights for people of all genders.

The Commonwealth of Virginia became the 38th state to ratify the ERA in 2020. Now in 2023, the two-year mandated hold has passed, and the 28th Amendment should be added to the U.S. Constitution. In 1992, the 27th Amendment was added to our Constitution more than 200 years after James Madison introduced it, setting the precedent today for inclusion of the ERA in our Constitution.

Democrats Abroad wants to affirm our support for SJ Res 4 because the legislation affirms the validity of the ERA. Adding the 28th Amendment to our Constitution secures a high standard of scrutiny in cases of sex discrimination and shores up a guarantee of equal rights against the whims of activist judges or lawmakers seeking to overturn our rights. The 28th Amendment will be a major

step forward to help move so many women away from living in poverty, equally protecting women's healthcare and addressing many other equality issues.

Democrats Abroad supports President Biden's call for Congress to affirm the ERA. On January 27, 2022, the ERA went into effect on the two-year anniversary of Virginia's ratification, making it the 38th and final state needed to pass the ERA. Although passage of SJ Res 4 is not required, Congress can, and should, act to remove any ambiguity that there is no time limit on equality.

Most of Democrats Abroad's members live in countries where equality is explicitly part of their host country's constitution. Over 85% of all country constitutions have equality in their constitutions, and every new country constitution since 1949. Members of Democrats Abroad do not want to lose those rights when they are back in the United States. We also want all our family and friends back home to have their rights enshrined in the Constitution.

We thank the Senate Judiciary Committee for holding this critically important hearing.

Submitted by:

Shari Temple

ERA Task Force Chair

Democrats Abroad

Texas voter living in Munich, Germany

28 February 2023

Re: Senate Joint Resolution 4 + Equal Rights Amendment

Dear Senate Judiciary Committee,

I write in support of the Equal Rights Amendment (ERA) and Senate Joint Resolution 4 (SJ Res 4). The ERA reached the threshold of ratification in 75% of US states more than three years ago. The ERA explicitly guarantees that all rights held by the Constitution are held equally by all US citizens without regard to sex. I see that there are groups within our country who believe that people who are not men are NOT endowed with the same unalienable rights as are men. I see the attacks on women's ability to earn a livelihood, to make healthcare choices independently, to vote with the same ease as men who rarely change their names upon marriage. As an American woman and mother of daughters, I cannot fathom a free and just USA in which I and my daughters have fewer rights and liberties than our male fellow citizens. It simply would not be American.

And yet, currently there is only one right that the Constitution specifically affirms and applies equally to women and men: the right to vote. That's an important one but it should not be the ONLY one.

Unless we put the bedrock principle that equality of rights cannot be denied on account of sex into the US Constitution, the victories women have achieved over 200 years are vulnerable to erosion or reversal at any time. Besides the gross unfairness and human rights perspective, loss of rights for non-male citizens would have a dramatic and chilling effect on the USA's economic, scientific, technological, medical, and many other types of markets and standings.

I urge you to pass SJ Res 4 to remove the arbitrary time limit preventing the ERA's advancement and affirm the ERA as the 28th Constitutional Amendment.

Thank you.

Kind regards,

David Denton
Johns Creek, Georgia

To: durbin_testimony@judiciary-dem.senate.gov, chastidy_burns@judiciary-dem.senate.gov,
stephanie_trifone@judiciary-dem.senate.gov

*TESTIMONY ON S.R. 4 BEFORE U.S. SENATE JUDICIARY COMMITTEE
FROM THE EQUAL RIGHTS AMENDMENT NORTH CAROLINA ALLIANCE
FEBRUARY 2023*

My name is Roberta Madden; I am a co-founder and board member of the Equal Rights Amendment North Carolina Alliance. For more than six decades, I have worked to make the Equal Rights Amendment part of the United States Constitution. Previously living in Iowa, Tennessee, Louisiana and other states, I personally experienced sex discrimination. I was unable to obtain a credit card in my own name. I was excluded from jury service. I was paid three-fourths of the wages earned by men for the same job. Without the Equal Rights Amendment, women had no legal recourse.

The ERA North Carolina Alliance is proud to support Senate Resolution 4—a simple proposal.

Albert Einstein believed that everything should be made as simple as possible--but no simpler.

Here's a simple idea—and an old one: American women and men deserve equal rights under the Constitution. In 1776, Abigail Adams wrote to her husband John, who was participating in the Constitutional Convention: “Remember the Ladies, and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If particular care and attention is not paid to the Ladies we are determined to foment a rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.” But John ignored Abigail's plea and left women out of the U.S Constitution.

Amending the Constitution is pretty simple: two-thirds of both houses of Congress propose an amendment, then three-fourths of the state legislatures need to ratify it. That's it. No mention of a deadline. In fact, the 27th Amendment (dealing with congressional pay raises) proposed by Congress in 1789 specified no deadline. Over 200 years later, the state legislatures finally ratified it—a period considered “sufficiently contemporaneous.”

The Equal Rights Amendment has its own long, complex history. Introduced in 1923, passed by Congress in 1972, it then went to the states for ratification. However, some wily legislators had attached a seven-year deadline (later amended

to 10 years). The time limit, passed by a joint resolution, appears only in the preamble, not in the ERA itself. Deadlines didn't appear in amendments until the 20th century, beginning with Prohibition, and then they were included only sporadically.

Nevertheless, the time limit became an issue, decades after the 1982 deadline, when the last three of the needed 38 states ratified the amendment in 2017, 2018, and 2020.

Women today face a significant gender pay gap, pregnancy discrimination, violence against women, loss of reproductive rights, discrimination in sports, and much more. Only a constitutional amendment can protect women and men from laws that discriminate on the basis of gender. Only a constitutional amendment can prevent legislators, the executive branch, or the courts from changing, diluting, or ignoring laws that are supposed to protect women and men from sex discrimination.

President Biden has expressed his continuing strong support for the ERA and has declared that the only action needed now must come from Congress. The National Archivist refused to certify the ERA after ratification by the 38th state because of an order from the prior administration which prohibited his doing so.

Meanwhile, the Attorneys General of ratified Nevada and Illinois filed a lawsuit, arguing that under Article V, a time limit in a congressional resolution cannot stand in the way of an amendment that has now been ratified by three-quarters of the states. Their suit languishes in an appeals court.

Section 3 of the ERA specifies that "this amendment shall take effect two years after the date of ratification." The idea was that the states would have two years to bring their laws into accordance with the ERA. The last of the required 38 ratifications occurred on January 15, 2020.

Meanwhile, the prominent law firm Winston and Strawn is combing through laws on the books in North Carolina, Nevada, and other states, uncovering numerous laws that codify sex discrimination. State legislators must get busy bringing those laws into accord with the 28th Amendment, which should now legally be considered part of the Constitution.

The ERA-NC Alliance continues working for ratification. Even though the ERA is actually the 28th Amendment, it's important for North Carolina's legislature to sign

on. It's an embarrassment to our state that North Carolina did not ratify the 20th (suffrage) Amendment until 1971.

Yes, it's complicated. Now, in the final stretch, we are striving for the simplicity on the other side of complexity.

The ERA-NC Alliance urges the Judiciary Committee and the full Senate to approve Senate Resolution 4.



**Testimony to the Senate Judiciary Committee
by the ERA Project at Columbia Law School and Constitutional Law Scholars
on Joint Resolution [S.J.Res. 4: Removing the Deadline for the Ratification of
the Equal Rights Amendment](#)**

February 28, 2023

With respect to ratification of constitutional amendments “Congress is uniquely equipped to decide the timeliness question,” because the constitution made Congress the “director of the Amendment process.”

Ruth Bader Ginsburg

The Equal Rights Amendment Project at Columbia Law School (ERA Project)¹ and the undersigned constitutional law scholars provide the following analysis of S.J.Res. 4, resolving to remove the time limit for the ratification of the Equal Rights Amendment (ERA) and declaring the ERA fully ratified.

Introduction

In the analysis below, we make several points related to Congressional power to remove the time limit for the ratification of the ERA and declaring it fully ratified:

- Congress has the authority to amend, extend, or repeal the ratification time limit placed in the preamble to the ERA.
- Little weight should be given to a federal court ruling, the Congressional Research Service, and the Office of Legal Counsel that the time limit for state ratifications of the ERA expired in 1982.
- It matters that the time limit for state ratification of the ERA was placed in the *preamble* of the Congressional resolution proposing the amendment and not in the *text* of the amendment itself.
- The text of Article V specifically references state ratifications, and makes no mention of rescissions or withdrawals of earlier ratifications of proposed constitutional amendments. Not only are state legislative rescissions not accounted for in the Constitution, there is no historical precedent for recognizing state rescissions. Even if rescissions had a place in the constitutional amendment process, Congress is in the best position to recognize or reject state legislative rescissions or withdrawals of earlier ratifications of a proposed amendment

¹ The ERA Project at Columbia Law School’s Center for Gender and Sexuality Law is a law and policy think tank established in January 2021 to develop academically rigorous research, policy papers, expert guidance, and strategic leadership on the Equal Rights Amendment (ERA) to the U.S. Constitution, and on the role of the ERA in advancing the larger cause of gender-based justice.

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Article V of the Constitution sets forth the procedures for amending the Constitution and specifically anticipates no role for courts or the Executive Branch in this process. Authority to propose and ratify amendments lies fully in the political process, in Congress, state legislatures, and/or constitutional conventions. As such, the project of constitutional amendment is among the most quintessentially democratic exercises of self-government anticipated by the Constitution, and the amendment process should be left to the most representative bodies—Congress, state legislatures, and constitutional conventions. So, too, questions relating to the procedures for proposing and successfully ratifying proposed amendments are essentially political questions, properly left to the authority of political bodies to resolve.

For these reasons, disagreements related to proposed amendments should be addressed in ways that reflect and reinforce the underlying democratic structure and values of the amendment process itself. As between possible resolutions to a dispute relating to the ratification of a proposed amendment, the most democracy-enhancing answer should be favored.

Article V requires that any amendment be proposed by 2/3 of both houses of Congress and ratified by 3/4 of the state legislatures. The ERA has satisfied this high bar, yet uncertainties linger surrounding a congressionally created seven-year time limit for state ratification of the ERA and the impact of state efforts to rescind prior ratifications.

While Article V seems quite clear in what is required to amend the Constitution, in practice its implementation has resulted in a wide range of divergent procedures and irregularities. Debates like those surrounding the ERA have been the norm for nearly all of the 27 amendments to the Constitution.

The questions we seek to clarify about the status of the ERA are not unusual but the norm. Examples of legal uncertainties in previous amendments include:

- The 12th Amendment (which provides for separate Electoral College votes for President and Vice President), was approved in the Senate by 2/3 of a quorum and not the full body.
- The 13th, 14th, and 15th Amendments were ratified in the immediate aftermath of the Civil War and were accomplished through legal maneuvers that were highly unusual in violation of Article V—yet are widely and justly regarded as foundational elements of our modern democracy.
- The text of the 16th Amendment (which authorizes the federal income tax) varied between state ratifications, yet now forms the basis for the ubiquitous federal income tax.
- The 27th Amendment (sometimes called the “Madison Amendment,” which governs Congressional pay raises) was proposed by the First Congress and then took more than 200 years to be ratified by 38 state legislatures, and is now accepted as a part of the Constitution.²

1. Relevance of the Time Limit to the ERA’s Final Ratification

² Pozen, David E. and Schmidt, Thomas P., The Puzzles and Possibilities of Article V (2021). Columbia Law Review, Vol. 121, pp. 2317-95, 2021, Available at SSRN: <https://ssrn.com/abstract=3834066>

a. Congress has the clear authority to amend, extend, or repeal the ratification time limit placed in the preamble to the Equal Rights Amendment

In 1973, the resolution passed by Congress proposing the ERA was prefaced by a resolving clause that included a seven-year time limit for state ratification of the amendment: “the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress.”³ Congress subsequently extended the time limit for another three years, to June 30, 1982.⁴

Given that the 38th state to ratify the ERA occurred after the expiration of the time limit, thus securing the requisite number of state ratifications under Article V, questions remain regarding 1) the validity/legal effect of the time limit itself; 2) the significance of state ratifications after the expiration of the time limit; and 3) Congress’s power to extend and/or remove the time limit retroactively.

In *Dillon v. Gloss*, the Supreme Court held that Congress’s authority to impose a reasonable time limit for state ratification is implicit in Article V and “an incident of its power” to determine the mode of ratification under Article V.⁵ In that case, the Court upheld Congress’s specification of a seven-year time limit on the ratification of the 18th Amendment establishing prohibition. This principle was affirmed by the Supreme Court in *Coleman v. Miller*, holding that “Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications.”⁶

If Congress has the power to set the time limit for ratification, then it would follow from the principle of anti-entrenchment that a subsequent Congress could amend, extend, or repeal a previously established time limit. Of course, this conclusion may be different in cases where the time limit is included in the body of the amendment’s text itself, raising different concerns about authority to amend or repeal the time limit after states have ratified both the amendment and the time limit.

As such, Congress has the power through resolution to extend or repeal the time limit set forth in the preamble to the original resolution proposing to the states ratification of the ERA.

b. What weight should be given to a federal court ruling, the Congressional Research Service, and the Office of Legal Counsel maintaining that the time limit for state ratifications of the ERA expired in 1982?

In 2020, a federal judge in the District of Columbia ruled that “Congress set deadlines for

³ House Joint Resolution 208 (1972).

⁴ House Joint Resolution 638, (1978).

⁵ 256 U.S. 368, 375–76 (1921).

⁶ 307 U.S. 433, 456 (1939).

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ratifying the ERA that expired long ago” and that the recent ratifications asserted by Nevada, Illinois, and Virginia “came too late to count.”⁷ This case is on appeal before the D.C. Circuit and was argued in Fall 2022.

The central holding of the District Court’s ruling was that the plaintiffs did not have standing to bring the suit in the first place, so the court’s discussion of the time limit is *dicta*, meaning that it was not essential to the holding and is not legally binding. The District Court’s opining on the court’s jurisdiction to determine the validity of the congressionally imposed time limit and the validity of the last three state ratifications in Nevada, Illinois, and Virginia was outside the scope of its ruling based on narrow standing grounds.

The Congressional Research Service (CRS) has concluded several times that the ERA “formally died on June 30, 1982, after a disputed Congressional extension of the original seven-year period for ratification.” Of course, the CRS’s interpretations of legal questions are advisory, not binding, on Congress. More importantly, the positions taken by the CRS on the ERA time limit do not contradict the position that Congress had the power to extend the time limit in 1977, and this power should, and does, include the power to extend or repeal the time limit through joint congressional resolution.

The Office of Legal Counsel’s (OLC) opinions on this issue have swung back and forth depending on the position of various presidential administrations. First, during the Carter administration (concluding that Congress has the authority to extend the ERA time limit by simple majority), then the Trump administration (stating that the congressionally imposed time limit was binding and, upon its expiration, Congress did not have the power to remove or extend it), then back to the Biden administration (Congress is best positioned to resolve unresolved issues). The currently operative memo leaves the question to Congress to resolve, which is the appropriate forum for the resolution of this issue.

The current OLC has now cleared a path for Congress to consider and pass a joint resolution that would lift the time limit on final ratification of the ERA. It is important to recognize, however, that Article V enumerates no role for the Executive Branch in the process of amending the Constitution, and as such, OLC’s opinions are informative but not binding on Congress in anyway.

Some opponents have taken the position that upon the expiration of the time limit for ratification of the ERA in 1982, the ERA became a legal nullity and that Congress had to act while the measure was actually pending; that is, before it expired with the passage of the ratification time limit. Unfortunately, these parties cite no authority for this position. In fact, there is no grounding or justification for this position in the text of Article V, in the past practices of Congress related to other amendments, or in any court decisions interpreting congressional authority under Article V.

- c. Is there any legal significance to the fact that the time limit for state ratification of the ERA was placed in the *preamble* of the congressional resolution proposing the amendment and not in the *text* of the amendment itself?**

⁷ *Virginia v. Ferriero*, 525 F.Supp.3d 36, 40 (D.D.C. 2021).

Time limits on ratification of proposed amendments to the Constitution are a relatively modern feature of the amendment process. Twenty-three of the 27 amendments to the Constitution were proposed by Congress for state ratification without a time limit. Indeed, the most recent amendment to the Constitution, the 27th, was originally introduced in Congress by James Madison in 1789, did not have a time limit, and took over 200 years for the states to fully ratify in 1992.

Congress first began placing seven-year time limits for amendment ratification in 1917 with the proposal of what would become the 18th Amendment. The 18th, 20th, and 22nd Amendments all contain a time limit clause in the text of the amendment declaring that these articles “shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.” Congress took a different approach with the ERA, placing the time limit not in the amendment’s text but in the preamble, thus raising important questions about its enforceability. Generally, the preamble to legislation, or the Constitution itself, is not regarded as a source of law or enforceable.⁸

To the extent that Congress has the authority to set the time for state ratification of proposed amendments, this power comes not from Article V, which is silent as to time limits, but rather from Congress’s implicit power to determine the *mode* of ratification under Article V.⁹

2. What effect is to be given to states that have voted to rescind prior ratifications of the ERA?

Five state legislatures, Nebraska, Tennessee, Idaho, Kentucky, and South Dakota, have voted to rescind their earlier ratifications of the ERA. How should those votes be treated under Article V?

Article V’s text says nothing about a state’s power to *rescind* or *withdraw* an earlier ratification of a proposed amendment; instead, it speaks only to state *ratification*. One way to read this language is to conclude that once a state has ratified an amendment, it cannot reverse that decision. Another is to hold that the question is left to Congress to decide as a political question, attendant to Congress’s implicit power to determine the mode of ratification under Article V.

There is precedent for the latter position, relating to the ratification of the 14th Amendment when Congress ignored rescissions by two, or more, states. New Jersey (in 1866) and Ohio (in 1867) ratified the 14th Amendment, and in 1868 the legislatures of both states voted to rescind, or “withdraw,” their previous ratifications.

In July of 1868, Secretary of State William Seward sent a message to Congress stating that, notwithstanding the complexities of state ratifications, the three-quarters requirement for ratification had been satisfied, discounting the withdrawals of previous ratifications by New Jersey and Ohio:

⁸ See e.g. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

⁹ *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921).

 **Columbia Law School**
ERA PROJECT

“It appears ... that New Jersey and Ohio have passed resolutions respectively withdrawing the consent of each of said States to the aforesaid amendment; and whereas it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States ... I do hereby certify that if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining in full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said states from such resolution, then the aforesaid amendment has been ratified ... and has been ratified ... for all intents and purposes ... as a part of the Constitution of the United States.”¹⁰

Congress responded to Seward’s message with a concurrent resolution that declared the 14th Amendment ratified, and included New Jersey and Ohio on the list of ratifying states.

The 14th Amendment precedent could be interpreted to conclude that Congress has the power to recognize or reject state legislative rescissions/withdrawals of earlier ratifications of a proposed amendment, and that the matter of final declaration is an essentially political question to be resolved by Congress, sometimes upon the recognition or recommendation of other political authorities.

Conclusion

The text of the Constitution, along with historical and legal precedents, instruct that incident to Congress’s power to determine the mode of ratification under Article V, Congress has the authority to create, amend, and remove a time limit for state ratification of proposed constitutional amendments, and that the meaning and validity of state rescissions of prior ratifications can be determined by Congress as an essentially political, not legal, question.

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¹⁰ William H. Seward, 15 Stat. Leg. 706 (July 20, 1868).



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Statement of S. Mona Sinha on behalf of Equality Now
 Testimony for the U.S. Senate Committee on the Judiciary Hearing on 28 February 2023
The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution

Greetings Chair Durbin and Distinguished Members of the U.S. Senate Committee on the Judiciary. Thank you for holding this hearing at a critical moment in United States history. My name is S. Mona Sinha and I am the Global Executive Director of Equality Now, an international human rights organization, incorporated in New York and elsewhere, working globally with grassroots organizations and coalitions such as the ERA Coalition to protect and promote the rights of all women and girls.

Equality Now's mission is to achieve legal and systemic change that addresses violence and discrimination against women and girls around the world. I am honored, the week before International Women's Day, to provide this written testimony in support of the Equal Rights Amendment (ERA) and **S.J. Res. 4 - Removing the deadline for the ratification of the Equal Rights Amendment**, which recognizes that the ERA is "valid to all intents and purposes as part of the Constitution".

Equality Now has seen the pervasive damage done to women and girls wrought by legal inequality, including the promotion of gender-based violence (GBV) in discriminatory laws. Conversely, we have seen the tremendous benefits gained by countries that have embraced equality in the law, including in their constitutions, the supreme law of the land.

In other countries, constitutional equality provisions have advanced progress on important issues such as the reform of parental leave to incentivize equal caregiving between parents, and on GBV issues such as the elimination of marital rape exceptions and discriminatory child marriage provisions,¹ and the upholding of an anti-female genital mutilation (FGM) statute².

The vast majority of countries around the world recognize the pervasive harm arising from sex inequality and the need for express constitutional guarantees of equality on the basis of sex. The United States is a **global outlier** in not having a constitutional equality provision - 85% of other UN member states do have one.³

¹ Concrete examples of these advances from around the world are elaborated on in Equality Now's joint *amicus curiae* brief with women's rights organizations from every region of the world in *Commonwealth of Virginia, et al v. Ferrero* filed on January 10, 2022 in the United States Court of Appeals for the District of Columbia Circuit, No. 21-5096, available at

<https://equalitynow.storage.googleapis.com/wp-content/uploads/2022/01/13220010/2022.01.10-Equality-Now-et-al-ERA-Amici-Brief.pdf>

² See Dr. Tatu Kamau v. AG & Others, Judgment Nairobi H.C. Constit. Pet. No. 244 of 2019, available at

<http://kenyalaw.org/kenyalaw/cases/view/209223/>

³ Heymann J. et al. 2020. Advancing Equality: How Constitutional Rights Can Make a Difference Worldwide. California: Univ. of California Press. 49. DOI: <https://doi.org/10.1525/luminos.81>

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According to the 2020 comparative constitutional analysis, *Advancing Equality: How Constitutional Rights Can Make a Difference Worldwide*, no constitution adopted since 2000 omits protections against sex-based discrimination. Furthermore, countries such as France, Germany, and Luxembourg have amended their older constitutions in acknowledgment of the concrete harms caused by sex inequality.⁴

The United States is **required to adopt, and implement, the ERA to be in compliance with international law**, its treaty obligations and international human rights standards.⁵ The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, requires States parties to ensure equal enjoyment of civil and political rights for all, including by taking the necessary steps to prevent sex discrimination and gender-based violence.

Sex equality has attained the status of customary international law and is reflected in numerous other treaties and commitments which the United States has also endorsed, including the Beijing Platform for Action, and most recently the UN Sustainable Development Goals. The United States is also prohibited from taking actions that would defeat the object and purpose of the Convention on the Elimination of All Forms of Discrimination against Women, a treaty the United States has signed which requires sex equality. At a bare minimum, this means a constitutional guarantee against discrimination on the basis of sex must be in place. Recognizing the ERA's validity will be an important step towards compliance, and will also give the United States more credibility on the world stage.

Until all women and girls, no matter their gender identity or expression, sexuality, race, class, religion or any other socio-economic status, have a constitutional guarantee of equality on the basis of sex, they will have to rely on an incomplete patchwork of state and federal laws to protect their most basic human rights. Nations across the globe have recognized that this is not sufficient, and it is 100 years, a century, past time that America does as well by finally incorporating the ERA as the 28th amendment to the United States Constitution.

We strongly believe that the Equal Rights Amendment will bring about further positive legal and social change, as it has in other countries, and make an enormous difference in the lives of all American women and girls, their families, and their communities. It could provide further protection from [gender-based violence](#), including sexual and domestic violence, [child marriage](#), [FGM](#), and other forms of violence and discrimination.

Thank you for your attention and your commitment to this vital issue. Having been ratified by the requisite number of states, all constitutional requirements have been met for the ERA to be codified and become the supreme law of the land. Please support S.J. Res. 4 and call for the urgent incorporation of the Equal Rights Amendment into the United States Constitution.

⁴ *Id.* at 58; Julie C. Suk, An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home, 28 Yale J.L. & Feminism 381, 385 (2017).

⁵ See joint amicus brief, note 1.



Written Testimony of Zakiya Thomas, President & CEO
On behalf of the ERA Coalition

Submitted for the Record to Senate Committee on the Judiciary for the Hearing on

“The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our
Constitution”
February 28, 2023

Chairman Durbin, Ranking Member Graham, and members of the Senate Committee on the Judiciary: Thank you for the opportunity to submit this written testimony on behalf of the ERA Coalition and for holding this important hearing on SJ Res 4, the bipartisan resolution declaring the Equal Rights Amendment valid, having met all requirements in Article V of the U.S. Constitution.¹

The ERA Coalition was founded in 2014 to bring concerted, organized action to efforts to ratify the Equal Rights Amendment (ERA). Composed of more than 280 organizations across the country, the Coalition provides education and advocacy on constitutional equality. The ERA Coalition has a sister organization, the Fund for Women’s Equality, which promotes education and outreach on the need for constitutional equality.

It has been a century since the ERA was first introduced in Congress in 1923, seeking to enshrine full equality for all, regardless of sex, in the U.S. Constitution. After steadily gaining traction, the amendment was voted out of Congress in 1972, having been passed overwhelmingly in the House (354-to-24)² and the Senate (84-to-8). It was sent to the states for ratification, though with a seven-year ratification time limit in its preamble. In 1978, Congress passed a joint resolution extending the time limit for ratification to June 30, 1982³. By that date, 35 of the necessary 38 states had ratified the amendment.

Even after 1982, however, advocates in the states continued to pursue ratification in their state legislatures. In 2017, led by State Senator Pat Spearman, Nevada became the first state to ratify the ERA

¹ *A joint resolution removing the deadline for ratification of the Equal Rights Amendment.* (S.J. Res. 4) 118th Congress, 2023-2024. Retrieved February 2023 from <https://www.congress.gov/bill/118th-congress/senate-joint-resolution/4/text?s=1&r=1&q=%7B%22search%22%3A%5B%22sj+res+4%22%5D%7D>.

² *An amendment to the Constitution of the United States relative to equal rights for men and women.* H.J. Res 208. 92nd Congress. 1971-1972. Retrieved February 2023 from <https://www.govinfo.gov/content/pkg/STATUTE-86/pdf/STATUTE-86-Pg1523.pdf>

³ *Joint resolution extending the deadline for the ratification at the equal rights amendment.* H.J. Res. 638. 95th Congress. 1977-1978. Retrieved February 2023 from [https://www.congress.gov/bill/95th-congress/house-joint-resolution/638#:~:text=638%20%2D%2095th%20Congress%20\(1977%2D,Congress.gov%20%7C%20Library%20of%20Congress](https://www.congress.gov/bill/95th-congress/house-joint-resolution/638#:~:text=638%20%2D%2095th%20Congress%20(1977%2D,Congress.gov%20%7C%20Library%20of%20Congress)

since 1977. Illinois followed in 2018. In 2020, the Virginia General Assembly voted to ratify, , bringing the number of ratifying states to the necessary 38. With Virginia's ratification, the ERA has now been ratified by three-quarters of the states, so it has satisfied all requirements for an amendment under Article V of the Constitution.

Unfortunately, there are still questions about the ERA's validity. These questions have been amplified by the Archivist's failure to comply with the federal law requiring publication of the ERA upon satisfaction of all constitutional requirements. The Archivist's decision was based on an opinion published by the Department of Justice's Office of Legal Counsel (OLC) under the Trump Administration, which cites the time limit in the 1972 joint resolution as setting a permanent expiration date for the ERA, despite analysis by the nation's leading constitutional scholars to the contrary.⁴ The OLC has since clarified that its opinion is not a barrier to Congressional action.

This is the first time in our history that an amendment has fulfilled all ratification requirements under Article V and yet has not been recognized as part of the U.S. Constitution. Congress should now recognize it as valid, notwithstanding the 1972 time limit. The time limit was never a part of the language of the amendment voted on by the states; it appears only in the preamble introducing the amendment, so it is merely advisory and cannot stand in the way of an amendment that satisfies all Article V requirements. Moreover, Congress retains the power to change the time limit—as it did in the late 1970s—and it also retains the power to declare the ERA valid notwithstanding the time limit and the efforts by a handful of states to rescind their prior ratifications. SJ Res 4 would remove any doubt that the ERA is valid today as the 28th Amendment to the U.S. Constitution.

While others will focus their testimony on the procedural arguments in support of this resolution, our intention in this testimony is to discuss how the Senate's actions today will pave the path for a better future for generations to come. The ERA is as important today as it ever was. There can be no time limit on equality.

The ERA provides an explicit guarantee of protection against discrimination on the basis of sex in the U.S. Constitution.

Great progress has been made by the Courts in interpreting the 14th Amendment's Equal Protection Clause to provide some protection against discrimination on the basis of sex. The recent *Dobbs* decision, however, shows that a majority of our current Supreme Court follows an originalist interpretation of the Constitution—a document that was written before women and people of color could vote, own land, or otherwise live as free individuals.⁵ As the late Justice Antonin Scalia noted,

⁴ U.S. Department of Justice, Office of Legal Counsel (2020). *Ratification of the Equal Rights Amendment, Opinion* by Steven A. Engle. Washington, DC Retrieved February 2023 from <https://www.justice.gov/olc/file/1232501/download>

⁵ The New York Times (2022). *The Dobbs v. Jackson decision, annotated*. Retrieved February 2023 from <https://www.nytimes.com/interactive/2022/06/24/us/politics/supreme-court-dobbs-jackson-analysis-roe-wade.html>.

"Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that."⁶

We do not accept this reading of the Constitution. At a minimum, though, the *Dobbs* decision illustrates the importance of the amendment process. If the meaning of the Constitution's current equality guarantee is frozen in time in 1868—when the 14th Amendment was ratified—then it is all the more important to add an amendment that explicitly protects against discrimination on account of sex. Women and the LGBTQIA+ community have gained too much in recent years for their rights to be in question.

The ERA makes a critically important statement about equality. The Constitution reflects our most cherished values as a nation, and it should contain an explicit statement about sex equality.

The Constitution represents the fundamental principles that govern our society and our government. The Equal Rights Amendment has always been—and continues to be—overwhelmingly popular. Recent polls show that nearly eight in ten U.S. adults support having sex equality in the Constitution.⁷ Women were intentionally left out of the Constitution; it is beyond time to right that wrong. Recognizing the ERA as valid brings our nation closer to the promise of a more perfect union. It is past time for the Constitution to reflect our nation's values, which put individual rights, opportunity, and equality at the forefront.

The ERA sends a particularly important message to children, who need to see evidence in our Constitution that *all* people—regardless of gender, sexual orientation, and gender expression—are equal under the law.

While the amendment's relevance in society has not changed since its introduction 100 years ago, our renewed efforts are centered on women of color (African American, Asian American/Pacific Islander, Latina, and Native American women), as well as gender-nonconforming and transgender women and girls, and nonbinary people—the people who are most impacted by systemic inequities today. The United States has always been a nation made stronger by its diversity. At the same time, discrimination continues to threaten the promise that every individual has an equal opportunity to succeed. And the impact of discrimination on the basis of sex is greater on the members of society who also face discrimination on the basis of race, ethnicity, sexual orientation, gender identity, disability, and so on. Recognizing the ERA as the 28th Amendment to the U.S. Constitution will send an important and urgently needed message that discrimination of all forms is inconsistent with our country's values.

⁶ M. Fisher. (2011). *Scalia says constitution doesn't protect women from gender discrimination*. The Atlantic: Washington, DC. Retrieved February 2023 from

<https://www.theatlantic.com/politics/archive/2011/01/scalia-says-constitution-doesn-t-protect-women-from-gender-discrimination/342789/>

⁷R. Minkin. (2020). [Most Americans support gender equality even if they don't identify as feminists](https://www.pewresearch.org/fact-tank/2020/07/14/most-americans-support-gender-equality-even-if-they-dont-identify-as-feminists/). Pew Research Center: Washington, DC. Retrieved February 2023 from <https://www.pewresearch.org/fact-tank/2020/07/14/most-americans-support-gender-equality-even-if-they-dont-identify-as-feminists/>; M. Dale and J. Noveck. (2020). AP-NORC poll: *Most Americans support the Equal Right Amendment*. Chicago, IL Retrieved February 2023 from <https://apnews.com/article/42b93fd7386089110543f4e1827ded67>

The ERA brings the United States up to par with the rest of the world. Most developed nations (and all new constitutions adopted in the world since World War II) provide some kind of equal rights guarantee.

According to the UCLA WORLD Policy Analysis Center, 85 percent of countries have an explicit prohibition against governmental discrimination on the basis of sex. The United States is not one of them.⁸ The United States is the only industrialized democracy that does not include an explicit provision against sex discrimination in its constitution. The U.S. is viewed as a beacon of democracy and equality in the world, with many looking to it as the example upon which they can base their own standards for human rights. Recognizing the ERA as valid sends a bold message that sex discrimination has no place in society.

The ERA provides additional tools to protect against sex-based violence and discrimination in the enforcement of laws and legislation.

Gender-based violence is a form of sex discrimination and a violation of human rights.⁹ According to a report by the U. S. Justice Department's Office on Violence Against Women (VAWA), one in every 25 women (25%) as compared one in every ten men (10%) experience sexual and physical violence and/or stalking by an intimate partner and report personal intimate violence during their lifetimes.¹⁰ The second clause of the ERA grants Congress power to enact legislation to prohibit discrimination on the basis of sex, providing an additional constitutional basis for legislation to protect against sex-based violence.

The ERA provides additional tools to combat discrimination in government employment, including in education, law enforcement, and the military. This will set a gold standard that would impact employment in all sectors of the economy.

The Federal Government is the largest employer in the country, with 2.1 million civilian workers. Whether or not the protections of the ERA extend to the private sector, businesses often look to the government as setting the standard for employment practices. Women continue to face a pay gap, earning 82 cents for every dollar white non-Hispanic men earned. This pay gap is even wider for Latinas

⁸ J Heymann. (2020) *U.S. protection for constitutional rights falling behind global peers* UCLA WORLD Policy Analysis Center: Los Angeles, CA.

⁹ J. Neuwirth. (2015) *Equal means equal: Why the time for an equal rights amendment is now*. The New Press: New York, New York.

¹⁰ Office of Violence Against Women. (2020) Biennial Report on Congress on the Effectiveness of Grant Programs Under the Violence Against Women Act. U.S. Department of Justice: Washington, DC. Retrieved February 2023 from ocs.google.com/document/d/1kLq0EwZLnDRRWv7ahwjX6PxcldFuPtKQK3-TT3JIE6I/edit

who earned 58 cents, Native American women earning 50 cents, and Black women earning 63 cents.¹¹ Women are also 35 percent more likely to be living in poverty.¹²

The ERA could be used to provide important protections against unequal pay, workplace harassment, and pregnancy discrimination and to advance policies such as parental and paid family leave.

* * *

We recognize that in a free society, there will always be disagreements in how we envision and interpret the concept of equality. There should be no disagreement, however, that prohibiting all forms of discrimination is fundamental to our democracy and the realization of this country's promises of life, liberty, and freedom.

The simplicity of the ERA's first section speaks volumes in a mere 24 words: "Equality of rights shall not be denied or abridged by the United States, or by any state, on account of sex." SJ Res 4 allows the amendment process to proceed as the Framers intended—without interference by a vocal minority that fears a society that values sex equality. In affirming that constitutional sex equality that should never have been left out of our nation's narrative, Congress can act now to set us on a path of renewal and freedom, advancing liberty and justice for all.

We thank the Senate Judiciary Committee for moving forward and exploring "how Congress can recognize ratification and enshrine Equality in our Constitution." We, representing the majority of our nation, depend on the 118th Congress to fulfill our dream and the Nation's promise of an equal future.

¹¹ J. Frye and R.Khatter. (2021). *Women of Color and the Wage Gap*. Center for American Progress: Washington, DC. Retrieved February 2023 from <https://www.americanprogress.org/article/women-of-color-and-the-wage-gap/>

¹² A. Fins. (2020). National snapshot: *Poverty among women and families*. National Women's Law Center: Washington, DC. Retrieved February 2023 from <https://nwlc.org/wp-content/uploads/2020/12/PovertySnapshot2020.pdf>

3.4.23

The following statement is submitted on behalf of The Feminist Front regarding the future of the Equal Rights Amendment and SJ Res 4:

The Feminist Front is a youth and women of color led, national gender justice organization. Together through advocacy, education, and the arts, we actively build towards a more just and care centered feminist future for all. This vital community work has largely been fueled by a desire to see the Equal Rights Amendment incorporated into our Nation's Constitution in our lifetime, which we hope will happen through S.J. Resolution 4.

The Equal Rights Amendment would guarantee equality of rights under the law to all individuals regardless of sex or gender. While its' language may be short and simple, the E.R.A.'s impact would be significant and far-reaching - providing civil rights protections to Americans experiencing gender discrimination, bolstering our economy by unlocking professional potential stifled by that very discrimination, and finally allowing us to join 165 other countries that already have protections against gender discrimination enshrined in their Constitutions. The United States cannot claim to support freedom and liberty while actively denying full equality to women under law. This would be especially momentous as we acknowledge that this year, 2023, marks the 100th year of struggle for the E.R.A. We cannot wait another year, another month, another day, until gender equality is codified by law in the United States. There is too much at stake.

As a youth organization, we know that we would not be submitting this testimony without the work of so many who came before us in these 100 years of struggle. This includes suffragists like Alice Paul & Crystal Eastman, Congresswomen of color like Barbara Jordan whose legacy supporting the E.R.A. has been taken up by Representatives Pressley and Bush today, local LGBTQ+ leaders like Virginia's Danica Roem & Nevada's Pat Spearman, and fierce organizers like the E.R.A. Coalition's Carol Jenkins. It is our honor to continue building upon their rich foundation of feminist organizing for the E.R.A. and it is our duty to ensure that we are the generation that sees it to the finish line. It has been over a century and our generation demands our leadership to be on the right side of history by finally making the E.R.A. a reality.

Our future as Gen Z and Millennials depend on it. As youth, we continue to be some of the most impacted communities forced to reckon with gender inequality and gender discrimination's many consequences, not just on a political level but also a personal one. Several of our organization's leaders are University of California, Santa Barbara (UCSB) alumni and during our time there, we bore witness to a vicious gender-driven school shooting that left six classmates murdered, many more injured, and our college community heartbroken. This massacre was not a senseless, random tragedy. It was instigated by a young man who sought out the violent death of all female students on our campus who he believed had denied him romantically. He recorded videos about it, wrote a misogynistic manifesto, and eventually opened fire on our classmates, rampaging through our small college community of Isla Vista. A place where we were supposed to feel safe. Where our classmates had left their families back home to receive an education. Their young lives ripped away in an instant because of unchecked misogyny. This is just one

example of the costs of gender based violence, of expectations placed upon us by society for the bodies we're born into. It comes at far too high a cost. That's why we want to make it clear that gender discrimination harms all of us at the end of the day.

It limits our potential both as individuals and as a collective nation. Gender discrimination inflicts severe trauma, teaches us that our value is tied to our bodies, and contributes to rising mental health issues. These attitudes seep into all parts of our world: our schools, workplaces, hospitals and contribute to further inequities in education, housing, industry, and healthcare outcomes. Take for example, the fact that there is still pay inequity based on gender. Black women make .64 cents and Latinas make .46 cents for every dollar a white man makes. Or that among all workers—including the millions who worked part-time or for part of the year because of COVID-19—the gender pay gap is at an unacceptable 23% according to a recent Lean In study. Numbers like these matter especially when we are still navigating the pandemic and inflation. Pay equity matters when you have a family to feed and every dollar and cent counts. By passing the Equal Rights Amendment, we can work to combat this issue directly and in turn change the material lives of millions of women and children in the U.S.

Passing the Equal Rights Amendment most importantly will enshrine these protections permanently in our Constitution no matter what administration is in office or which party has the majority. When rollbacks happen, it harms the fabric of our nation and creates instability. Instead, this can be a true bipartisan effort that allows everyone on both sides of the aisle to reap the E.R.A.'s many benefits and champion women's now protected status as equals in this country.

We urge the Senate Judiciary Committee to not ignore the decades of calls, struggles, and sacrifices made in the name of gender equality. Especially now that the House has passed their own joint E.R.A. resolution and voters in Nevada passed what is arguably the most comprehensive state level E.R.A. during the last election. These legislative victories should be understood as charges from the general public who desire the recognition, protection, and affirmation that a federal E.R.A. will provide. If Senate Judiciary Committee members work together and pass Joint Resolution 4 through the full Senate, then and only then will the United States be one step closer to being able to truly call itself the "land of the free."

As an organization run by and for youth, led by survivors of sexual violence, LGBTQ+ folks, people of color, and community organizers, we know what is at stake. As human beings, we are born equal and it is high time the United States Constitution reflected it.



Written Testimony of Belan Yeshigeta and Rosie Couture, Co-Founders and Co-Executive Directors
On behalf of Generation Ratify

Submitted for the Record to Senate Committee on the Judiciary for the Hearing on

“The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our
Constitution”

February 28, 2023

Chairman Durbin, Ranking Member Grassley, and Members of the Senate Committee on the Judiciary, thank you for the opportunity to submit this written testimony on behalf of Generation Ratify and young women and queer people across the country who demand our inclusion in the U.S. Constitution. We are grateful for this crucial hearing on SJ Res 4, the bipartisan resolution declaring the Equal Rights Amendment valid, having met all requirements in Article V of the U.S. Constitution.

Generation Ratify is a movement of over 12,000 young people organizing for the publication of the Equal Rights Amendment (ERA) and advancement of gender justice in the United States. We founded Generation Ratify in July of 2019 along with a few friends. We were high school sophomores who understood that young people had the most to gain from the ratification of the ERA. We mobilized our peers across the state to make Virginia the 38th and final state needed to ratify the ERA. We educated our communities, contacted thousands of voters, rallied outside of the state capitol, and met with our legislators. After months of advocacy, we rang in Virginia's ratification and the ERA's fulfillment of Article V's requirements to become an amendment.

We are still fighting for the ERA's recognition as the 28th Amendment. Our movement has grown from five high schoolers in Arlington, VA to thousands of young people from all 50 states. We've filed two amicus briefs in federal court, organized dozens of rallies and walkouts, contacted over 1.2 million voters, and mobilized hundreds of youth to lobby for gender justice legislation. Young people across the country are spearheading the fight for the Equal Rights Amendment. We know that our freedoms, bodies, and futures are on the line. We have the most to gain from constitutional gender equality, and the most to lose from inaction. Every young person joined our movement for a reason. They understand the ERA will change their life for the better. We've shared these stories with many of your offices through constituent meetings and demonstrations. We would like to highlight a few of our shared stories.

We are students at educational institutions with pervasive sex discrimination. We are students at schools that protect sexual abusers over our safety. We are survivors who have been failed by weak Title IX protections and forced to leave our schools. If Congress recognized the ERA as the 28th amendment of

the United States Constitution, survivors of sexual assault and harassment would have a legal tool to combat sexual violence and strengthen Title IX. **We are also students who have missed class because of our periods and sexist dress codes.** An astounding [84% of high school students](#) have reported missing school at least once because they didn't have access to menstrual products. Nearly 1 in 7 undergraduate women [report](#) being unable to afford the menstrual products they needed at some point in the past-year. Black and Latine menstruators are more likely to be unable to afford menstrual products. Further, a [National Women's Law Center](#) report found dress codes to harm female students' academic performance, particularly Black students. **The ERA will promote gender equality in education and fight inequities that keep young women and queer people, particularly students of color, from succeeding in school.**

We are young people who must have control over our reproductive healthcare to stay in school and pursue our dreams. Many young people do not have the resources to bring a child into this world—but in the 24 states that have fully or partially banned abortion since the overturning of *Roe v. Wade*, we are forced to make decisions about our reproductive healthcare that are against our best interest. Unintended parenthood poses a barrier to receiving a college degree and employment. Further Title X, which exists to provide low-income people with accessible birth control and reproductive care, is under attack. Just this December, a federal judge ruled in *Deanda v. Becerra* that a parent's right to control their children supersedes a child's right to bodily autonomy. The same judge is set to rule on a legal challenge aiming to vacate the FDA's approval of mifepristone, a pill that is necessary to safely perform a medication abortion. A national injunction on mifepristone would disproportionately harm young people of color living in communities where abortion is heavily restricted. The ERA is the solution. State-level ERAs in Utah and Minnesota blocked trigger abortion bans that went into effect last year. Likewise, legal scholars posit that adding the ERA to the Constitution would prompt a reevaluation of *Dobbs*. **We must recognize the ERA as the 28th amendment to the United States Constitution to defend the bodily autonomy and reproductive freedom of America's youth.**

We are queer youth whose identities and right to exist are under attack. Gen-Z is disproportionately queer, with [1/3 members of Gen-Z](#) identifying as a member of the LGBTQ+ community. NPR reports that in the first four months of 2022, [over 200 homophobic laws were introduced](#) in state legislatures. These bills restricted access to life-saving gender-affirming healthcare, outlawed education about the LGBTQ+ community, and banned trans students from competing in sporting competitions. Homophobia and transphobia kills. In 2021, [57 trans individuals were murdered](#) in America. From a youth standpoint, in 2021, LGBTQ+ teens in states with homophobic and transphobic policies were more likely to attempt suicide than those in [states with inclusive policies](#). **We must recognize the ERA as the 28th amendment to the United States Constitution because the ERA will protect queer youth and let us know that we are seen, respected, and validated in our experiences.**

Ultimately, the ERA is the *only* comprehensive response to today's attacks on young women and queer people. On behalf of young people across the country, we thank you for your commitment to advancing the ERA. We look forward to working together to enshrine gender equality in our Constitution.

Generation Ratify – [Generationratify.org](https://www.generationratify.org)

To the Senate Judiciary Committee,

We write to you as the staff of Leading Women of Tomorrow, a national organization predicated on empowering young women and nonbinary individuals to consider careers in public service, with the overall goal of bridging the overwhelmingly apparent gender gap among public service representatives in our society. In doing this, we strive to equip undergraduate students with the resources, expertise, and confidence to grow into fierce advocates in their respective professional sectors. Our mission overlaps with that of the Equal Rights Amendment (ERA) immensely, as the insurance of equitable legal rights for all citizens of the United States regardless of sex would affect our membership assuredly. Since our founding, we have fostered a community of outstandingly kind and dedicated individuals who spend valuable time investing in the betterment of public service, and the termination of legal distinctions between genders in terms of redress in regard to divorce, property, employment, and other crucial matters has the potential to benefit their futures.

We would like to thank the Senate Committee on the Judiciary for holding this incredibly vital hearing on SJ Res 4, the bipartisan resolution affirming that Congress views the Equal Rights Amendment (ERA) as legitimate, having been ratified by three-fourths of the states, as required by Article V of the United States Constitution. The Equal Rights Amendment has been promoting this influential mission for the past century, and now, the efforts are being reversed. As key civil rights are being revoked from marginalized communities across the country, there is no better time than the present to take formidable action to once and for all protect all citizens, not just female-identifying, equally under the law, especially considering that the ERA has been ratified, and has successfully fulfilled the requirements stipulated in Article V of the

Constitution. We, as Leading Women of Tomorrow, want to be absolutely clear in our support of SJ Res 4, which proclaims the validity of the Equal Rights Amendment.

Though there are a plethora of reasons as to why we believe that the ERA is undoubtedly essential in this current moment in America's history, there are a few that we feel are most centrally important to our organization and the lives of our members. Firstly, the ERA emphasizes the areas of the Constitution that reflect our most cherished values as a national organization, which have to do with spreading sex equality. We believe entirely in the deconstruction of institutional barriers set between men and women in society for matters that have no gender affiliation whatsoever, but in modern practice, have become overwhelmingly gendered, such as litigations for employment, property, and divorces. The Equal Rights Amendment also puts incredible efforts toward combatting sex-based discrimination in the enforcement of laws and legislation, which affect our member base directly. Leading Women of Tomorrow, a base of female and nonbinary changemakers, hosts many individuals who seek to enter careers in public service, law, and government. Therefore, we are eternally grateful for the work that the ERA puts in to resist and strike down discrimination in governmental employment, in sectors such as education, military, and law enforcement, which many of our members are interested in.

We wholeheartedly believe that in order for our members, and many other individuals across the nation to fully employ their professional and personal skill sets, it is absolutely vital that SJ Res 4, which affirms the validity of the Equal Rights Amendment, be passed immediately. Thousands upon thousands of citizens are desperate for this kind of positive and invaluable change, and this resolution is a profound step in the right direction, and we need it now.

Sincerely,

Ali Spagnolo

Director of Special Initiatives | she/her/hers

Chloe Ross Bohn

Executive Director | she/her/hers

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**Statement for Virginia Kase Solomón, Chief Executive Officer
League of Women Voters of the United States
US Senate Committee on the Judiciary
Hearing on The Equal Rights Amendment: How Congress Can Recognize
Ratification and Enshrine Equality in Our Constitution
February 28, 2023**

Chairman Durbin, Ranking Member Graham, and Members of the Senate Committee on the Judiciary, thank you for holding this critical hearing to discuss how Congress can recognize the ratification of the next equality amendment and enshrine equality on the basis of sex in the Constitution. My name is Virginia Kase Solomón, and I am the Chief Executive Officer at the League of Women Voters of the United States, (“The League”). The League is a century-seasoned federated organization with more than 500,000 members and supporters across the country who carry out our mission to empower voters and defend democracy. For decades, the League has fought for the final passage and ratification of the Equal Rights Amendment (ERA).

The League of Women Voters of the United States appreciates the opportunity to share with the Senate Judiciary Committee our strong support on this topic, and we hope this hearing will result in achieving consensus on the path forward to affirm the validity of the Equal Rights Amendment as a part of the US Constitution.

The League has fought for ratification of the ERA since it passed through Congress in the 1970s. We believe in the power of women to create a more perfect democracy, and we know that inequality hurts everyone. We seek to secure equal opportunities for all and support equal rights for all under the law, regardless of sex, race, color, gender, religion, national origin, age, sexual orientation, or disability. Today, the League supports the final publication of the fully ratified ERA.

More than 100 years after the ratification of the 19th Amendment constitutionally protected women’s right to vote, the Constitution still does not protect equality on the basis of sex. Despite the 14th Amendment’s Equal Protection Clause, sex discrimination claims are not subject to the same strict scrutiny standard as other classifications, such as race. We see the ramifications of this judicial scrutiny in the ongoing battles against systemic sex discrimination including unequal pay, workplace harassment, pregnancy discrimination, domestic violence, and more. We must address the root cause of inequality by amending our Constitution.



The ERA will constitutionally protect the equality of rights under the law regardless of sex. It is brief and composed of three sections. Section one is twenty-four words and reads, “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” Section two gives Congress enforcement power, and section three dictates that the amendment take effect two years after its ratification.

The ERA has met all ratification requirements as outlined by Article V of the Constitution. More than 50 years ago it was passed through Congress with well over the required two-thirds majority vote and was sent to the states. In 2020, Virginia became the 38th and final state needed to meet the three-fourths state ratification threshold. As Article V outlines, an amendment is a valid part of the Constitution when it is ratified by three-fourths of the states. The effective waiting period has come to an end and the amendment is enforceable. It is past time that the will and ratification rights of the states are respected by ensuring that the ERA is formally recognized as the 28th Amendment.

When Congress passed the ERA in 1972, it included in the amendment preamble a seven-year time limit for states to ratify the amendment. In 1978, Congress exercised its authority to extend the time limit by three years, which passed before all 38 states ratified the amendment. Now, Congress can take action to address any doubt about the validity of the ERA.

Congress is the only branch of government that is given a role in the amendment process outlined by Article V. In 1921, the Supreme Court ruled in *Dillon v. Gloss* that an amendment must be ratified within a “reasonable” and “sufficiently contemporaneous” time after its proposal. Following that decision, in *Coleman v. Miller* (1939), the Court decided that the question of whether an amendment had been adopted within a “reasonable time” was a question for Congress. In 1992, after the Archivist published the 27th Amendment, and more than 200 years after its introduction, Congress resoundingly endorsed the amendment’s passage, effectively establishing a precedent for what is a reasonable time for final ratification of a constitutional amendment. As the Equal Rights Amendment is 100 years old this year, the states’ speedier ratification of the ERA is a clear signal that it is judicious that Congress declare that the ERA’s ratification is within a reasonable and sufficiently contemporaneous time.

Bipartisan legislation, S.J. Res. 4, affirms that the ERA is a valid part of the US Constitution and addresses the question of a ratification time limit. The League is



grateful for the leadership of Senators Cardin and Murkowski over the last several Congresses to move this issue forward. The US House of Representatives has affirmed a similar resolution in the previous Congress and introduced matching legislation. It is time for the Senate to act and affirm that equality is the law of the land.

The fight for the Equal Rights Amendment is 100 years old in 2023, and support for it across the country is stronger than ever. Nearly 75% of Americans support the ERA, according to polling from Associated Press-NORC Center for Public Affairs Research¹. If you believe in equality for all regardless of sex, the League urges you to support S.J. Res. 4 and critically affirm the enshrinement of sex equity in the Constitution once and for all.

The League will continue to fight to ensure that every person is guaranteed equality of rights under the law regardless of sex, because the strength of our democracy depends on it. Thank you again for the opportunity to submit testimony on this vitally important legislation. I look forward to finding ways that the League of Women Voters can continue working with you on this important issue moving forward.

¹ <https://apnews.com/article/nyc-wire-nc-state-wire-us-news-ap-top-news-politics-42b93fd7386089110543f4e1827ded67>

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February 27, 2023

Senator Richard Durbin
United States Senate
Chair
Senate Judiciary Committee

Senator Chuck Grassley
United States Senate
Ranking Member
Senate Judiciary Committee

Re: Senate Judiciary Committee February 28, 2023 hearing on the Equal Rights Amendment and SJ Res 4

Dear Chairman Durbin and Ranking Member Grassley,

Legal Momentum, the Women's Legal Defense and Education Fund, submits this testimony in full support of SJ Res 4 and affirmation of the Equal Rights Amendment's validity. It is essential, now 100 years after the effort first began, that the United States values of equality, dignity, inclusion and equal opportunity for all is permanently enshrined within our Constitution.

Over the course of our five-decade history, Legal Momentum has fought to realize full equality for women under the law and to eradicate sex-based discrimination and harassment. We have brought challenges under Title VII on behalf of traditional and non-traditional work forces including steel workers, flight attendants, professors, veterans, fire fighters and police officers and under Title IX of the Education Amendments of 1972 on behalf of pregnant and parenting students, students subjected to sexual harassment and violence and students subjected to sex-segregated classrooms. We are proud to have been closely involved in developing the landmark bipartisan legislation that became the Violence Against Women Act (VAWA) of 1994—a watershed moment in seeking equality and freedom from violence for women and girls—and every reauthorization since. Recognizing that issues of sex discrimination intersect with many other forms of subjugation, we have also focused our efforts on issues including affirmative action, the military, the criminal justice system, poverty alleviation, and many other issues. We have, and continue to, fight for bodily autonomy and the right to be free from government surveillance and intrusion into reproductive healthcare. And we have advocated for the Equal Rights Amendment since our inception.

As Legal Momentum continues its mission to advance gender equality, we believe that the strength and endurance of a constitutional amendment guaranteeing the equal rights of women can no longer be overlooked. We know from our 50-years of legal advocacy that the words of the Constitution can never be adequately replaced with the acts of Congress and the Supreme Court alone. The ERA will confirm the rightful place of sex equality in all aspects of American life and finally provide an explicit guarantee of protection against discrimination on the basis of sex in the U.S. Constitution which will give clarity to Congress and the Supreme

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Court to carry out their functions to enact and interpret, respectively, laws aimed at ensuring equality and safety.

The ERA has met all of the requirements necessary for a constitutional amendment: passed by the Congress and ratified by 3/4 of the states. While a time limit was included in the original joint resolution, rather than the text of the Amendment itself, SJ Res 4 takes the significant step to eliminate this time limit and affirm that the original ratification process is complete. We thank the Committee for holding this important hearing on SJ Res 4 and urge that it move forward. The core principle of the ERA is simple: that women deserve to be treated equally. The Constitution reflects our most cherished values as a nation and putting sex equality in the Constitution has broad impacts on all aspects of our society. Some 233 years after women were first omitted from the Constitution it is past time to act.

Respectfully submitted,



Carol Moody
President and CEO
Legal Momentum, the Women's Legal Defense and Education Fund



Maryland National Organization for Women

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February 28 2023

**Testimony of Maryland Chapter of
National Organization for Women on SJ Res 4**

Maryland NOW supports the mission of National Organization for Women, including the priority to ensure constitutional equality for women with an amendment to the U.S. Constitution that guarantees equal rights to every US citizen regardless of sex. At the state level, Maryland NOW is committed to giving all Maryland women a voice in state government and advancing women's rights through legislative action. We work independently, with coalition partners, and with legislators and committee leaders to advance legislation that protects and guarantees women's rights in Maryland. Specific to the Equal Rights Amendment (ERA), Maryland NOW aims to increase awareness of the ERA among Marylanders; organize Marylanders to take action to promote recognition and validation of the ERA as the 28th Amendment to the Constitution; and take action to support protection, implementation, and enforcement of the Maryland state ERA (MD ERA).

We thank the members of the Senate Committee on the Judiciary for holding this important hearing on SJ Res 4, the bipartisan and bicameral resolution affirming that Congress views the ERA as valid, having been ratified by three-fourths of the states, as required by Article V of the U.S. Constitution.

**Maryland NOW supports SJ Res 4,
which affirms the validity of the Equal Rights Amendment.**

A full century has passed since Alice Paul first introduced the ERA to Congress in 1923. Although the resolution was initially slow to gain momentum, Americans who valued liberty and justice for all were undeterred and continued to introduce the ERA in every Congressional session moving forward. It was more than 80 years ago that the Republican Party recognized the ERA's relevance to party members and constituents and added the ERA to their political platform; the Democratic Party followed suit shortly thereafter. Over the next three decades both parties continued to advocate for the ERA until Congress finally passed the resolution in March 1972. Maryland was early to ratify the ERA in May 1972, and in that same year Maryland voters approved an amendment to the state Constitution guaranteeing Marylanders "equality of rights under the law shall not be abridged or denied because of sex." Fifty years later, we at Maryland NOW are today relieved and elated that with ratification of the US Equal Rights Amendment in January 2020 all US citizens finally share the guarantee of equal rights that Marylanders have enjoyed for five decades.

The Equal Rights Amendment has met the requirements for a Constitutional Amendment set out in Article V of the US Constitution: the resolution passed both houses of Congress by a two-thirds vote and three-quarters of the states ratified the amendment. However, opponents of the ERA continue to refute and cast doubt as to its validity, basing their contentions primarily on (a) a time limit for ratification contained in the preamble to the amendment and (b) cases of a few states' rescission of ratification. This committee has heard and will hear expert testimony from law scholars that these contentions are baseless; the menacing ambiguity these contentions introduce threatens the Constitutional right of all US citizens to freedom from discrimination on the basis of sex. Congress is in a position to allay any doubts about the validity of the ERA by passing SJ Res 4 and HJ Res 25, thereby confirming in both houses that the ERA is valid to all intents and purposes as part of the US Constitution.

The US is a global outlier when it comes to guarantees for equality on the basis of sex, which is a detriment to not only our women and girls, but to all of our citizens. We have learned from countries with constitutional guarantees of sex equality and from states with constitutional ERAs that the ERA will provide the entire nation stronger protections from discrimination and strengthen the power Congress and state legislatures have to enact laws that ensure better legal protection against sexual assault and domestic violence. Perhaps most important, the ERA makes a fundamental statement about equality as an American value; spe-

cifically, the inclusion of sex equality in the US Constitution emphasizes and reinforces expectations for all citizens and has far reaching impacts on all aspects of our society.

In closing, we at Maryland NOW believe our nation is positioned to be a stronger, more unified nation and to re-establish itself as a global leader in civil and political rights now that our Constitution includes language protecting the rights of all citizens regardless of sex. However, the level of unity and enhanced status afforded by the 28th Amendment depends on the clarity and resolve with which all aspects of our government recognize the ERA as an Amendment to the US Constitution.

Thank you for the opportunity to express our views.

Respectfully submitted,



Barbara Hays
President, Maryland NOW



Mary Ann Gorman
Maryland NOW ERA Task Force Chair

Mid-Day Women's Alliance Testimony for Hearing on SJ Res 4**Mission Statement of MDWA**

The mission of Mid-Day Women's Alliance shall be to promote equity for all women and to develop their potential through advocacy, mentoring, networking, skill building and education.

Purpose

Mid-Day Women's Alliance supports the right of women to develop to their fullest potential and encourages responsible political involvement at every level of government.

Fundamental to MDWA's Legislative platform is support of the Alice Paul Equal Rights Amendment—since all statutory rights are derived from the U.S. Constitution—and ratification of the UN-CEDAW. Enshrining equal rights for all citizens takes priority over all other items on our Legislative Platform until these two laws are enacted at the federal and international levels.

As an organization supporting business and entrepreneurial women, our mission is to advance equity for all women. MDWA's Legislative platform includes taking action on legislation to advance: pay equity, equal opportunities for women in the workplace and schools, women's health issues, access to affordable dependent care, achieving economic security at any age, and ending all violence and acts of discrimination against women.

We thank the Senate Committee on the Judiciary for holding this important hearing on SJ Res 4, the bipartisan resolution affirming that Congress views the Equal Rights Amendment (ERA) as valid, having been ratified by three-fourths of the states, as required by Article V of the U.S. Constitution.

As a business women's group, our Legislative platform is clear on eliminating every form of discrimination and unequal treatment for women: in employment, education, healthcare, ending violence, and economic security. The ERA brings the United States up to par with the rest of the world in protecting everyone (not just women) equally under the law. Most developed nations (and all new constitutions adopted in the world since World War II) provide some kind of equal rights guarantee.

We want to be clear in our support for SJ Res 4, which affirms the validity of the Equal Rights Amendment with the requirements of Article V having been met. Current statutes providing equal pay, eliminating pregnancy discrimination, preventing violence against women, etc. have proven to be insufficient, and any of these laws can be overturned by legislation leaving women at constant risk of having these rights removed.

It's time to provide women equal rights under the U.S. Constitution so that we are no longer seen as 2nd class citizens by the Supreme Court. We ask that SJ Res 4 be passed so that the ERA will be published in the Constitution as the 28th Amendment.



The National Federation of Democratic Women Submission of Written Testimony
for SJ Res 4

February 28, 2023

The National Federation of Democratic Women (NFDW) is an affiliate of the Democratic National Committee, and our objective is to “unite women of the Democratic Party, to promote the cause of the Democratic Party, and to encourage full participation of women in every level of the Democratic Party structure.”

Thank you to the Senate Judiciary Committee for holding this critically important hearing on SJ Res 4, the bipartisan resolution affirming that Congress acknowledges the Equal Rights Amendment (ERA) as valid. The Amendment has been ratified by three-fourths of the states as required by Article V of the U.S. Constitution.

For more than 100 years, women have lived in our country knowing each day that we are not adequately or equally protected by our U.S. Constitution. We fully understand our Constitutional rights have been challenged and chiseled away before our eyes. We are confident these attacks on the Constitutional rights of women will continue until the ERA is added to our Constitution. Women have been fighting for equality for more than 100 years. Adding the ERA to our Constitution will guarantee equal rights for both women and men.

The Commonwealth of Virginia became the 38th state to ratify the Equal Rights Amendment in 2020. Now in 2023, the two-year mandated hold has passed and the 28th Amendment should be added to the Constitution. In 1992, the 27th Amendment was added to our Constitution more than 200 years after James Madison introduced it, setting the precedent today for inclusion of the ERA in our Constitution.

NFDW wants to affirm our support for SJ Res 4 because the legislation affirms the validity of the Equal Rights Amendment. Adding the 28th Amendment to our Constitution secures a high standard of scrutiny in cases of sex discrimination, and shores up a guarantee of equal rights against the whims of activist judges or lawmakers seeking to overturn our rights. The 28th Amendment will be a major step forward to help move so many older women away from living in poverty, equally protecting women's healthcare, as well as addressing many other equality issues.

NFDW supports President Biden's call for Congress to affirm the ERA. On January 27, 2022, the ERA went into effect on the two-year anniversary of Virginia's ratification, making it the thirty-eighth and final state needed to pass the ERA. Although passage of SJ Res 4 is not required, Congress can, and should act to remove any ambiguity that there is no time limit on equality.

Submitted by:

Gail Buckner

President

National Federation of Democratic Women

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Nevada

Audrey Dempsey
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Patricia Farley
Florida

Roxanna Murray
Indiana

Linda Stover
North Carolina

Shari Temple
Democrats Abroad

**The Equal Rights Amendment: How Congress Can Recognize Ratification and
Equality in our Constitution**

TESTIMONY

CHRISTIAN F. NUNES, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN

February 28, 2023

Mr. Chairman, Members of the Committee, thank you for holding this critically important hearing today. My name is Christian F. Nunes and I am president of the National Organization for Women (NOW), the largest feminist grassroots activist organization in the country. Our organization has been working on behalf of a constitutional guarantee of equality for women since our founding in 1966. NOW's thousands of activists played an important role in organizing state's support for ratification of the Equal Rights Amendment (ERA). NOW leaders working closely with members of Congress were instrumental in gaining an extension of the deadline. More recently, our members and supporters helped push through the three-state strategy to bring home the final three states' ratification in Nevada, Illinois and Virginia. At every step of the way, we have found strong bipartisan support for a guarantee of equality for women and men in the Constitution.

The National Organization for Women believes that with ratification by three-fourths of the states the ERA should now be recognized as part of the U.S. Constitution. Our view on the deadline which appears in the preamble of the 1972 proposing legislation is that it has no force of law. States did not vote to approve that deadline; they approved the text set out in these three sections:

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."

Lest any confusion remain about a deadline, we ask that the Senate pass S.J. Res. 4, A joint resolution removing the deadline for the ratification of the Equal Rights Amendment. A constitutional provision against denial or abridgement of rights on account of sex is urgently needed.

American women's equal rights sustained a serious blow in June 2022 when a conservative majority of Supreme Court justices concluded that there is no Constitutional right to privacy that would protect a woman's decision to end a pregnancy. Negating the opinion of seven justices in *Roe v. Wade* (1973), the Roberts Court's ruling in *Dobbs v. Jackson Women's Health Organization* (2022) pushed women solidly back into a second-class status. Shockingly, this decision was the first time in U.S. history that an important right had been taken away. And we fear that other long-recognized rights may be reversed, including access to contraception.

The resulting restrictions on reproductive health care at the state level, including the silencing of providers from advising pregnant persons on how they may access care, the surveillance of women's menstrual data and pregnancies, the efforts to prevent women from crossing state lines for reproductive health care, the threat of criminal prosecutions of providers and now – of patients – and the forcing of persons to continue pregnancies that threaten their health and lives -- has led to a truly dystopian version of American 'freedom' and 'democracy.'

The reaction to the *Dobbs* decision through multiple polling of public opinion shows that a majority of Americans, regardless of political persuasion, believe that abortion care should remain legal in all or most circumstances.

Women's history holds a long narrative about laws, policies and court decisions that affirmed discrimination against women. Throughout most of this country's history women were not full citizens. Women were denied the vote, denied property, denied bank accounts and loans, denied child custody in divorce, denied service on juries, denied admission to higher education, denied access to certain professions and discouraged from participating in the public square. The restrictions and privations imposed on women of color and marginalized women over the centuries is an especially egregious part of that history. It has only been through women dedicated organizing and litigating, beginning in the mid-Twentieth Century and continuing today that we have begun to rewrite history.

But the *Dobbs* decision dims the prospect of success for future sex discrimination challenges that would rely on the Fifth Amendment Due Process Clause or the Fourteenth Amendment Equal Protection Clause. Additionally, there are now more than 200 federal judges who were screened for nomination with the requirement that each and every one oppose abortion rights. It is reasonable to assume that many of these judges hold views that are not underlain with a value that favors women's equality.

For 42 years, the United States has failed to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), one of only six UN member states that have failed to ratify. The Convention would require State parties to commit to embody the principle of the equality of men and women in their national constitutions as part of their domestic legal obligation upon ratifying CEDAW. Signatories agree to adopt the principle of women's equality and an explicit prohibition against sex discrimination in nation's foundational documents. The U.S. should end its outlier status.

A constitutional provision that would embed sex equality as a foundational principle is an urgent necessity to counter the resurgence of laws that have circumscribed the most vital and private aspects of women's lives. Constitutions are the underlying basis of state accountability. Without that accountability, there continues to be an imbalance of power between women and men. A fundamental guarantee of equal rights in the Constitution would not only bring women to a level of equality with men, but such a guarantee would correct the stubborn imbalance of power in American society. It is important, we believe, to understand that women seek empowerment not only to help themselves but also to help save democracy from dangerous abuses of power that threaten its legitimacy.

**Christian F. Nunes, President
National Organization for Women
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Testimony from the National Women's Political Caucus on ERA Enactment

The National Women's Political Caucus—the nation's oldest grassroots multi-partisan organization working to recruit, train and elect pro-choice women at every level of government—has supported and worked for the Equal Rights Amendment since the organization was founded in 1971.

Ratification of the Amendment—which was first proposed 100 years ago—has always been an NWPC “bottom line” issue. The failure of Congress to approve it in 1970 drove our very existence. Our founders understood that more women needed to be elected not just to pass the ERA, but to bring women fully into the political and economic fabric of America. We have worked for over 50 years with many other organizations—not just women's organizations but those committed to equality and justice for ALL Americans—to get the Amendment passed.

For decades, ERA opponents have claimed it isn't necessary. They argue that the 14th Amendment is sufficient to protect the rights of women, but it has never been conclusively adjudicated to include sex as well as race. The only way to fully recognize the legal rights of more than half the nation's population and resist the backlash against the civil rights of women is to put those rights clearly and permanently into the Constitution.

We are frankly tired of waiting for the Equal Rights Amendment. We agree with our partners in the ERA Coalition and Equal Means Equal that *the Amendment has already met the Constitutional requirements for inclusion and should be recognized as such*. Despite the unnecessary and unprecedented requirements for ratification (unlike any other amendment), the ERA was approved by Congress, it was ratified by the required 38 states, and it has been submitted to the Archivist. It should be recognized as the law of the land.

NWPC's purpose is not just to achieve gender parity in public office, both elected and appointed. It is to achieve a democracy that truly represents all its citizens and that ensures the rights of ALL Americans are upheld and their concerns addressed in the public square.

For hundreds of years, our nation has systematically discriminated against women, as it has against people of color.s. The Equal Rights Amendment by itself will not fully correct issues of discrimination and inequality based on sex—but it will give a sound legal test for public policy and a judicial remedy for those who bear the burden of discrimination and inequality. All Americans will be better served by a constitution that includes all of us.

One hundred years after the ERA was first introduced, it is past time. We urge your support for this resolution that will bring the Equal Rights Amendment into the Constitution once and for all.



GEORGETOWN LAW

Victoria Nourse
Professor of Law
Executive Director, Center for Congressional Studies

February 28, 2023

Chairman Richard Durbin
Senate Judiciary Committee
Dirksen Building
United States Senate
Via Email

Dear Chairman Durbin:

Thank you for providing me the opportunity to share this testimony with the Senate Judiciary Committee. In this letter, I explain why, as a scholar of constitutional interpretation, I believe we need an Equal Rights Amendment (ERA) and then respond to objections to the Amendment's procedural status.

A. The Need for an ERA: The Supreme Court has Changed

In June of 2022, the Supreme Court of the United States declared that women had no fundamental rights under the Fourteenth Amendment unless those rights existed in 1868 based on a new textualist judicial philosophy.¹ That philosophy imperils many Supreme Court precedents by which women (and men) have attained their freedom from sex discrimination in the twentieth century; those cases rarely emphasize constitutional *text or history* to support their conclusions. Given that, it is imperative that the Congress reinvigorate the Equal Rights Amendment. Without the *text* of the ERA, the current Supreme Court may feel free to revisit precedents long enshrined in our daughters,' mothers,' and grandmothers' lives.²

¹ *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) ("Neither respondents nor the Solicitor General disputes the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy"). Sometimes this judicial philosophy is called originalism, but the *Dobbs* holding is firmly based on the absence of constitutional text supporting abortion: "The Constitution makes no express reference to a right to obtain an abortion." *Id.* at 2245.

² *Dobbs* was primarily a due process case, and many of the early precedents subjecting gender classifications to intermediate scrutiny were adjudged under the Equal Protection clause. But, in the past two years and more, in many areas, the current Supreme Court has turned to 1868 and 1787 history to implement the spare constitutional text. See *New York State Rifle Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (rejecting intermediate scrutiny in Second Amendment

Under the current Supreme Court’s judicial philosophy, constitutional text trumps precedent. That philosophy allows the Court to overrule well-established precedents not based on verbatim constitutional text (as was done in *Dobbs*, which overruled *Roe v. Wade*). Women are only explicitly recognized in the Constitution’s text once—in the Nineteenth Amendment, which declares that the vote cannot be denied based on “sex.” Constitutionally, the ability to vote does not guarantee citizenship, much less equal citizenship or equal protection under the law. In 1873, in *Bradwell v. Illinois*, the Supreme Court held that, under the 14th Amendment, women were only partial citizens and persons, virtually represented by their husbands and fathers and “unfit . . . for many of the occupations of civil life,” including the legal profession.³ Since the current Supreme Court returned to the 13th century in the *Dobbs* decision,⁴ there is no reason to think that it would not return to the 19th century (1868) in the future to determine other women’s rights.⁵ But it need not go back so far; as recently as 1948, the Supreme Court held that women had no right to challenge a law saying that they could not be bartenders under the Fourteenth Amendment.⁶

If the Court’s new philosophy does not explain why the ERA is crucially important today, then the current state of the law on violence against women, and particularly women of color, should. Recently, Olympians testified before Congress that they were ignored by the FBI when they reported sexual assaults.⁷ This kind of disbelief is not new, and the Congress, and President Biden, have been fighting it for decades. The Supreme Court has been hostile to these fights. In 2000, in *United States v. Morrison*,⁸ the Supreme Court struck down a civil rights remedy, authored by then-Senator Biden in the first Violence Against Women Act, which would have allowed the Olympians, and other survivors of abusers like Jeffrey Epstein and Harvey Weinstein, to hold their abusers to account in the civil justice system, precisely because they were disbelieved in the criminal justice system. State tort systems have never provided survivors with adequate redress. When a police officer sexually assaults a woman (and women of color are the most

cases and applying a historical standard); *Torres v. Madrid*, 141 S. Ct. 989 (2021) (debating pre-1787 British common law to determine application of the Fourth Amendment seizure claim); *Lange v. California*, 141 S. Ct. 2011 (2021) (same with respect to Fourth Amendment search claim). Although this movement started earlier, see *Crawford v. Washington*, 541 U.S. 36 (2004) (going back to the 15th century and the Founding to apply the Confrontation clause of the Sixth Amendment) (Scalia, J.), it has become more insistent in the past two Terms and is deployed by a variety of Justices in majority and dissent. See *Kahler v. Kansas*, 140 S. Ct. 1021 (referring to British common law to determine whether a state has complied with due process regarding an insanity defense) (Kagan, J.); *Mahoney Area School District v. B.L.*, 141 S. Ct. 2038, 2059 (2021) (Thomas, J. dissenting) (arguing that the First Amendment analysis should be based on what “ordinary citizens” in 1868 would have thought of its text). For a survey of all 300 Supreme Court opinions of the past two years, focusing on textual and historical philosophy, see Victoria Nourse, *The Paradoxes of a United Judicial Philosophy*, 38 CONST. COMM. 1 2038 (forthcoming Spring 2023).

³ 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring in judgment). Justice Miller’s majority opinion for the Court held that a law license was not a “privilege or immunity” protected by the Fourteenth Amendment. *Id.* at 139 (Miller, J.). The quoted language is from the opinion of Justice Bradley, concurring in the judgment; like *Dobbs*, he relies upon the common law: “So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state.” *Id.* at 141 (Bradley, J., concurring in judgment).

⁴ *Dobbs*, 142 S. Ct. at 2249 (citing “Henry de Bracton’s 13th-century treatise” and “English cases all the way back to the 13th century” to support the historical argument that abortion has long been a crime).

⁵ See *Frontiero*, 411 U.S. at 685 (explaining that women were not granted the right to vote in 1870). For the range of cases in which the Court has recently returned to history, see *supra* note 2.

⁶ *Goesaert v. Cleary*, 335 U.S. 464 (1948) (rejecting equal protection challenge to Michigan state law barring females from being licensed as bartenders unless she be the “wife or daughter of the male owner”).

⁷ *Derelection of Duty: Examining the Inspector General’s Report on the FBI’s Handling of the Larry Nassar Investigation Before the S. Comm. on the Judiciary*, 117th Cong. (2021).

⁸ 529 U.S. 598 (2000).

likely victimized), the officer is typically immune under state and federal civil law. That is unequal protection under the law. Without an ERA, Congress may have no power to correct this situation.⁹

B. Responding to the Procedural Objections of ERA Opponents

ERA opponents assert several procedural objections to extending the deadline, including the Amendment's age, none of which are correct.

First, Congress has plenary power to determine the timeline for ratification.¹⁰ Some Amendments have proceeded under deadlines, others have not; some have been revived, others have not. Nor is the age of the ERA relevant. Recently, the so-called "Madison amendment" proposed in the First Congress, and long thought dead, was ratified over 200 years later to become the 27th Amendment to the Constitution.¹¹

Second, the *timeline was not part of the actual constitutional amending language*. As a preamble to the Amendment, it is not a part of the constitutional text.¹² Under the Supreme Court's own current judicial philosophy, only the *operative constitutional text* matters. Congress knows how to draft deadlines *inside* operative constitutional text, and how to draft deadlines *outside* operative text. The deadlines in the 18th, 20th, and 22nd Amendments make the Amendment "inoperative" unless ratified within a particular time. Congress drafted the ERA differently. The deadline occurs in prefatory legislative language *before* the Amendment's constitutional text.

Third, preambles, like the preamble to the United States Constitution, are generally unenforceable in constitutional law.¹³ A preamble, like a title, "is no part of the Act."¹⁴ As the Supreme Court held in *District of Columbia v. Heller*,¹⁵ prefatory constitutional material does not "limit" operative text: it may

⁹ In theory, an assault by a state actor should be covered under 42 U.S.C. 1983, but that statute is judicially encrusted with "qualified immunity" doctrine. States have similar, and even more restrictive, immunity schemes barring civil liability. Even if Congress were to amend section 1983 to eliminate qualified immunity for sexual assault by state actors, police etc., that legislation could be rejected as unconstitutional under the *Morrison* decision, which interpreted a civil law to be a criminal prohibition outside of Congress's power under the Commerce Clause and the Equal Protection Clause.

¹⁰ The Supreme Court itself has agreed with this statement. See *Coleman v. Miller*, 307 U.S. 433, 456 (1939) ("Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality . . .").

¹¹ Many constitutional amendments have raised particular issues about the process, see the excellent memorandum by the ERA Project at Columbia Law School 2 (February 28, 2023).

¹² In 1971, Congressional resolution proposing the ERA was prefaced by a resolving clause that included a seven-year deadline for state ratification of the amendment: "the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress." H.R.J. Res. 208, 92d Cong. (1971); 86 Stat. 1523. That deadline was extended in 1978. H.R.J. Res. 638, 95th Cong. (1978); 92 Stat. 3799.

¹³ *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) ("Although th[e] preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States.").

¹⁴ SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION sec. 47.4 (quoting 1 KENT'S COMMENTARIES 460 (13th ed. 1884)).

¹⁵ 554 U.S. 570, 578 (2008) (Scalia, J.) ("[A] prefatory clause does not limit or expand the scope of the operative clause.") (emphasis added) (citing F. DWARRIS, A GENERAL TREATISE ON STATUTES 268–269 (P. Potter ed. 1871); T. SEDGWICK, THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 42–45 (2d ed. 1874)). See *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009) (quoting the "preamble is no part of the

explain, but does not control. Preambles should not be confused with findings or purpose sections of a statute that may be relevant in statutory construction. The preamble here is in a *constitutional* Amendment.

Fourth, judicial decisions are irrelevant to this question, because the timing of ratification is constitutionally committed to Congress. ERA opponents have cited various lower court precedents, but these precedents do not bind Congress. The constitutional Amendment process is committed to Congress as the federal branch most closely tied to the people by the constitutional text.

Fifth, statements by the Office of Legal Counsel, particularly under a former President, have no weight, as those statements have changed over time. The Congress, not the President, controls the Amendment process. President Biden has called on the *Congress* to pass a law to extend the deadline and more: stating that “I am calling on Congress to act immediately to pass a resolution recognizing ratification of the ERA.”¹⁶

Sixth, Justice Ruth Bader Ginsburg made various statements about the ERA. But many things have changed since then including, most radically, the Supreme Court of the United States. As I noted at the beginning of this letter, the most important reason to enact the ERA is to respond to *the Supreme Court’s new philosophy imperiling women’s rights*. I do not expect that the Court will change its views on abortion, but I do expect that the Court may well mean what it said in *Dobbs* that women’s rights, being absent from the text of the Constitution, may be denied.



Victoria F. Nourse
Ralph Whitworth Professor of Law
Exec. Dir., Center for Congressional Studies at Georgetown Law

act”); *Peublo v. Texas Ysleta Del Sur*, 142 S. Ct. 1929 (2022) (applying the preamble is no part of the act principle)(Roberts, C.J. dissenting).

¹⁶ Press Release, White House, Statement from President Biden on the Equal Rights Amendment (Jan. 27, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/27/statement-from-president-biden-on-the-equal-rights-amendment/>.

Dear Senator Durbin,

I want to thank you for holding the first hearing on the Equal Rights Amendment in forty years. It certainly took a long time for the hearing to happen and I am glad my civil rights were finally deemed worthy of discussion. I won't follow the usual template, I am certain you have received many submissions with the history of the struggle and don't need a refresher.

The National Organization for Women has been a party to the struggle and even though we have other issues as well, until women have constitutional protection, it seems to be like building on quicksand. The Dobbs Ruling made that painfully clear to many of us. The time to finally insure equality for women is long overdue, women should have been included in the very founding of this nation. We contribute more than 50% to the success of this nation.

Had the ERA been the law of the land as I was beginning my path as an adult, my life would have been very different. I am retired now and since I was paid less than my male counterpart, my retirement is not as generous as my brother's even if we were exactly the same except for our gender, I was passed over for promotions for the males and it was explained to me that men had families to support. As a single mother raising three daughters on my own it really was offensive. I was not raising eggplants; I too was raising a family. This certainly flies in the face of equal pay for equal work. Also, it makes the equal opportunity idea a joke.

Even as children, girls were treated differently, we were wrapped in pink at birth and treated like little delicate flowers who aren't very bright. From kindergarten on, I was channeled into female professions, referred to as pink collar jobs, and it was made very clear by society that the most important role I could have was as wife and mother. Even in gym class we were different from boys, one example was basketball had different rules for girls supposedly to protect our reproductive organs, we could only dribble the ball three times.

The required number of states have ratified the amendment, the time period has been served to wait until it is the Law of the Land so now I am asking that the ERA be published and recognized as the 28th amendment to the Constitution of the United States. Grant me as well as all women and girls the same privileges and protection that my brothers are born entitled to. If you feel the time limit needs to be removed from the preamble, remove it. I don't feel it is necessary because it is not part of the amendment and clearly is being used as a device to block the amendment.

I have been in this struggle since my mother took me to my first NOW meeting in 1974. It has been a long and hard road but it is the right thing to do. The Congress has the power to undo this miscarriage of justice. The time is now. I don't want to die and have never been a full citizen of this country I have so loved. I am seventy-eight and have fewer days ahead of me so I have a sense of urgency.

Again, thank you for holding the hearing, I was glued to the TV,

Carolyn Casper
President,
Ohio National Organization for Women
2545 Northwest Blvd.
Upper Arlington, Ohio 43221
614 822 9004

From: anne pyron annepyron@gmail.com
Subject: Pass SJ 4 now!
Date: February 27, 2023 at 11:11 AM
To: Durbin_Testimony@judiciary-dem.senate.gov, Chastidy_Burns@judiciary-dem.senate.gov,
Stephanie_Trifone@judiciary-dem.senate.gov



Dear Senators:

We thank the Senate Committee on the Judiciary for holding this important hearing on SJ Res 4, the bipartisan resolution affirming that Congress views the Equal Rights Amendment (ERA) as valid, having been ratified by three-fourths of the states, as required by Article V of the U.S. Constitution.

The ERA provides an explicit guarantee of protection against discrimination on the basis of sex in the U.S. Constitution.

The ERA makes a critically important statement about equality. The Constitution reflects our most cherished values as a nation, and putting sex equality in the Constitution has broad impacts on all aspects of our society.

The ERA sends a particularly important message to children, who are growing up in a world that is more diverse.

Thank you.

Anne Pyron

Arizona ERA Task Force
National Organization for Women
League of Women Voters AZ

Written Testimony from Melinda Hamilton
On Behalf of South Carolina Equal Means ERA

Submitted for the Record to Senate Committee on the Judiciary for the
Hearing on
"The Equal Rights Amendment: How Congress Can Recognize and Enshrine
Equality in Our Constitution"
February 28, 2023

Chairman Durbin, Ranking Member South Carolina Senator Graham, and members of
the Senate Committee on the Judiciary:

Thank you for the opportunity to submit this written testimony on behalf of South
Carolina Equal Means ERA and 2.6 million women who make up more than half of
the state's residents. So many of us in South Carolina realize that here, in particular,
the status of women is regressing. We are especially grateful for this hearing on SJ
Res. 4, the bipartisan resolution declaring the Equal Rights Amendment valid having
met all the requirements in Article V of the U.S. Constitution.

Because the 100-year history of the ERA has been detailed in other testimony
submitted for this hearing, I focus my comments on South Carolina and the
consequences of lack of equality and why, once again, we must depend on the
Federal government to ensure our fundamental rights. The 19th Amendment which
was added to the Constitution in 1920 is a profound example. It was not ratified by
South Carolina until July 1, 1969, and not certified until 1973. Were it not for the
Constitution, it is reasonable to wonder when women would have been allowed to
vote in South Carolina.

South Carolina remains one of 13 states that has not ratified the ERA.

Even though women make up more than 37 percent of the South Carolina Bar
Association, this state recently became the only one in the nation without a woman
serving on its Supreme Court.

Just a few weeks ago, the nearly all male South Carolina Senate passed a six-week
abortion ban after deleting a clause that would send women to prison for medical
procedures when their lives were at risk.

South Carolina has always struggled with concept of equality on which this country is founded. Without the guarantee of equality ensured by the ERA as 28th Amendment to the U.S. Constitution, South Carolina will continue its downward spiral victimizing women, especially the nearly 15 percent of those who live in poverty. Here in the Deep South, many women know that the ERA reflects our most cherished values as a nation. We are depending on the United States Congress and the 38 ratified states to be our voice.



FORDHAM UNIVERSITY
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FACULTY

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Professor of Law

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February 24, 2023

Chairman Richard Durbin
Senate Judiciary Committee
Dirksen Building
United States Senate

Via Email

Dear Chairman Durbin:

In advance of the hearing scheduled by the Senate Judiciary Committee on S.J. Res. 4 (“Removing the Deadline for the Ratification of the Equal Rights Amendment”), I wish to bring your attention to historical evidence and legal analysis that support Congress’s constitutional authority to resolve the question as to whether the amendment has been validly ratified. I write as a legal scholar who has authored a book and several law review articles on the twenty-first century path of the Equal Rights Amendment (ERA). I am a law professor at Fordham University School of Law, where I teach civil procedure and advanced courses on law and gender and comparative constitutional law. In this letter, I explain the law and history that refute the procedural objections to S.J. Res. 4.

Introduction and Summary

Article V of the Constitution entrusts Congress with the important power to decide when amendments to the Constitution are necessary. In 1972, Congress proposed the ERA, deeming sex equality to be a fundamental principle for a modern constitutional democracy like ours, when the Supreme Court was reluctant to do so. Today, even though most Americans across the political spectrum embrace the commitment to sex equality, the ERA’s imperfect procedural history has kept it out of the U.S. Constitution to date. Congress is the branch of government designated by Article V of the Constitution to resolve the contested procedural questions, namely whether late ratifications by some states and rescissions by other states should render the ERA dead. The late Justice Ruth Bader Ginsburg noted when Congress last took action to change the ERA time limit that “Congress is uniquely equipped to decide the timeliness question,”¹ because Congress is the “director of the Amendment process under our constitutional scheme.”² It is through Congress’s Article V power that the American people can shape the constitutional future of the nation through their elected representatives, especially when the Supreme Court renders significant decisions that are stuck in the constitutional past. Furthermore, the language Congress used in the 1972 ERA

¹ Ruth Bader Ginsburg, *Observation, Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 924 (1979).

² Equal Rights Amendment Extension Hearings on S.J. Res. 134 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary, 95th Cong. 262, 265 (1978) (Testimony of Ruth Bader Ginsburg). For a more detailed discussion of Ginsburg’s scholarship and Congressional testimonies on the ERA, see Julie C. Suk, *Justice Ginsburg’s Cautious Legacy for the Equal Rights Amendment*, 110 GEORGETOWN L.J. 1391 (2022).

resolution stipulating a ratification timeline of seven years empowers it to excuse ratifying states for ratifying past seven years, and to reject states' efforts to undo their completed ratifications, as Congress did when some states attempted to rescind the Fourteenth Amendment. These conclusions are amply supported by the history and text of the time frame in the 1972 ERA resolution as well as the history and text of other constitutional amendments adopted under Article V, detailed below.

The Language of the ERA Deadline Did Not Set an Expiration Date

The joint resolution proposing the ERA in the 92nd Congress included the following language prior to the text of the proposed amendment:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress.³

The language used in this resolution was a departure from the language that imposed deadlines on previous constitutional amendment proposals. For most of the constitutional amendments that succeeded since Prohibition, Congress used different language to make it clear that the amendment proposal would expire if not ratified by the requisite number of states within seven years. The first ratification deadline employed by Congress in proposing an amendment was attached to the Prohibition Amendment. Congress inserted the ratification deadline into the text of the proposed Eighteenth Amendment itself; Section 3 of the Eighteenth Amendment as adopted by Congress and ratified by three-fourths of the states reads: “This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.”⁴ That “inoperative unless . . . ratified . . . within seven years” language was repeated in the Twentieth, Twenty-First, and Twenty-Second Amendments, but not in the ERA. “Inoperative unless” expresses a clear intent to expire the proposed amendment, different from the ERA resolution’s language, which only said that the amendment would be valid “when ratified . . . within seven years,” without saying that it would be inoperative if not ratified within seven years. Therefore, the ERA resolution’s “when ratified . . . within seven years” is best understood as setting a target date, to be revisited when circumstances warrant, rather than an expiration date. As Justice Ruth Bader Ginsburg put it in her testimony as a law professor before the Senate Judiciary Committee on the ERA extension, Congress simply made “an initial judgment as to time.”⁵

When proposing amendments after the Twenty-Second Amendment, Congress changed the placement of the deadline. Instead of placing deadline language in the text of the constitutional amendment, Congress placed it in the resolution proposing the amendment. Congress sought to

³ H.J. Res. 208 (92nd Cong. 1972) (emphasis added).

⁴ U.S. CONST., 18th Amend. (emphasis added).

⁵ Testimony of Ruth Bader Ginsburg, *supra* note 2, at 268.

avoid cluttering up the text of the Constitution with these deadlines.⁶ But moving the deadline to the resolution came with language that was a little less rigid about the consequences of not ratifying within seven years' time. The Twenty-Third and Twenty-Fourth Amendment resolutions stated that the amendment would be valid as part of the Constitution "only if . . . ratified . . . within seven years."⁷ "Only if" speaks in conditional terms, making clear that the amendment would become part of the Constitution if and only if that seven-year target was met. It follows logically from the "only if" language that the amendment would not be valid past seven years, even if Congress refrained from using the more rigid expiration date language of "inoperative unless . . . ratified . . . within seven years."⁸

Congress changed the deadline language in the direction of greater flexibility again in proposing the Twenty-Fifth and Twenty-Sixth amendments, as well as the ERA. The resolutions stated that those amendments would be valid "when ratified . . . within seven years."⁹ This change reflects Congress's evolving awareness of its own constitutional responsibilities under Article V, not only to make an initial judgment as to the time necessary for ratification, but to change that judgment in the future, if necessary as state ratifications proceeded. In floor debates and committee hearings in the early 1970s devoted to whether the ERA should have a seven-year ratification window, Senator Marlow Cook, the Republican co-sponsor of the Senate ERA resolution, noted that "a 7-year time limit would not vitiate a constitutional amendment. Congress itself has the final determination whether by lapse of time its proposal to amend the Constitution has lost vitality,"¹⁰ relying on the Supreme Court's decision in *Coleman v. Miller*.¹⁰ If Congress intended to foreclose future Congresses from making that final determination recognizing the amendment as timely and ratified, it could have and would have used the "inoperative unless ratified" language, and placed it in the amendment text rather than the introductory paragraph preceding the proposed amendment.

Congress's Subsequent Amendment Actions Confirm Its Authority to Remove the ERA Deadline

The "target date" understanding of the 1972 ERA deadline is confirmed by Congress's actions with regard to subsequent constitutional amendments. In 1978, concurrent with its resolution extending the time for ERA ratification, Congress implicitly acknowledged the comparative open-endedness of the ERA's "when ratified . . . within seven years" language by choosing the more rigid "inoperative unless . . . ratified . . . within seven years" language in the text of the next amendment that it adopted. For the proposed amendment that would give congressional voting rights to the District of Columbia, Congress utilized the same deadline language found in the Prohibition Amendment, and placed it in the proposed text of the amendment itself: "This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."¹¹ The contrast of Congress's choice of expiration date

⁶ See H.R. Rep. 1698 (86th Cong. 1960) (House Judiciary Committee report on the proposed Twenty-Third Amendment explaining time limit language and placement).

⁷ Twenty-Third Amendment, S.J. Res. 39, 74 Stat. 1057 (1961); Twenty-Fourth Amendment, S.J. Res. 26, 76 Stat. 1259 (1964) (emphasis added).

⁸ Twenty-Fifth Amendment, S.J. Res. 1, 79 Stat. 1327 (1965); Twenty-Sixth Amendment, S.J. Res. 7, 85 Stat. 829 (1971).

⁹ 116 Congressional Record 35,959 (Remarks of Marlow Cook) (Oct. 9, 1970).

¹⁰ *Id.* (citing *Coleman v. Miller*, 307 U.S. 433 (1939)).

¹¹ Proposing an Amendment to the Constitution to Provide for Representation of the District of Columbia in Congress, H.R.J. Res. 354, 95th Cong., 92 Stat. 3795 (1978).

language in that amendment points to the conclusion that the differently worded ERA deadline was a more flexible target date, to be adjusted if necessary.

Then, in 1992, Congress was faced with ratifications by 38 legislatures of the congressional pay amendment, which it had adopted 203 years earlier, in 1789. Congress understood correctly that, even though the amendment met the two textually prescribed requirements of Article V—adoption by two-thirds of Congress and ratification by three-fourths of the state legislatures—the amendment’s legitimacy depended upon Congress’s judgment as to whether the amendment retained vitality. Each house of Congress passed a resolution declaring the Twenty-Seventh Amendment to be ratified,¹² which definitively resolved any doubts about whether the abnormal length of time it took the states to ratify it should render it dead. Similarly, the ERA has met the requirements prescribed by Article V, albeit past Congress’s target date. Since the target date was prescribed by Congress, not by the Constitution, it should follow that only Congress can enforce the target date or excuse tardiness. Only Congress could determine ERA’s vitality in the twenty-first century, by passing a resolution recognizing it as ratified or by informing the states that it is indeed too late. The Constitution authorizes Congress, not the other branches of government, to decide this important matter definitively and legitimately.

Some courts¹³ and the Office of Legal Counsel¹⁴ have misconstrued the ERA deadline as an expiration date rather than a target date because they have failed to appreciate the full textual range of ratification deadlines throughout the history of constitutional amendments. By activating its amendment power in S.J. Res. 4, Congress has a critical opportunity to correct the constitutional errors of courts and the Executive Branch, whose opinions on the matter do not bind Congress. It is now for Congress, not the courts or the Executive Branch, to decide whether to accept the late ratifications by some states or not, and whether to accept the rescissions by some states or not. This is a political question. It is not a legal question to which the text, history or jurisprudence of Article V provide a clear answer. As a legal matter, all of the following options are available to Congress: (1) Congress accepts late ratifications and rejects rescissions, declaring the ERA ratified; (2) Congress accepts both late ratifications and rescissions, and declares the ERA to be open for continued ratification and rescission; or (3) Congress rejects late ratifications and declares the ERA to be expired, rendering the validity of rescission moot. As a political, historical, and moral matter, a full consideration of the past and future prospects for inclusive constitutional democracy in the United States should lead Congress to choose the first option—accepting late ratifications and rejecting rescissions to conclude that the ERA is ratified.

The ERA Retains Vitality Under Present Circumstances

Congress’s decision on whether to accept late ratifications or reject rescissions of any amendment with the procedural irregularities that have occurred with the ERA should depend on its assessment of present circumstances related to the continued need for the amendment. *Coleman v. Miller* held that the timeliness of the Child Labor Amendment was a political question for Congress to answer, rather than a legal question for the courts.¹⁵ Unlike the ERA, the Child Labor

¹² See 138 Congressional Record 11,869 (1992) (Senate); 138 Congressional Record 12,052 (1992) (House).

¹³ *Virginia v. Ferriero*, 525 F. Supp. 3d 36, 57 (D.D.C. 2021); *Idaho v. Freeman*, 529 F. Supp. 1107, 1152-53 (D. Idaho 1981).

¹⁴ Ratification of the Equal Rights Amendment, 44 Op. O.L.C. ___, slip op. at 3 (2020).

¹⁵ *Coleman v. Miller*, 307 U.S. 433, 454 (1939).

Amendment had no ratification deadline, and the Supreme Court held that the length of time states should be given to complete ratification was wholly up to Congress, because Congress “had full knowledge and appreciation” of the “social, political, and economic conditions which have prevailed during the period since the submission of the amendment.”¹⁶ Such knowledge guides the political judgment as to whether the amendment is still necessary.

Deeming an amendment necessary is a task that Article V allocates to Congress. With an amendment that was proposed with a deadline, the logic, if not the holding, of *Coleman* should apply: Congress must assess whether the amendment is still necessary and therefore timely. Where the ratification deadline is phrased in the language of a target date (“valid . . . when ratified . . . within seven years”) rather than an expiration date (“inoperative unless . . . ratified . . . within seven years”), Congress retains its power to make that determination if and when three-fourths of the states ratify the amendment as required under Article V, even after seven years has elapsed. As Ruth Bader Ginsburg observed during the 1978 ERA extension hearings, “an informed judgment cannot be made by crystal ball, but only by focusing on the precise situation existing when the ratification process is completed.”¹⁷

What is the precise situation existing in the twenty-first century, when the ERA ratification process was completed? Skeptics say that the ERA is no longer needed because Supreme Court decisions have enforced sex equality under the Equal Protection Clause of the Fourteenth Amendment. Nonetheless, in all three states that ratified the ERA since 2017, the ratification debates emphasized the continuing need for law and public policy to address remaining manifestations of gender inequality. These include pay inequity, often attributable to workplace disadvantages women face due to pregnancy, motherhood and caregiving obligations, and the persistence of sexual assault and harassment.¹⁸

These problems—disadvantages associated with childbearing and childrearing, and sexual violence—took on a new sense of urgency for many American women after the Supreme Court in 2022 stopped protecting the constitutional right to terminate a pregnancy.¹⁹ The Court’s decision in *Dobbs v. Jackson Women’s Health* effectively exposes millions of American women to laws that force them to bear children, even those conceived through sexual assault, in states that do nothing to alleviate the burdens, disadvantages, and risks of mortality stemming from maternity. The *Dobbs* decision demonstrates the Supreme Court’s pinched view of the Fourteenth Amendment’s meanings as limited to those accepted at the moment of ratification in 1868, before women could vote and before women were otherwise regarded by the legal order as equal citizens.

When the Supreme Court subjects the American people to narrow and contestable interpretations of their constitutional rights that are out of touch with people’s lived realities, the constitutional amendment process provides Congress with the power and responsibility to respond

¹⁶ *Id.*

¹⁷ Testimony of Ruth Bader Ginsburg, *supra* note 2, at 271.

¹⁸ See JULIE C. SUK, WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT 134-35, 152-53, 160-61 (2020) (detailing these issues as discussed in ratification floor debates in Nevada, Illinois, and Virginia in 2017-2020).

¹⁹ *Dobbs v. Jackson Women’s Health*, 142 S.Ct. 2228 (2022).

on behalf of the people.²⁰ By recognizing the continued vitality of the ERA and the validity of its ratification, Congress could express a commitment to modern ideas of gender equality where the Supreme Court has refused to do so. As litigants continue to argue claims of twenty-first-century gender justice under the Fourteenth Amendment, an ERA that was adopted in 1972 and ratified in 2020 would provide a more obvious source of twenty-first century meanings of women's equal citizenship. The amendment process empowers Congress to shape the future of constitutional meaning in directions that diverge from the Supreme Court's interpretations. Now, more than ever, there is a need for Congress to lead in protecting our most fundamental constitutional commitments. Sex equality, and the people's ability to make "a more perfect union" through Congress's prudent management of the Article V process, are principles that will keep our democracy alive.

Sincerely yours,



Julie C. Suk
Professor of Law

²⁰ See Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 436 (1983) (noting that, when Congress proposes an amendment to the states, it reflects a national dissatisfaction with the direction of constitutional law as elaborated by the courts).



February 28, 2023

Vote Mama would like to submit testimony in support of the passage of SJ Res 4.

For far too long women have been left out of the conversation, out of office, and out of power. Vote Mama is fighting to change that by building the political power of moms across the country and breaking down the structural and cultural barriers that hold us back.

By passing SJ Res 4, we have the opportunity to explicitly guarantee protection against discrimination on the basis of sex in the U.S. Constitution. As we work to increase the political participation of American moms, we must also address the barriers that prohibit women's entry into the political sphere - the primary of which is gender discrimination.

Women have been fighting for true equality and representation for over 100 years. Now, as our rights are being rolled back it is time to take action and ensure that we are protected equally under the law.

The ERA sends a particularly important message to our nation's children, especially our daughters. *Women belong in the Constitution.*

We thank the Senate Committee on the Judiciary for holding this important hearing on SJ Res 4, the bipartisan resolution affirming that Congress views the Equal Rights Amendment (ERA) as valid, having been ratified by three-fourths of the states, as required by Article V of the U.S. Constitution.



WOMEN LAWYERS ON GUARD
ACTION NETWORK, INC

March 8, 2023

The Honorable Richard J. Durbin, Chair
The Honorable Lindsey Graham, Ranking Member
U.S. Senate Committee on the Judiciary
Washington, D.C. 20500

Re: Letter in Support of the Equal Rights Amendment

Dear Senators Durbin and Graham:

On behalf of Women Lawyers on Guard Action Network, Inc. (WLGAN), we write in support of the Equal Rights Amendment (ERA). WLGAN is a national non-partisan organization harnessing the power of lawyers and the law to preserve, protect, and defend the democratic values of equality, justice, and opportunity for all.

Just this past week, on February 28, 2023, the DC Circuit rejected a challenge to Congress's authority to affix a deadline to the Equal Rights Amendment. *See Illinois v. Ferriero*, No. 21-5096, 2023 WL 2249874, at *9 (D.C. Cir. Feb. 28, 2023). If Congress can affix a deadline to a constitutional amendment, it can certainly remove it. So too can Congress declare that a Constitutional amendment has met the requirements for ratification. Some objectors argue that the ERA has not met the requirements for ratification under Article V because certain states have purported to rescind their ratifications. We would like to draw attention to recent scholarship refuting this theory. As set forth in the *attached article* by Michelle Kallen and Morgan Maloney, published in the University of Virginia Law School Journal of Law & Politics, permitting state rescission violates the text, structure, original intent, and consistent historical understanding of Article V. Purported state rescissions, therefore, should pose no obstacle to Congress's efforts to affirm ratification of the ERA, nor should it stand in the way of Congress removing the deadline associated with the ERA.

The ERA is crucial for protecting women's rights in the United States. *First*, the Fourteenth Amendment does not protect women as much as it protects other suspect classifications, like race. *Compare Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.") with *Craig v. Boren*, 429 U.S. 190, 197 (1976) (classifications by gender are subject to intermediate scrutiny, such classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives"). Justice Ginsburg and advocates of women's equality, however, sought strict scrutiny for gender-based discrimination. *Frontiero v. Laird*, 1971 WL 134340 (U.S.), 28

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A national non-profit, harnessing the power of lawyers and the law to protect, preserve and defend equality, justice and opportunity for all.

(U.S., 2004) (seeking strict scrutiny for gender-based discrimination). That is, advocates of gender equality fought—unsuccessfully—for sex to be protected as vigorously as race.

Second, there is reason for concern that even this limited protection is at risk. Whereas prior Supreme Courts have been reticent to overturn precedent, the Supreme Court has in recent years overturned longstanding precedent, including *Roe v. Wade*. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). And there is good reason to worry that established Fourteenth Amendment jurisprudence may be at risk. Originalists believe in interpreting laws (including the Fourteenth Amendment) in the manner the drafters intended. In an interview around 2010, Justice Scalia, famous for his originalist view of constitutional interpretation, stated “[c]ertainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t. Nobody ever thought that that’s what it meant. Nobody ever voted for that.” There is little doubt that the drafters of the Fourteenth Amendment did not intend for it to protect women. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 951 (2002) (“Americans who adopted the Reconstruction Amendments believed it was unnecessary to enfranchise women under the federal Constitution because women were represented in the state through male heads of household and because enfranchising women would harm the marriage relationship.”). Numerous judges (including Supreme Court justices) today ascribe to the originalist methodology of interpreting laws and may well decide to forgo longstanding Fourteenth Amendment jurisprudence protecting women’s rights.

The Supreme Court's equal protection jurisprudence has changed over the years and very well may change again. That is one reason we need the ERA and one reason why the ERA is not purely symbolic. Even as a symbol, however, the ERA is profoundly important. Our Constitution reflects our country’s values. We are past the days where people outright and directly dispute that women should be equal. We should also be past the days of women not being recognized as equal in our Constitution.

Women constitute more than 50% of the population. Half of the U.S. population should not be excluded from the Constitution. This should not be controversial.

Sincerely,



Cory Amron, President
Women Lawyers On Guard Action Network, Inc.

cc: Durbin_Testimony@judiciary-dem.senate.gov
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“*IN TOTO*” AND “*FOR EVER*”: WHY STATES CANNOT
RESCIND RATIFICATION OF CONSTITUTIONAL AMENDMENTS

INTRODUCTION

The Founding era is often idealized by a telling of history that portrays the Founders as flawless. This framing, however, undermines the Founders’ recognition of their own shortcomings—the Founders did not purport to be perfect.¹ Far from viewing the Constitution they drafted as flawless and immutable, the Founders aimed to create a “*more* perfect union.”² And Article V arose from their effort to help future generations “go on . . . perfecting” the document.³

Article V lays out two steps to the amendment process: proposal and ratification. *First*, Article V contemplates two methods of proposing the text of a potential amendment: (1) proposal by two-thirds of both houses of Congress or (2) proposal by a convention called for by two-thirds of the states. *Second*, Article V provides for two methods of ratification: (1) ratification by the legislatures of three-fourths of the states or (2) ratification by conventions of three-fourths of the states.⁴ Rescission involves this second step of the process: ratification.

Today, this carefully crafted amendment process is eroding.⁵ The withering of this process is clearly exemplified by the Equal Rights Amendment (ERA). The ERA is broadly supported by Americans—nearly 80% favor the ERA.⁶ And, the requisite thirty-eight states have ratified the

¹ See Gloria Steinem, *Foreword* to JESSICA NEUWIRTH, *EQUAL MEANS EQUAL: WHY THE TIME FOR THE EQUAL RIGHTS AMENDMENT IS NOW*, at xiv (2015) (“Indeed, [the Founders] may have recognized their own imperfections better than we do.”). As one delegate at the North Carolina ratifying convention remarked, most constitution-writers “thought their wisdom equal to all possible contingencies, and that there could be no error in what they did. The gentlemen who framed this Constitution thought with much more diffidence of their capacities.” 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (Jonathan Elliot, ed., 1901) 176 (James Iredell in the North Carolina ratifying convention).

² U.S. CONST. pmbl. (emphasis added).

³ Letter From Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in *FOUNDERS ONLINE*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-41-02-0255>.

⁴ U.S. CONST. art. V.

⁵ In the past half-century, the Archivist of the United States has only once certified and published a constitutional amendment. U.S. CONST. art. V; U.S. CONST. amend. XXVII; see also 1 U.S.C. § 106(b) (“Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published. . .”).

⁶ Juliana Menasce Horowitz & Ruth Igielnik, *A Century After Women Gained the Right to Vote, Majority of Americans See Work to Do on Gender Equality*, PEW RESEARCH CENTER, July 7, 2020 (“About eight-in-ten U.S. adults (78%), including majorities of men and women and Republicans and

ERA. However, the United States Archivist refuses to carry out his statutory duty and issue a proclamation certifying the ERA as part of the Constitution.⁷ Nevada and Illinois have jointly sued the Archivist to compel him to issue this proclamation.⁸ Among the many issues raised by the litigation is whether the Archivist must remove from his list of ratifying states the five states that have purported to rescind their ratifications of the ERA.⁹ This essay will show that permitting state rescission violates the text, structure, original intent, and consistent historical understanding of Article V.

I. THE TEXT

The text of Article V does not grant the power of rescission to the states. The provision lays out the amendment process in detail and explicitly delineates the powers granted to Congress and to the states.¹⁰ In doing so, Article V crafts a careful balance of power between the states and the federal government, the “two loci of power” in the amendment process.¹¹ As the Supreme Court has noted, it is “an instrument drawn with . . . meticulous care.”¹² Indeed, one Founder empathized that Article V created a system that would result in “little confusion.”¹³

In its plain text, Article V speaks of ratification solely in positive terms: it only contemplates “*when*” a state ratifies an amendment.¹⁴ Nowhere does

Democrats alike, say they at least somewhat favor adding the Equal Rights Amendment (ERA) to the U.S. Constitution.”).

⁷ 1 U.S.C. § 106b.

⁸ Virginia originally led the litigation efforts but, in early 2022, Virginia withdrew from the lawsuit. Justin Jouvonal, Laura Vozzella & Katie Mettler, *Virginia’s New AG Pulls State from Effort to Recognize ERA Ratification*, WASH. POST, Feb. 18, 2022. See *Illinois v. Ferriero*, No. 21-5096 (D.D.C. June 16, 2022).

⁹ *Virginia v. Ferriero*, 525 F.Supp.3d 36, 55 (D.D.C. 2021).

¹⁰ U.S. CONST., art. V. (“The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.”).

¹¹ Comment, *The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issue*, 127 U. PA. L. REV. 494, 502 (1978).

¹² *United States v. Sprague*, 282 U.S. 716, 732 (1931).

¹³ 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 177 (Jonathan Elliot, ed., 2d ed. 1836) (Quoting James Iredell in the North Carolina ratifying convention).

¹⁴ See U.S. CONST. art. V. (“*when* ratified by the legislatures”) (emphasis added).

the text of the Article discuss rejection of an amendment or rescission of ratification.¹⁵ If a right to rescind ratification exists, it must derive from the penumbras of Article V.

But the Supreme Court has specifically warned against searching beyond the text when interpreting Article V. The Court confirmed that a “mere reading demonstrates” that “article 5 is clear in statement and in meaning . . . and calls for no resort to rules of construction.”¹⁶ Acknowledging the importance of the Founders’ careful balance, the Supreme Court cautioned against any attempts by the “courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.”¹⁷ Article V leaves no room for doubt about the powers of the states and the federal government in both steps of the amendment process—and rescission is not one of those powers.

Like Article V, the statutory framework that Congress enacted to govern the amendment process does not set forth a provision for rescinding a filed ratification. In 1 U.S.C. § 106b, Congress directed the Archivist to “cause [an] amendment to be published . . .” “[w]henver official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution”¹⁸ The statute’s text never contemplates states sending the Archivist notices of rescission—only notices of adoption. Likewise, the 1818 predecessor statute to 1 U.S.C. § 106b required the Secretary of State,¹⁹ “whenever official notice shall have been received, at the Department of State, that any amendment . . . proposed to the constitution of the United States, has been adopted . . . to cause the said amendment to be published”²⁰ Neither statute calls for the Archivist to be notified of a State’s failure to ratify, nor is there any provision for rescinding a filed ratification.

¹⁵ *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (“Article V, speaking solely of ratification, contains no provision as to rejection.”).

¹⁶ *Sprague*, 282 U.S. at 730.

¹⁷ *Hawke v. Smith*, 253 U.S. 221, 227 (1920).

¹⁸ 1 U.S.C. § 106b.

¹⁹ Though the process for publishing constitutional amendments has remained largely the same throughout American history, the official responsible has changed. Originally, the Secretary of State was responsible for promulgation. *See* Act of Apr. 20, 1818, Pub. L. No. 15-80, 3 Stat. 439. Then, the obligation was transferred to the General Services Administration as part of a large governmental reorganization plan. *See* Reorganization Plan No. 20 of 1950, 15 Fed. Reg. 3178 (May 24, 1950); *see also* Act of Oct. 31, 1951, Pub. L. No. 84-248, 65 Stat. 710. Finally, in 1984, Congress created the National Archives and the National Archivist became responsible for promulgations. *See* Act of Oct. 19, 1984, Pub. L. No. 98-497, 98 Stat. 2291.

²⁰ *See* 3 Stat. at 439.

Both the constitutional and statutory text are clear: neither the Founders nor Congress created an avenue for state rescission.

II. THE STRUCTURE AND ORIGINAL INTENT

Rescission also violates the logic and structure of the amendment process. The Founders understood ratification of the Constitution as a final act, regardless of the laws or practices of each individual state which may permit rescission of certain legislative acts. The same logic applies to the ratification of amendments. This is because ratification is not a state legislative act, it is a federal one. When a state acts on a federal constitutional amendment, it is bound by the constraints of Article V. Rescission is thus antithetical to the original intent of the Founders and the structure of the amendment process.

The Founders believed that ratification was absolute and irrevocable. When the Founders drafted the Constitution, they created it not only for themselves but for “[p]osterity.”²¹ That is, the Constitution was designed to be transmitted, with amendments, from generation to generation. It follows that, once adopted, the Constitution could not be un-adopted by a state. During the ratification debates, James Madison affirmed this point to Alexander Hamilton. He wrote “[t]he Constitution requires an adoption *in toto*, and *for ever*.”²² He warned Hamilton that “[a]n adoption [of the Constitution] for a limited time would be . . . defective” and concluded, “[i]n short any *condition* whatever must viciate the ratification.”²³

Madison was not alone in this belief. During the ratification debates, George Washington wrote to the Marquis de Lafayette noting approvingly that both Thomas Jefferson and Lafayette shared his “wise” opinion that the Constitution should be adopted “*in toto*.”²⁴ There was a practical reason for this approach. The Founders sought to create a document which would “endure for ages to come,” rather than one that could be up-ended constantly.²⁵ Allowing the states to ping-pong back and forth between ratification and rescission of the Constitution would yield tremendous uncertainty, something the young nation could not afford.

²¹ U.S. CONST. pmb1.

²² Letter From James Madison to Alexander Hamilton, (July 20, 1788), *in* FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-05-02-0012-0086>

²³ *Id.*

²⁴ Letter From George Washington to the Marquis de Lafayette (April 28-May 1, 1788), *in* FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/04-06-02-0211>.

²⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

The same logic for adopting the Constitution “*in toto*” applies to the ratification process for constitutional amendments.²⁶ Permitting rescission amounts to allowing the conditional ratification of an amendment, which is the exact scenario that Madison, Washington, Lafayette, and Jefferson explicitly rejected.²⁷ Notably, no state even attempted rescission during the Founding Era.²⁸ This suggests that, to the founding generation, ratifications—whether of the Constitution itself or its amendments—were irrevocable. As Professor Lawrence Tribe noted, “at the time article V was put in the Constitution” it was understood that “ratification must be without strings attached.”²⁹

A state’s internal practices and laws cannot alter this arrangement because state legislative action is distinct from state ratification of a federal constitutional amendment. Since 1789, the Supreme Court has been clear: when a state ratifies an amendment, it is not carrying out a normal legislative function. In *Hollingsworth v. Virginia*,³⁰ the Supreme Court agreed with Virginia’s argument that “[a]n amendment to the constitution, and the repeal of a law, are not, manifestly on the same footing.”³¹ Indeed, even though the casual observer may find similarities between a state legislature voting on a ratification resolution and on a traditional piece of legislation, the ratification process is “unconnected with the ordinary business of legislation.”³² Almost a century and a half later, in *Hawke v. Smith*, the Supreme Court reaffirmed this, writing that “ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word.”³³

²⁶ See Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment* (Oct. 31, 1977) in *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 7–27, 19 (1978) (“we see nothing to suggest that Madison’s reasoning should not be applied with equal force to proposed constitutional amendments”) [hereinafter *Harmon Memorandum*].

²⁷ Robert Hajdu & Bruce E. Rosenblum, *The Process of Constitutional Amendment*, 79 COLUM. L. REV. 106, 121 (1979).

²⁸ JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS, § 582 (Chicago, Callaghan and Company 1887), <https://hdl.handle.net/2027/hvd.32044090131491>.

²⁹ *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 43 (1978) (testimony of Professor Lawrence Tribe) [hereinafter *1978 Hearing*].

³⁰ In *Hollingsworth*, the Supreme Court issued its decision, agreeing with Virginia, without describing its reasoning. *Hollingsworth v. State of Virginia*, 3 U.S. 378 (1798). However, in subsequent cases, the Court has treated the *Hollingsworth* decision as endorsing Virginia’s arguments. See *Hawke v. Smith*, 253 U.S. 221, 229–30 (1920).

³¹ *Hollingsworth*, 3 U.S. at 380–81.

³² *Id.* at 381.

³³ *Hawke*, 253 U.S. at 229.

Traditional constraints on the typical state legislation process may not interfere with the ratification process for federal constitutional amendments because ratification is a federal, rather than a state, action. Upon ratifying the Constitution, the states “surrendered to the general government” the power to amend the “supreme law of the land.”³⁴ Then, Article V returned specific powers to the states, including in the ratification process. It is Article V “alone [that] confer[s] the power to amend and determine[s] the manner in which that power could be exercised.”³⁵ Therefore, the states act *only* under “authority from the federal Constitution”³⁶ and their power to amend the Constitution “exists *only* by virtue of a special grant in that Constitution.”³⁷ Under Article V, the ratification of state legislatures “shall be taken as a decisive expression of the people’s will and be binding on all.”³⁸ Once a state has acted in the affirmative, it has completed its role in the amendment process and cannot then withdraw its consent.³⁹

Throughout the Founding period, Congress reaffirmed this understanding of the final character of ratification. For example, in the three pre-Civil War congressional resolutions proposing amendments to the states, Congress wrote only in positive terms about ratification.⁴⁰ Arguing in favor of the Bill of Rights before the First Congress, Madison asserted that the ten amendments were necessary “to satisfy the public mind that their liberties will be perpetual.”⁴¹ The Founders believed that amendments, like the

³⁴ *Id.* at 226.

³⁵ *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

³⁶ *Hawke*, 253 U.S. at 230 (emphasis added). *See also* *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (“the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution”).

³⁷ JAMESON, *supra* note 28, § 583.

³⁸ *Dillon v. Gloss*, 256 U.S. 368, 374 (1921).

³⁹ A state can, however, reject and then approve an amendment. Robert Hajdu & Bruce E. Rosenblum, *The Process of Constitutional Amendment*, 79 COLUM. L. REV. 106, 120 (1979) (“If ratification is defined exclusively as an affirmative pronouncement, the article V power to ratify cannot be exhausted by an act other than an assent to the proposal; the problem of post-ratification actions is not raised since ratification does not occur until the state legislature votes affirmatively. Thus, rejection of a proposed amendment has no constitutional significance.”)

⁴⁰ The ten amendments which now make up the Bill of Rights were proposed in a single congressional resolution. Joint Resolution Proposing Twelve Amendments to the Constitution, 1st Cong., 1 Stat. 97 (1789) (the amendments “when ratified by three fourths of the [state] legislatures” will be “valid to all intents and purposes, as part of said Constitution”). The resolutions for the Eleventh and Twelfth Amendment contain similar language. Joint Resolution Proposing the Eleventh Amendment to the Constitution, 3d Cong., 1 Stat. 402 (1794) (“when ratified by three-fourths of the said legislatures” the Eleventh Amendment “shall be valid as part of the constitution”); Joint Resolution Proposing the Twelfth Amendment to the Constitution, 8th Cong., 2 Stat. 306 (1804) (“when ratified by three fourths of the legislatures of the several states, [the Twelfth Amendment] shall be valid to all intents and purposes as part of the said constitution”).

⁴¹ 1 ANNALS OF CONG. 449 (1789) (Joseph Gales ed., 1834).

original text, were for “posterity.”⁴² Congress in the early years of the republic was clear: ratifications are “*for ever*.”⁴³

III. CONSISTENT HISTORICAL UNDERSTANDING

Given the Founders’ clear intent and careful wording of Article V, it is unsurprising that the Legislative and Executive Branches have consistently rejected state rescission of ratification throughout the nation’s history. Since the Civil War, several states have attempted to rescind their ratifications of constitutional amendments including the Fourteenth, Fifteenth, and Nineteenth Amendments. Each time, Congress rebuffed these attempts. In 1978, the Office of Legal Counsel (OLC) affirmed: “an examination of the history of ratification of the Constitution and amendment thereto demonstrates uniform applications and acceptance of this position . . . ratification must be unconditional and irrevocable.”⁴⁴

A. *The Reconstruction Amendments*

The question of rescission was first put to the test in 1868. Both New Jersey and Ohio ratified the Fourteenth Amendment and then attempted to rescind their ratifications.⁴⁵ But Congress did not entertain either attempt. Upon receipt of New Jersey’s resolution in March 1868 “purporting to withdraw the assent of said State to the constitutional amendment,” the United States House of Representatives passed a resolution calling New Jersey’s act “disrespectful to the House and scandalous in character.”⁴⁶

In the following months, ratifications continued to come in from state legislatures around the nation. By July 1868, Secretary of State William H. Seward, still responsible for promulgating new amendments, found himself in a bind.⁴⁷ Based on the number of ratifications he had received, the Fourteenth Amendment had reached the requisite three-fourths threshold and he was statutorily required to certify it as part of the Constitution. However, if he discounted the ratifications of New Jersey and Ohio, the

⁴² U.S. CONST., pmbl.

⁴³ Letter from James Madison to Alexander Hamilton (July 20, 1788), in *THE PAPERS OF ALEXANDER HAMILTON* DIGITAL ED., 184 (Harold C. Syrett ed., 2011), <https://founders.archives.gov/documents/Hamilton/01-05-02-0012-0086>

⁴⁴ *Harmon Memorandum*, *supra* note 26, at 19.

⁴⁵ *Coleman v. Miller*, 307 U.S. 433, 448 (1939).

⁴⁶ CONG. GLOBE, 40th Cong., 2d Sess. 2226 (1868).

⁴⁷ In 1868, the Secretary of State remained responsible for the promulgation of amendments. *See supra* note 19.

ratification of one more state was still required to pass the Amendment.⁴⁸ Seward asked Congress “if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding [the purported rescissions].”⁴⁹ In response, both houses of Congress passed a concurrent resolution and “declared [the Fourteenth Amendment] to be a part of the Constitution.”⁵⁰ Congress included both New Jersey and Ohio in its list of states that had ratified the amendment.⁵¹ With Congress’s blessing, Seward proceeded to certify the amendment as “valid to all intents and purposes as a part of the Constitution.”⁵² In his certification, Seward counted both New Jersey and Ohio among the states who “adopted” the amendment.⁵³

Ignoring the cautionary example set by her sister states, New York tried her hand at rescission with the Fifteenth Amendment. After ratifying the Fifteenth Amendment, New York’s legislature passed a resolution “claiming to withdraw the said ratification.”⁵⁴ The Secretary of State treated this purported rescission as legally null.⁵⁵ Following the practice established during ratification of the Fourteenth Amendment, the Secretary of State included New York as a ratifying state in his certification of the Fifteenth Amendment.⁵⁶ As the OLC observed, the resolution “tends to indicate that the Secretary of State did not recognize the withdrawal of New York to have been effective.”⁵⁷ Once again, the Secretary of State, taking direction from Congress, rebuffed a state’s effort to rescind ratification.⁵⁸

⁴⁸ Joint Resolution Proposing the Fourteenth Amendment to the Constitution, 39th Cong., 15 Stat. 706, 707 (1868).

⁴⁹ *Id.*

⁵⁰ CONG. GLOBE., 40th Cong., 2d Sess. 4295-96 (1868); *see also* 15 Stat. 709, 710 (1868) (declaring the ratification of the Fourteenth Amendment).

⁵¹ CONG. GLOBE., 40th Cong., 2d Sess. 4295 (1868). (“Whereas the Legislatures of the States of... New Jersey... [and] Ohio... have ratified the fourteenth article of amendment to the Constitution of the United States”).

⁵² In the time between Congress’s concurrent resolution and Seward’s proclamation, Congress received Georgia’s official notice of ratification, which would have been enough to secure the three-quarters requirement without counting either New Jersey or Ohio. *Harmon Memorandum*, *supra* note 26, at 21. However, when Congress passed its resolution, it was still waiting to receive official confirmation of Georgia’s ratification. *Id.* at 20-21; *see also* 15 Stat. 708, 711 (1868) (certifying the ratification of the Fourteenth Amendment).

⁵³ 15 Stat. at 710-711.

⁵⁴ CONG. GLOBE., 41st Cong., 2nd Sess. 2298 (1870).

⁵⁵ *Id.*

⁵⁶ Given that the amendment could have been ratified without New York’s assent, the Secretary of State’s decision to include New York served as an even more pointed rebuke of rescission. *Id.*

⁵⁷ *Harmon Memorandum*, *supra* note 26, at 22.

⁵⁸ After the Secretary of State’s resolution was read on the House floor, one congressman argued that New York had not ratified the amendment. In response, another quipped, “We think she has.” The *Congressional Globe* notes that this prompted laughter and the subject was not raised again. CONG. GLOBE., 41st Cong., 2nd Sess. 2298 (1870). The Supreme Court, in dicta, declined to question

B. Post-Reconstruction

Tennessee became the next state to attempt rescission. Only thirteen days after ratifying the Nineteenth Amendment in 1920 and five days after the Secretary of State certified the amendment as part of the Constitution, Tennessee sought to rescind its ratification.⁵⁹ Following the practice established a half-century prior by the Legislative and Executive Branches, the Secretary of State declined to recognize Tennessee’s belated rescission and did not revise his certification of the Nineteenth Amendment.⁶⁰ Tennessee’s ratification was necessary to push the amendment over the three-quarters threshold—and to secure women’s right to vote.⁶¹ The United States Supreme Court then affirmed that the Nineteenth Amendment was properly ratified and reminded the states that while their legislatures “had power to adopt the resolutions of ratification,” once these resolutions were received by the Secretary of State, they were “conclusive upon him, and, being certified to by his proclamation, [were] conclusive upon the courts.”⁶² As the history of the Fourteenth, Fifteenth, and Nineteenth Amendments shows, various states have tried rescission, but, Congress has rejected their attempts at every turn.

By the end of the nineteenth century, constitutional scholars viewed the question of rescission as resolved. Writing in 1887, John Jameson asserted that Congress had settled any doubt on the question of rescission when it “declared by resolution that [New Jersey and Ohio] were to be counted among the ratifying States” for the Fourteenth Amendment.⁶³ Jameson reflected the prevailing view among legal scholars.⁶⁴ The American

Congress’s determination to include the rescinding states in the ratification certificates for the Fourteenth and Fifteenth Amendments, writing that “[t]he action of Congress upon the subject [of amendments] cannot be inquired into.” *White v. Hart*, 80 U.S. 646, 649 (1871).

⁵⁹ On August 18th, 1920, Tennessee ratified the Nineteenth Amendment. On August 26th, 1920, the Secretary of State certified that the Amendment had been adopted by the requisite number of states. On August 31, Tennessee attempted to rescind its ratification. *Harmon Memorandum*, *supra* note 26, at 22.

⁶⁰ *Id.* at 23; Joint Resolution Proposing the Nineteenth Amendment to the Constitution, 66th Cong. 41 Stat. 1821, 1823 (1920).

⁶¹ In 1920, there were 48 states thus 36 states were necessary for ratification. The Secretary of State’s resolution contains exactly 36 states. See “1920 Fast Facts,” CENSUS BUREAU, (last visited December 9, 2021), https://www.census.gov/history/www/through_the_decades/fast_facts/1920_fast_facts.html.

⁶² *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

⁶³ JAMESON, *supra* note 28, § 584, at 633.

⁶⁴ See BURDICK, CHARLES & FRANCIS MARION BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT*, § 20 (1922), https://link.gale.com/apps/doc/F0153219359/MOML?u=virginia_law&sid=bookmark-MOML&xid=b0198b05&pg=58. (“the act of ratification is final in each case”); COOLEY, THOMAS, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 203-04 (1880),

Historical Association, in its 1896 *Annual Report to Congress*, wrote, “it would seem that practice has decided that a State having once given its consent [to an amendment] the question is closed and it can not recall its action.”⁶⁵

C. *The Wadsworth-Garrett Amendment*

Facing this mountain of textual, historical, and scholarly opposition, supporters of rescission needed a new strategy. In 1924 Senator James Wadsworth of New York and Congressman Finis Garrett of Tennessee proposed a constitutional amendment to allow any state to “change its vote” on an amendment up until its ratification by three-quarters of the states.⁶⁶ However, both sponsors acknowledged that rescission would only be permissible if Article V was amended. Speaking at length about his proposal on the House floor, Congressman Garrett conceded that “it may be said—and I think it is generally regarded to be—the law that a State may reconsider and change a rejection, but may not reconsider and change a ratification.”⁶⁷ Addressing the Senate, Senator Wadsworth concurred:

It is apparent that under Article V, as now drawn, no State can change its vote from the affirmative to the negative in the matter of a constitutional amendment. Once ratified by a State, that State can not change, even though it does so before a sufficient number of States have ratified so as to insert the amendment in the Constitution itself. Tennessee tried to change [it’s ratification of the Nineteenth Amendment]. It can not be done under Article V.⁶⁸

<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1048&context=books> (failing to conclusively determine the matter but noting “in a somewhat analogous case, it has been repeatedly decided that consent once given is given finally”); W.F. Dodd, *Amending the Federal Constitution* 30 YALE L.J. 321, 346 (1921) (“Jameson takes the view, and the view is incontrovertible, that a state, once having ratified, may not withdraw that ratification. . . . The function of ratification seems to be one which, when once done, is fully completed, and leaves no power whatever in the hands of the state legislature.”).

⁶⁵ AM. HIST. ASS., ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896, H.R. DOC. NO. 54-353 at 300 (1896), https://heionline.org/HOL/Page?collection=uscset&handle=hein.uscset/usconset49666&id=1&men_tab=srchresults.

⁶⁶ Congressman Garrett had also submitted the same amendment in the prior Congress. 66 CONG. REC. 2152 (1925).

⁶⁷ *Id.* at 2159.

⁶⁸ 65 CONG. REC. 4475, 4492 (1924).

Despite their efforts, the Wadsworth-Garrett Amendment never received a vote in either house.⁶⁹ The Wadsworth-Garrett Amendment may have been a nod by rescission’s supporters to the reality that Article V forbade such state action. Rarely is legislative history so clear: even rescission’s most passionate supporters yielded to the reality that rescission is proscribed under Article V.

IV. RESCISSION AND THE EQUAL RIGHTS AMENDMENT

Fifty years later, the ERA ushered the question of rescission to the forefront once again when five states—Idaho, Kentucky, Nebraska, South Dakota, and Tennessee—purported to rescind their ratifications of the Amendment.⁷⁰ There is no reason to treat these rescissions any differently than the rescissions rejected in decades prior. The ongoing litigation considers two distinct issues: (1) the validity of the Congressionally imposed time limit for ratification and (2) the validity of ratification rescissions.⁷¹ The initial ratifications of the five states purporting to rescind should be counted towards the thirty-eight required for ratification of the ERA.

A. *A History of the ERA*

Women’s rights advocates have lobbied for the adoption of the ERA since 1923. Indeed, they succeeded in introducing some version of it in each session of Congress between 1923 and 1972.⁷² In 1972, Congress finally proposed the ERA to the states.⁷³ The operative words of the amendment read: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”⁷⁴ Additionally, in the preamble to the ERA resolution, Congress stated that the Amendment “shall be valid to all intents and purposes as part of the Constitution when ratified

⁶⁹ *Harmon Memorandum*, *supra* note 26, at 23.

⁷⁰ Nebraska purported to rescind in 1973, Tennessee in 1974, Idaho in 1977, Kentucky in 1978, and South Dakota in 1979. *Equal Rights Amendment – Proposed March 22, 1972: List of State Ratification Actions*, NAT’L ARCHIVES, (last visited December 9, 2021), <https://www.archives.gov/files/foia/pdf/era-list-of-state-ratification-actions-03-24-2020.pdf>. [hereinafter *List of State Ratifications*].

⁷¹ Plaintiff’s Motion for Summary Judgement, *Virginia v. Ferriero*, 525 F.Supp.3d 36 (D.D.C. 2021) (No. 1:20-cv-00242).

⁷² Melissa Murray, *The Equal Rights Amendment: A Century in the Making Symposium Foreword*, 43 *HARBINGER* 91, 93–94 (2019).

⁷³ *Id.* at 95.

⁷⁴ The rest of the amendment reads: “Sec. 2 The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. Sec. 3. This amendment shall take effect two years after the date of ratification.” H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972).

by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress.”⁷⁵

At first, the Amendment received wide-spread support. Both political parties supported the ERA as part of their political platforms.⁷⁶ Within a year, the Amendment received endorsements from twenty-two of the required thirty-eight states.⁷⁷ However, the momentum behind the amendment waned, and the pace of ratifications slowed to a trickle.⁷⁸ Between 1973 and 1978, four states voted to rescind their ratifications.⁷⁹ By 1978, the end of Congress’s seven-year timeframe, only thirty-five states, including the four who attempted to rescind, had ratified the amendment.⁸⁰ Congress then extended its deadline by three years and three months.⁸¹ In the next three years, the ERA failed to receive additional ratifications⁸² and South Dakota joined the “reverse bandwagon of rescissions.”⁸³ After the second congressional deadline passed, many ERA supporters assumed the measure was dead.⁸⁴

Forty years after the congressional deadline, in the wake of #MeToo and a revived feminist movement, the ERA received renewed support.⁸⁵ Nevada ratified it in 2017, Illinois in 2018, and Virginia—the thirty-eighth and last state required—in 2020.⁸⁶ Though the ERA has now completed both steps of the Article V amendment process—Congressional proposal and ratification by three-fourths of the states—the Archivist of the United States

⁷⁵ *Id.*

⁷⁶ 1976 Republican Platform: *Equal Rights and Ending Discrimination*, THE PRESIDENT FORD LIBRARY & MUSEUM (last visited December 29, 2021) <https://www.fordlibrarymuseum.gov/library/document/platform/rights.htm>; 1976 Democratic Party Platform, THE AMERICAN PRESIDENCY PROJECT, UNIVERSITY OF CALIFORNIA AT SANTA BARBARA, (last visited December 29, 2021) <https://www.presidency.ucsb.edu/documents/1976-democratic-party-platform>.

⁷⁷ Murray, *supra* note 72, at 96.

⁷⁸ *Id.* at 96.

⁷⁹ These four states are Idaho, Kentucky, Nebraska, and Tennessee. *List of State Ratifications*, *supra* note 70.

⁸⁰ *Id.*

⁸¹ Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 919 (1979).

⁸² *List of State Ratifications*, *supra* note 70.

⁸³ South Dakota’s rescission was distinct. South Dakota would only “withdraw[] its ratification” if the amendment failed to be ratified by three-fourths of the states by the original congressional deadline. 125 CONG. REC. 4862 (1979); 1978 *Hearing*, *supra* note 29, at 44 (testimony of Prof. Lawrence Tribe).

⁸⁴ *Virginia v. Ferriero*, 525 F. Supp. 3d 36, 43 (D.D.C. 2021).

⁸⁵ John F. Kowal, *The Equal Rights Amendment’s Revival: Questions for Congress, the Courts, and the American People*, 43 HARBINGER 141, 145 (2019).

⁸⁶ *List of State Ratifications*, *supra* note 70.

has refused to publish it as part of the Constitution.⁸⁷ Illinois and Nevada, two of the last three states to ratify the amendment, are currently seeking mandamus relief to compel the Archivist to promulgate the amendment.⁸⁸ They argue that Article V did not empower Congress to impose extra-textual constraints on states ratifications; that is, by empowering Congress to “propose” amendments and select one of two “mode[s] of ratification,” Article V did not empower Congress to place additional constraints on state ratification.⁸⁹

B. The Question of Rescission as Applied to the ERA

The efforts of five states to rescind their ratifications of the ERA are no different than prior rescission attempts—all are equally invalid. This fact has been recognized, implicitly or explicitly, by the Department of Justice, the Archivist and, in some cases, by the states themselves.

For over forty years, the Department of Justice (DOJ) has maintained the position that rescissions are invalid. When Congress debated extending the ERA’s ratification deadline in 1978, the OLC provided extensive written and oral testimony on the issue of rescission. The OLC was clear.⁹⁰

⁸⁷ Press Release, Nat’l Archives and Rec. Admin., *NARA Press Statement on the Equal Rights Amendment* (Jan. 8, 2020), <https://www.archives.gov/press/press-releases-4> (last visited Dec. 10, 2021) (The Archivist will abide by the Department of Justice’s guidance that the ERA should not be certified “unless otherwise directed by a final court order.”) [hereinafter NARA Press Statement].

⁸⁸ *Attorney General Mark Herring Continues Fight to Have ERA Recognized as Part of the Constitution*, (May 3, 2021), <https://web.archive.org/web/20210517224610/https://www.oag.state.va.us/media-center/news-releases/2044-may-3-2021-herring-continues-fight-to-have-era-recognized-as-part-of-the-constitution>; *Attorneys General Ford, Raoul Issue Statement After Argument in Equal Rights Amendment Litigation*, (Sept. 28, 2022), https://ag.nv.gov/News/PR/2022/Attorneys_General_Ford_Raoul_Issue_Statement_After_Argument_in_Equal_Rights_Amendment_Litigation/ (last visited Oct. 19, 2022).

⁸⁹ Placement of the deadline in the preamble (rather than the text) of the ERA is in contrast to other amendments which placed deadlines in the text of the amendments themselves. *See, e.g.*, U.S. Const. amend. XVIII, § 3 (“This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.”). In the case of those amendments, states were not stripped of the ability to ratify expired amendments, rather, an expired amendment by its own terms would become inoperative when ratified.

⁹⁰ As several members of Congress noted, in 1978, OLC held the unmistakable position that rescission is unconstitutional. *See* 1978 Hearing, *supra* note 29, 33-34 (1978) (Ms. Holtzman thanking Assistant Attorney General John Harmon for “the clarity and lucidity of [his] presentation”); *id.* at 31 (Mr. Drinan thanking the Department of Justice (DOJ) for taking a “clear and categorical” position and Mr. Butler appreciating “the witness’ candor”). In 1977, the year prior, DOJ had declined to take a firm position on rescission advising the General Service Administrator to either reject rescissions or submit the question to Congress. But it noted that “[v]arious commentators have agreed with the 1868 congressional ruling” that rescissions were invalid. *Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment*, 1 OP. O.L.C. 13, 14 (1977).

“ratification must be unconditional and irrevocable.”⁹¹ Looking at the text of the Constitution, the OLC argued that Article V “prohibit[s] rescission.”⁹² Like Senator Wadsworth and Congressman Garrett, the OLC agreed rescission could *only* be authorized by a constitutional amendment to Article V.⁹³ Furthermore, under the Trump administration, the OLC weighed in on various constitutional questions posed by the ERA. In its lengthy opinion, the OLC declined to return to the question of rescission or revise its earlier conclusion that “the Constitution does not permit rescissions.”⁹⁴

During the Obama administration, the Archivist concurred with DOJ’s position. Responding to a letter from Congresswoman Carolyn Maloney, National Archivist David Ferriero unqualifiedly informed the Congresswoman that “a later rescission of a state’s ratification is not accepted as valid.”⁹⁵ Like Congress, the Executive Branch has maintained the position—under Democratic and Republican administrations alike—that rescission is invalid.

Even some of the states now purporting to rescind ratification have previously agreed with this position. The Kentucky Supreme Court held in *Wise v. Chandler* that once the state votes on a proposed federal constitutional amendment “it has exhausted its power further to consider the question.”⁹⁶ Likewise, the Idaho and South Dakota Attorneys General have published official opinions against rescission. Idaho’s Attorney General opined that “once a state acts through its legislative process to ratify a proposed amendment to the United States Constitution, it has cast its one vote, and exhausted its power to affect the course of the proposed amendment.”⁹⁷ Two years later, the South Dakota Attorney General agreed. Responding to a query from a state representative, the Attorney General wrote: “We think the conclusion is inescapable that a state can act but once . . . upon a proposed amendment.”⁹⁸ The South Dakota state legislature voted to rescind ratification despite its own Attorney General’s opinion “that this Legislature or any future Legislature is without authority to withdraw

⁹¹ *Harmon Memorandum*, *supra* note 26, at 19.

⁹² 1978 Hearing, *supra* note 29, at 37 (testimony of John Harmon).

⁹³ *Id.* at 36.

⁹⁴ *Ratification of the Equal Rights Amendment*, OP. O.L.C. slip op. at 37 (Jan. 6, 2020).

⁹⁵ Letter from David S. Ferriero to the Hon. Carolyn Maloney (Oct. 25, 2012), <https://voteequality.files.wordpress.com/2020/07/archivist-letter-to-maloney-2012.pdf>.

⁹⁶ *Wise v. Chandler*, 108 S.W.2d 1024, 1033 (Ky. 1937).

⁹⁷ Official Opinion No. 73-166, Idaho Op. Att’y. Gen. (Jan. 24, 1973), <https://www.ag.idaho.gov/content/uploads/2018/01/FY1973.pdf>.

⁹⁸ Official Opinion No. 75-33, S.D. Op. Att’y. Gen. (Feb. 21, 1975), <https://atg.sd.gov/OfficialOpinions/Official%20Opinion%2075-33.pdf>.

the previous ratification of the Equal Rights Amendment.”⁹⁹ Thus, several of the states that have attempted to rescind the ERA, namely Kentucky, Idaho, and South Dakota, have recognized the limitations on their own powers.

Rather than carry out his statutory duty, the Archivist has turned the question of the ERA’s ratification to the courts.¹⁰⁰ In 2020, the Archivist refused to publish the ERA “unless otherwise directed by a final court order.”¹⁰¹ As to rescissions, the United States Supreme Court has not directly ruled on the issue¹⁰² and the only federal district court opinion squarely addressing rescission was later vacated.¹⁰³ But, the lower courts are not without guidance. When the Court has dealt with the question of rescission on the periphery of its cases, it has deferred to Congress and “historic precedent.”¹⁰⁴ The historic precedent, along with the Article V’s text, original intent, and the conclusions of both the Article I and Article II branches, are all clear: rescission is unconstitutional. The judiciary should join its two co-equal branches in affirming this core feature of our amendment process.

CONCLUSION

This conclusion regarding the legality of rescission does not imply that states who regret ratifying an amendment lack recourse. States whose legislatures oppose an amendment after ratification can seek a new amendment repealing the amendment with which they disagree. Indeed, this is precisely what happened with prohibition: the Eighteenth Amendment was repealed by the Twenty-First Amendment.¹⁰⁵

In 1788, Jefferson acknowledged the “faults” in the Constitution but drew “hope” in the ability of the people to “correct[] what is amiss in it.”¹⁰⁶ The

⁹⁹ *Id.*

¹⁰⁰ NARA Press Statement, *supra* note 87.

¹⁰¹ *Id.*

¹⁰² Kowal, *supra* note 85, at 144.

¹⁰³ In 1981, the Idaho District Court ruled that states have the power to rescind prior ratifications up to the point that the requisite three-quarters of states have ratified the amendment. *State of Idaho v. Freeman*, 529 F. Supp. 1107, 1155 (D. Idaho 1981). However, the following year the Supreme Court vacated the District Court’s judgement. *Nat’l Org. of Women v. Idaho*, 459 U.S. 809, 809 (1982). *See also* *Virginia v. Ferriero*, 525 F. Supp. 3d 36, 61 (D.D.C. 2021) (“Equally significant as the Court’s holding is what it does not hold...the Court does not reach the question of whether states can validly rescind prior ratifications.”); *Equal Means Equal v. Ferriero*, 478 F. Supp. 3d 105, 125 (D. Mass. 2020) (refusing to consider the question of rescission because the plaintiffs lack standing).

¹⁰⁴ *Coleman*, 307 U.S. at 450 (1939).

¹⁰⁵ U.S. CONST. amend. XVIII; U.S. CONST. amend. XXI.

¹⁰⁶ Letter from Thomas Jefferson to Moustier, (May 17, 1788), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-13-02-0095>.

Founders outlined this process in Article V. They carefully laid out a system for amendments, balancing the interests of the states and federal government. To date, the American people have chosen to amend their supreme law twenty-eight times, most recently with their adoption of the ERA. The courts should not obstruct the peoples' will.

As Jefferson concluded, "we must be contented to travel on towards perfection, step by step."¹⁰⁷ The Equal Rights Amendment is but one step further in our national quest to create a "more perfect union."¹⁰⁸

Michelle Kallen and Morgan Maloney

¹⁰⁷ *Id.*

¹⁰⁸ U.S. CONST. pmbl.

**Testimony Before the Senate Judiciary Committee on the
Equal Rights Amendment**

Danaya C. Wright
February 25, 2023

Good morning Chairman Durbin and the honorable members of this Committee. Thank you for allowing me to provide testimony on the complicated issues surrounding the Equal Rights Amendment. I am the T. Terrell Sessums & Gerald Sohn Professor of Constitutional Law at the University of Florida, Levin College of Law. I have taught law for over 25 years and Constitutional Law for many of those. I have written extensively on the procedural issues facing the ERA and presented on the subject at numerous different forums. I would like to summarize what my research on the subject has revealed.

Much has been said on the recent ratifications of the Equal Rights Amendment by Illinois, Nevada, and Virginia, some 35 years after the Congressional deadline on the ERA had passed. Viewed objectively, however, the legal issues are quite straightforward: (1) Does Congress have authority to impose a 7-year deadline on states to ratify, (2) if Congress has that authority can it waive or amend that deadline, and (3) may states rescind their ratifications. I conclude that (1) Congress does not have authority to impose a deadline, (2) if Congress were judged to have authority to impose the deadline it must have the concomitant authority to waive or modify the deadline, and (3) states may not upset the balance of power between the states by rescinding their ratifications. I discuss the evidence and precedents on each of these points.

Procedural History of the ERA

Introduced nearly every year since 1923, the ERA emerged 49 years later from Congress in 1972 subject to a 7-year deadline on ratification – a deadline placed in the preamble, not in the text of the amendment itself.¹ Only 35 of the necessary 38 states had ratified as the deadline neared, and Congress subsequently extended the deadline by 39 months. No more states ratified during the extension, and the final 3 states ratified over 35 years later.² Between 1973 and 1979, five states purported to rescind their ratifications, although there are procedural irregularities associated with most of those.³

1. Is the Congressional Deadline Valid?

¹ The location of the deadline could be important, as some scholars have suggested that only the text of the amendment itself, and not the preamble, makes its way into the constitution and is therefore binding once the states have begun to ratify. A deadline in the preamble, they argue, can be waived or modified, but not one in the text of the amendment itself. This distinction formed the basis of Congress' extension of the deadline in 1978.

² Illinois ratified in 2017, Nevada in 2018, and Virginia in 2020 thereby technically meeting the requirements of Article V – proposal by 2/3rds of each house of Congress and ratification by 3/4ths of the states.

³ The Lieutenant Governor of Kentucky vetoed its state's rescission; Idaho rescinded its ratification with a bare majority although its legislative rules require a super-majority to ratify; South Dakota adopted a joint resolution on March 1, 1979 stipulating that its 1973 ratification would be sunsetted on the original deadline of March 22, 1979; and on March 19, 2021 the North Dakota legislature adopted a concurrent resolution to retroactively clarify that its 1975 ratification was valid only until midnight on March 22, 1979.

Article V of the Constitution does not expressly grant Congress the authority to impose a deadline; rather, Article V provides that Congress or the states may propose amendments; states, by legislatures or conventions, have the sole authority to ratify; and Congress has the sole authority to set “the one or the other mode of ratification.”⁴ The term “one or the other” clearly refers to the earlier provision that state legislatures or state conventions shall exercise the ratification function.⁵

Lacking *express* authority to impose a deadline, Congress would need to rely on an *implied* authority to impose a deadline on the states’ ratification power. Implied powers are recognized by the courts where necessary, but no court has held that Congress has that authority. In the only case involving an amendment deadline, *Dillon v. Gloss*,⁶ the Supreme Court held that an amendment that was fully ratified in less than seven years was not invalid simply because it carried a deadline. The Court did not address the issue presented by the ERA as to whether a deadline can cause an otherwise validly-ratified amendment to self-destruct if the ratifications occurred after the deadline. The Court did assert that a deadline could be a “subsidiary matter of detail” like publication in the Federal Register, but few people would be likely to view such a dramatic curtailment of states’ rights as a subsidiary detail.⁷

In the absence of express authority or judicial precedent, we turn to history, policy, and constitutional theory. All support the conclusion that Congress may not impose a deadline on the states’ sole ratification power. As a historical matter, the framers did not grant Congress any role in the amendment process in early drafts of the Constitution. The Virginia Plan had no role for Congress in the amending function whatsoever and the Committee of Detail affirmed the amending power as a solely state function. Alexander Hamilton, however, suggested that Congress should have the power to make proposals along with the states, but his amendment left ratification entirely within the power of the states.⁸ Federalist 85 explained that the amending power should not reside in Congress, as the national government would be unlikely to make necessary amendments that might curtail its power. It was important to the framers that amending the Constitution, like adopting the Constitution, should ultimately lie fully within the discretion of the states. The final version of Article V gives Congress joint authority with the states to propose, but no role in ratification. Congress could offer amendments, but the states were to remain both necessary and sufficient to amend the Constitution because the states were the final check on federal authority.

⁴ The relevant language of Article V provides: “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;”

⁵ To this point, Congress could not declare that ratification would occur by a public referendum. *Hawke v. Smith*, 253 U.S. 221 (1920).

⁶ 256 U.S. 368 (1921). For a thorough discussion of *Dillon*, see Danaya Wright, “Great Variety of Relevant Conditions, Political, Social and Economic”: The Constitutionality of Congressional Deadlines on Amendment Proposals Under Article V, 28 *Wm & M. Bill of Rights J.* 45, 69-74 (2021).

⁷ See more detailed discussion at Danaya Wright, *Adventures in the Article V Wonderland: Justiciability and Legal Sufficiency of the ERA Ratifications*, 12 *IRVINE LAW REVIEW*, 1013, 1056-7 (2022)

⁸ A proposal to require Congressional approval of constitutional amendments after state ratification failed. See David Kyvig, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-2015*, at 56-7 (2016).

Unquestionably, the framers placed the decision whether to ratify an amendment squarely in the hands of the states, and arguably the decision *whether* includes the decision *when* to ratify. In his comprehensive Constitutional Law treatise, David Watson asked over a hundred years ago: “Who but the State can judge of what would be a reasonable time? It is for the State to ratify and cannot the State take its own time to do it? What branch of the government can tell a State when it must ratify an amendment in the absence of any constitutional provision on the subject?”⁹ It is hard to conceive of the Framers granting Congress the power to limit the time during which the states could consider an amendment.¹⁰

Throughout the nineteenth and early twentieth centuries, Congressmen and legal scholars agreed that deadlines and other restrictions on the ratification function were unconstitutional. Attempts to legislate procedures whereby amendments had to be ratified by super-majorities or within a given deadline all failed, and treatise writers noted that any attempt to limit the state’s ratification power might unduly influence states to act with haste and would be unconstitutional without first amending the constitution.¹¹

Constitutional jurisprudence also recognizes that Congressional power to restrict the states in their exercise of ratification authority is counter to the Constitutional process and the balance of powers established by the Framers. The federal government is one of enumerated powers and the Tenth amendment reserves to the states any powers not expressly granted to Congress. Even the necessary and proper clause, which lies in Article I, would not extend Congressional authority to impose a deadline on states through Article V because it is neither necessary nor proper for Congress to limit states’ authority to exercise their own part of the constitutional function.¹²

Moreover, amending is a form of constitution-making that holds a unique place in our constitutional democracy. The constitution itself was ratified by the states without a deadline and all amendments have either been ratified fully, regardless of time, or failed to garner the requisite ratifications. No other amendment except the ERA has met all the requirements of Article by obtaining the ratifications of 3/4ths of the states yet risks being declared invalid because of a technical detail imposed by Congress. A Congressional limitation on the states’ role in constitution-making that has the effect of telling them that their official actions are ineffective defeats the federalism balance that placed final constitution-making in the hands of those most closely responsive to the people.

Experts also have concluded that there is no authority for a Congressional deadline. David Kyvig, after studying the history of the original deadline in the 18th Amendment, noted:
 Article V specified no time limit on ratification of a constitutional amendment by the states. The drafters of Article V left no evidence that they thought in terms of restricting the rights of states to endorse at any time a constitutional change approved by Congress.

⁹ David Watson, *THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION, AND CONSTRUCTION* (1910) at 1311-12.

¹⁰ And although seven years might seem to be a sufficient period, if Congress has the power to limit the states then Congress could conceivably allow only seven months, or seven weeks, or even seven days. Such power is simply inconsistent with the federalism structure built into the Constitution.

¹¹ See Wright, *Adventures*, *supra* note 7 at 1066-70.

¹² See Wright, *Great Variety*, *supra* note 6 at 90-2.

The sovereign right of the people to sanction constitutional change through the agency of a state legislature or convention was fundamental and unqualified. . . . The ratification time-limit issue arose only because clever politicians sought, in effect, to vote both yes and no on constitutional change.¹³

Considering the persuasive evidence against the constitutionality of deadlines, and the lack of evidence to the contrary, it is my opinion that the seven-year deadline was an unconstitutional Congressional overreach into the sole ratification function that Article V grants to the states. Repealing the deadline would be an acknowledgement of Congress' overreach.

2. Can Congress Waive or Amend the Deadline?

Although it is my opinion that any Congressional deadline on the power of the states to ratify whenever they choose is unconstitutional, the Supreme Court in *Dillon v. Gloss* could be read as holding that a deadline is not inconsistent with Congressional authority. The Court's statements could also be read as *dicta* since the effectiveness of a deadline was not the issue in that case and the power of a deadline to nullify an otherwise fully-ratified amendment was not before the Court. It should be noted, however, that the deadline discussed in *Dillon* was located in the text of the amendment and not in the preamble. Now much ink has been spilled on whether it matters if the deadline is part of the text of the amendment or is in the preamble. Clearly there is a difference because the preamble does not become part of the constitutional text. Ratification of amendments by the states is a federal act that imports and changes the constitution according to the newly ratified language. The deadline in the ERA is not part of the text of the Constitution that is to be amended, and it follows therefrom that the deadline could be repealed by a later Congress. That was the conclusion in 1978 when Congress voted to extend the deadline.

Ultimately, however, it is not necessary to finally determine the constitutional authority of Congress because if Congress indeed has the authority to impose a deadline, it logically has the authority to remove it. If the deadline were judged to be a valid exercise of Congressional power to dictate the mode of ratification, then by the same logic Congress would have the concomitant reciprocal authority to remove it. It would be contorted semantics to argue Congress had the power to impose the original deadline but no power subsequently to waive it. Either a deadline is constitutional, or it is not. If it is, it can be changed, just as a parent who establishes a child's bedtime can grant an exception to it.

3. May States Rescind their Ratifications?

Turning to the question of the five state rescissions again requires an objective analysis of the facts and the law. Three of the state rescissions were tainted by dubious procedures, like declaring after the fact that the ratification would sunset (South Dakota), passing it without the super-majority required for ratification (Idaho), or being the subject of a gubernatorial veto (Kentucky). Despite these irregularities, a few states have claimed they have the power to rescind. To evaluate the merits of those claims we begin again with the text of Article V which

¹³ Kyvig, *supra* note 8 at 467-8

makes no mention of the power to rescind; it speaks only of ratification. Clearly, there is no express power to rescind.

Next, we ask if there is an implied power to rescind or, more precisely, does the express power to ratify include an implied power to rescind? Assuming no one is making a claim that a state should be able to rescind AFTER an amendment has been fully ratified, the question is whether a state should be able to rescind before all the ratifications have occurred. The only judicial precedent on the issue suggests, in a plurality opinion, that recognizing rescissions is a political matter that resides with Congress.¹⁴ That said, no rescission has ever been recognized or given legal effect even though a few states have attempted to rescind on numerous amendments.¹⁵ As a matter of historical fact, Congress has never recognized a state's purported rescission.

Thus, in the absence of express authority or binding judicial precedent, we turn once again to history, constitutional theory, and public policy. As noted, no rescission has been given effect and scholars and experts in the past have concluded that rescissions are not included within the federal powers granted to the states to engage in the amendment process.¹⁶ Bills have been introduced to permit rescissions, but those failed.¹⁷ In a discussion on the original ratification of the Constitution, James Madison rejected the power of states to rescind, stating that "a reservation of a right to withdraw if amendment be not decided on . . . is a *conditional* ratification . . . Compacts must be reciprocal, this principle would not in such a case be preserved. The Constitution requires an adoption *in toto* and *for ever*."¹⁸

Unlike the Congressional deadline, which is a federalism issue, whether states can rescind is essentially an issue of state's rights vis-à-vis each other. In the hoary political realm of constitutional ratification and amending, it would be destabilizing to permit states to undercut each other by allowing them to change their position on something as important as a constitutional amendment. As Richard Bernstein explained: "A state's decision to adopt an amendment forms the basis for later states' decisions to adopt or to reject. To permit rescission of a ratification would be to confuse and perhaps derail the amending process's orderly functioning. By contrast, if a state reconsiders its rejection of an amendment, its action does not undercut the basis for later states' decisions."¹⁹ In effect, allowing rescissions would permit some states to utilize their Article V discretionary powers to undermine the actions of other states.

Moreover, the power to rescind is not implied in the power to ratify because rescission and ratification have different legal effects. A state that changes its mind and ultimately decides to

¹⁴ *Coleman v. Miller*, 307 U.S. 43 (1939). The political question doctrine has been much discussed by scholars, but the general consensus is that Article V issues are fully justiciable. See Wright, *Adventures*, *supra* note 7 at 1047-50; 1054-60.

¹⁵ New Jersey and Ohio attempted to rescind their ratification of the 14th Amendment; New York attempted to rescind its ratification of the 15th Amendment; and Tennessee attempted to rescind its ratification of the 19th Amendment. See Danaya Wright, "An Atrocious Way to Run a Constitution: The Destabilizing Effects of Constitutional Amendment Rescissions," 59 DUQUESNE L. REV. 12, 33-7 (2021).

¹⁶ See discussion at Wright, *Adventures*, *supra* note 11 at 1072.

¹⁷ See Wright, *Atrocious*, *supra* note 15 at 35-6.

¹⁸ Letter from James Madison to Alexander Hamilton (July 20, 1788).

¹⁹ Richard Bernstein & Jerome Agel, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?, 254 (1993).

ratify (post-rejection ratification) does not affect the decisions of other states. A state that chooses to rescind (post-ratification rescission) destabilizes the ratification process and creates uncertainty for other states, threatening the delicate balance of Article V's finely wrought procedure and undermining the constitutional participation of other states.

Justice Marshall explained in *McCulloch v. Maryland*²⁰ that it would be unacceptable for the government of one state to undermine the interests of the people of other states. As a policy and constitutional matter, states have reliance interests in the actions of other states that militate against permitting rescissions.

Nonetheless, whether decided as a matter of constitutional interpretation by a court or whether rescissions are considered non-justiciable political questions, Congressional rejection of the ERA's five purported rescissions would be consistent with historical practice, constitutional precedent, and constitutional theory.

Conclusion

Admittedly there are other tangential procedural matters in the ERA case, such as the ministerial role of the National Archivist and whether states have standing to enforce recognition of their ratifications. But reduced to legal questions and not political talking points, the authority of Congress to impose the deadline and the authority of states to rescind are the core legal issues facing Congress and the courts with regard to the ERA. Given the lack of express authority for either in Article V, and the lack of judicial precedent recognizing any implied authority for either, we are left having to resolve these issues based on how they promote or impair the constitution-making process which, at its core, is a balance between promoting democratic participation and imposing bright-line rules. In that balance, the better part of valor suggests Congress does not have authority to restrict the time during which states may exercise their constitutional function to deliberate upon and ratify an amendment. And states themselves do not have authority to destabilize other states' deliberations and constitutional function by rescinding. But if Congress were deemed to have the power to impose a deadline, it seems indisputably true that Congress may waive that deadline and declare the ERA valid.

²⁰ 17 U.S. 316 (1819).

**STATEMENT FOR THE RECORD FROM
MARGARET MITCHELL
CEO
YWCA USA**

**THE COMMITTEE ON THE JUDICIARY
U.S. SENATE**

AT A HEARING ENTITLED

**“The Equal Rights Amendment: How Congress Can Recognize Ratification
and Enshrine Equality in Our Constitution”
February 28, 2023**



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Chairman Durbin and Ranking Member Graham, and Members of the Committee, thank you for allowing me to submit this statement for the record in support of SJ Res 4, the bipartisan resolution which affirms the validity of the Equal Rights Amendment (ERA), having been ratified by three-fourths of the states as required by Article V of the U.S. Constitution.

Founded more than 160 years ago, YWCA is one of the oldest and largest women’s organizations in the nation. Our national network of almost 200 local associations across 45 states and the District of Columbia serves as many as 2.3 million women, girls, and family members of all ages and backgrounds each year in more than 1,200 communities. We combine programming and advocacy to generate lasting change in the areas of racial justice and civil rights, empowerment and economic advancement for women and girls, and improved health and safety for women and girls.

Removing barriers and expanding opportunities for women’s successful participation in all aspects of civic and community life is at the heart of YWCA’s mission to eliminate racism, empower women, and promote peace, justice, freedom, and dignity for all. YWCA has been at the forefront of the most pressing social movements --- from voting rights to civil rights, from affordable housing to pay equity, from violence prevention to health care reform. We support fair wages and equal pay; safe, fair, and inclusive workplaces free of discrimination and harassment; job-protected safe leave, paid sick leave, and paid family leave; and other law and policies that open doors of opportunity for women and girls.

It is because of our storied legacy of advancing justice and equity for all women that YWCA has long supported the passage and ratification of the Equal Rights Amendment-- and with the Commonwealth of Virginia becoming the 38th state to ratify the ERA in 2020, we now urge recognition by Congress of its validity as having been ratified by three-quarters of the states in accordance with Article V of the U.S. Constitution.



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Foremost in our minds as we urge Congress to pass SJ Res 4 is the explicit guarantee of protection against discrimination on the basis of sex that the ERA would enshrine in the U.S. Constitution. For too many women, discrimination and harassment at work, in school, and in other sectors of their lives remains a daily reality. In YWCA's most recent national survey of women during the summer of 2022, more than half of the women surveyed (53%) reported having experienced discrimination because they are a woman. Moreover, more than 1-in-10 (13%) reported that they experienced sexual harassment at work within the last year, with even higher reporting rates for Gen Z women (26%), Millennial women (21%), and Black women (19%).

Recognition of the ERA would finally provide an explicit guarantee of protection against discrimination on the basis of sex in the U.S. Constitution – sending a critically important message about equality to all, as well as creating additional needed avenues of legal recourse for people who face discrimination under the law on the basis of sex. At a time when long-recognized rights of women and marginalized communities are being reversed and rolled back, this protection of rights is critical.

Moreover, the Equal Rights Amendment would help improve the lives of survivors of domestic and sexual violence around the country by giving Congress the constitutional power to enact laws that give women victimized by gender-based violence better protection and legal recourse in the courts for claims of gender-based violence. As the largest network of domestic and sexual violence service providers in the United States, YWCA knows that women and girls of all ages, income levels, racial and ethnic communities, sexual orientations, gender identities, and religious affiliations continue to experience gender-based violence in the form of domestic violence, sexual assault, dating violence, stalking, and trafficking. We work for practical solutions to protect survivors, hold perpetrators accountable, and eradicate all forms of gender-based violence. From our work each year providing more than 535,000 women with safety services that include emergency shelter, crisis hotlines, counseling and court assistance, and other community safety programs, we see first-hand the real need for the protection that the ERA would provide to the victims and survivors we serve.

These are just a few of the numerous ways in which the ERA would empower and improve the lives of women. We urge all Members of Congress to join in support of SJ Res 4 to recognize the Equal Rights Amendment as validly ratified by the states in accordance with Article V, so that women across the country can benefit from comprehensive protection against discrimination in

schools, employment, during pregnancy, and in many other parts of their lives.

YWCA appreciates the opportunity to share our views with you. If you have any questions, please contact YWCA USA Vice President of Public Policy and Advocacy, Catherine Beane, at cbeane@ywca.org or 202-835-2354.

Sincerely,



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Written Testimony from the Zonta USA Caucus
Submitted by Bobbee Cardillo, Convener

For the Record to Senate Committee on the Judiciary for the Hearing on

“The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine
Equality in Our Constitution”
February 28, 2023

Chairman Durbin, Ranking Member Graham and members of the Senate Committee on the
Judiciary:

The Zonta USA Caucus represents more than 8,000 members of Zonta International who live in the United States. Zonta is a non-partisan, non-sectarian global organization of professionals, with a mission to empower women and girls through service and advocacy. Founded in 1919 in Buffalo NY, Zonta has always believed that women should have equal rights with men. We have supported those rights being enshrined in the US Constitution since the Equal Rights Amendment was first proposed in Congress in 1923. There are now more women living in the rest of the world with gender equality guaranteed in their national constitutions---yet here in the United States, more than 100 years later, we continue to battle for women’s legal rights!

In that regard, we wish to commend the Senate Judiciary Committee for holding this vital hearing on SJ Res 4 which, if adopted, will formally recognize that the ERA is valid as the 28th Amendment of the US Constitution. This resolution recognizes the fact that all requirements for amendment, outlined in Article V of the Constitution regarding ratification, have already been met.

The ERA has had a long road to reach ratification. Introduced in Congress in 1923, it was written as a follow up to the 19th Amendment, which gave women the right to vote in 1920.

While the amendment was introduced in Congress every year since 1923, it did not succeed until 1972, when both houses of Congress passed it with bipartisan support and it was sent to the states for ratification. Thirty-eight states were needed to achieve ratification.

While this did not occur before the artificial deadline set by Congress, it was finally achieved when Virginia became the 38th state to ratify in 2020. As the deadline is not part of the official Amendment voted on by the states, and deadlines are not enumerated in Article 5, the deadline should not dictate the timeline for ratifying the amendment. Accordingly, the Equal Rights Amendment met the constitutional requirements related to ratification on January 27, 2020.

Passing SJ Res 4 is critical in order to assure the American people and the Biden Administration that Congress acknowledges that ratification of the ERA has occurred. Enactment of the ERA will help the courts in their interpretation of all laws affecting women's equality going forward and benefit women in the US, who make up over 50% of the population, by finally making women's rights equal to those of men under the law.

Passage of SJ Res 4 and acknowledgement of the Equal Rights Amendment is important to the Zonta USA Caucus as a demonstration of the commitment of the USA to gender equality. After being founded in the USA to advance the status of women, Zonta International has grown to advance the ideals of equality and equal opportunity in 63 other countries around the globe. It is critically important that the core of those ideals, equal rights under the law, be enshrined in the US Constitution as it has been in the constitutions of so many other nations. The USA should be the shining example of gender equality we were always meant to be.

Passing SJ Res 4 is a must! We respectfully request your immediate action to pass SJ Res 4.

**Advocates seeking to resuscitate the 1972 Equal Rights Amendment
are on a 40-year losing streak before federal judges of every stripe:
So far, five courts, 26 judges and justices -- and counting**

By Douglas D. Johnson

Senior Policy Advisor and Director of the *ERA Project*

National Right to Life Committee

[Originally published March 18, 2021. Updated January 5, 2022.]

Judge Rudolph Contreras, a federal district judge appointed by President Obama, ruled on March 5, 2021 that the Equal Rights Amendment resolution approved by Congress in 1972 contained a constitutionally valid ratification deadline that expired decades ago, and that “ratifications” by Nevada, Illinois, and Virginia in 2017-2020 were without legal effect. This seemed a very newsworthy development, given the extent of the media coverage that we saw surrounding the Virginia’s “ratification” in January 2020, which many journalists readily accepted as the final ratification needed to put the ERA over the three-fourths finish line (nowadays, 38 states) set forth in Article V of the Constitution.

Yet, the judge's ruling received little immediate coverage in the mainstream press. I saw nothing about it that day or the next in the *Washington Post*, the *New York Times*, or the *Wall Street Journal*, or on the major TV networks. Many “elite” journalists reflexively look leftward for signals on developments that may be important. I suspect that they received no prodding from that direction to cover Judge Contreras’ ruling, which was disruptive to the narrative that organizations and politicians on the Left have been peddling with increasingly vigor: That after a hundred years of struggle, nearly 50 years after the Congress sent the ERA out to the state legislatures, the ERA is on the brink (they say) of becoming part of the Constitution.

Few journalists or media personalities have been much disposed to looking very hard at the ramshackle structure of legal improbabilities on which that narrative rests, or the inconvenient truths that it omits.

The ERA cannot become part of the Constitution unless the federal courts embrace or acquiesce in not just one but all of the following dubious propositions: *That Congress has a right to retroactively change the terms of a constitutional amendment resolution, a half-century after most states acted on it; that Congress can do such a thing by simple majority votes, even though Article V requires two-thirds votes; that no state that once consents to any proposed amendment can ever change its mind and rescind its ratification, ever before a congressionally dictated deadline and before 38 states have ratified; that no such ratification ever truly expires, even if the ratifying body formally said that it would expire or has expired; and that no constitutional amendment submission structured in the usual modern fashion can ever truly die.*

On March 17, 2021, the U.S. House of Representatives narrowly passed (222-204) a joint resolution (H.J. Res. 17) that purports to “remove” the ratification deadline that Congress included in the 1972 ERA deadline -- a deadline that expired March 22, 1979. This measure is expected to come the floor of the U.S. Senate sometime during 2022, where a successful filibuster is likely to ensue. After a year of hard lobbying by pro-ERA groups, the number of Republican senators who have embraced the measure remains the same as during the previous Congress – two (Senators Lisa Murkowski of Alaska and Susan Collins of Maine).

Here is one of the inconvenient truths that ERA proponents hope does not come into sharp focus: Since the 1979 deadline passed, they have seven times approached federal courts seeking to gain any shred of judicial support for the legal theories supporting their contention that the ERA remains a viable proposal. On each such occasion, they have utterly failed.

The record shows that the bumper-sticker assertions of the ERA-is-alive crowd disintegrate like wet cardboard under sustained judicial scrutiny, whatever the political affiliations of the judge.

By my count, as of January 5, 2022, 26 federal judges on five courts have been offered opportunities to vote whether to consider, or have ruled on the merits of, key elements of the ERA-is-alive theories – 14 judges appointed by Republican presidents, 12 by Democratic presidents. The judges who reached the merits rejected outright or set aside the substantive legal claims on which the ERA-is-alive movement is premised. Those who disposed of cases on purely procedural grounds did so despite the strong contrary pleadings of ERA advocates.

If the controversy concerned something other than the ERA, the mainstream news media would probably regard such a one-sided pattern of judicial actions, by judges of diverse judicial backgrounds and philosophies, as evidence that the constantly losing side was on weak legal footing – maybe even just making stuff up for purposes of providing fodder for political rhetoric. But so far, that has not happened with respect to the ERA. Funny how that works.

The ERA Resolution (H.J. Res. 208) approved by the 92nd Congress, sent to the states on March 22, 1972, contained a 7-year ratification deadline in its Proposing Clause. The Proposing Clause is not a mere “preamble,” but an element of every constitutional amendment submitted by Congress to the states, beginning with the First Congress – an element required by the structure of Article V itself. The Supreme Court, in a unanimous 1921 decision in *Dillon v Gloss*, said that Congress’s Proposing Clause (“mode of ratification”) power *includes* the power to set a binding ratification deadline, although Congress is not *required* to do so.

In his March 5 ruling, Judge Contreras dismissed a claim by Virginia, Nevada, and Illinois, that their legislative actions in 2017-2020 had caused the ERA to achieve the 38 ratifications required to become part of the Constitution. After a year of proceedings in the case styled *Virginia v. Ferriero*, Judge Contreras held that “the ERA’s deadline barred Plaintiff’s late-coming ratifications.”

Responding to the claim by the three pro-ERA states that the Archivist of the United States (the official charged by law with receiving state ratification documents), David Ferriero, was obligated to certify the ERA as part of the Constitution, Judge Contreras said that the Archivist had merely recognized that there was “an obvious and direct contradiction between the Plaintiffs’ claimed ratifications and a deadline that Congress had imposed pursuant to its Article V ‘power to designate the mode of ratification.’” To suggest that the Archivist is obligated to certify an amendment that had failed to meet constitutional requirements would be “absurd,” Judge Contreras said.

In his ruling, Judge Contreras five times cited holdings by federal district Judge Marion Callister, who handed down the first judicial ruling on the ERA ratification issues in 1981, in a case styled *Idaho v. Freeman*. Judge Callister had been appointed by Republican President Gerald Ford. The case was brought by a group of Idaho legislators, among others, who objected to a measure approved (by simple majority votes) in Congress in 1978, purporting to extend the ERA ratification deadline from March 22, 1979 to June 30, 1982. Moreover, Idaho was

also among four states that had rescinded their ratifications prior to the 1979 deadline, and the legislators sought a court order preventing the Administrator of General Services (who was at that time tasked with receiving ratification papers) from counting Idaho among the ratifying states.

The National Organization for Women (NOW) also became a party to parallel litigation, arguing that the deadline extension was constitutional and that rescissions are never permissible.

Judge Callister held that the 1978 deadline extension was unconstitutional. While Congress was not obligated to set a deadline for ratification, once it had done so "it was not at liberty to change it" after submission of the proposed amendment to the states, Judge Callister ruled. Moreover, even if Congress did possess the power to change a deadline after submission, it would require a two-thirds vote in each house of Congress to do so, since a two-thirds vote is required whenever Congress exercises its powers under Article V, Judge Callister held. Since the 1978 extension resolution had been approved by less than two-thirds margins, it was doubly unconstitutional under Judge Callister's holdings.

In addition, Judge Callister upheld the Idaho claim that its legislative rescission effectively removed it from the count of ratifying states. Callister ruled that states may rescind prior ratifications up until the point that a proposed amendment reaches the required threshold of three-quarters of the states, at which point it immediately becomes part of the Constitution. In addition to nullifying Idaho's ratification, "The same is true for any other state which has properly certified its action of rescission to the Administrator," Judge Callister said.

The *Washington Post* characterized the ruling as "the single most staggering defeat for ERA since it was placed before the states in 1972." (12-24-81) The *New York Times* editorialized that Judge Callister "has issued judgments enough to kill the Equal Rights Amendment two or three times over," accused him of "unfair meddling," and called for "Supreme Court correction...reversal has to be swift." (12-30-81)

ERA supporters appealed to the 9th Circuit Court of Appeals, but also sought immediate review by the U.S. Supreme Court. The Supreme Court agreed to review the matter (granted pre-judgment certiorari) and stayed the holding of the district court. But the purportedly extended deadline came and went on June 30, 1982, with no new states having ratified. Thus, the final ratification total was 35

states-- or only 30 or 31, if the pre-deadline rescissions by Idaho and three or four other state legislatures were valid.

The Acting Solicitor General of the U.S. then submitted a memo, noting that the ERA had “failed of adoption” no matter whether the 1978 deadline extension was constitutional or not, and no matter whether the rescissions were valid or not. Therefore, he argued, the entire matter should be deemed moot. The Supreme Court took explicit note of the Acting Solicitor General's filing, declared the case moot, and vacated Judge Callister's decision. This does not mean the Callister holdings were reversed, but rather, that the ruling was not to be regarded as having precedential weight; it had not been reviewed in adversarial proceedings in a higher court. That does not mean, however, that Judge Callister's thorough decision does not have persuasive value. Judge Contreras apparently saw merit in at least some of Judge Callister's analysis, since he cited Judge Callister's ruling five times.

Judge Contreras also noted that “the Supreme Court's vacatur of the decision in *Idaho v. Freeman*... appeared to tacitly acknowledge that the ERA's ratification deadline was effective... To reach that conclusion, the Court must have assumed that the ERA's deadline barred further ratifications -- as the respondents [the pro-ERA side] warned a mootness ruling would imply.”

Essentially the same conclusion was stated in the January 6, 2020 opinion of the Office of Legal Counsel of the Justice Department, which cited an N.O.W. filing from 1982 that said “Even an unexplained ruling that this case is moot would necessarily signal implicit acceptance of the [Acting Solicitor General's] position...”

Likewise, Professor Michael Stokes Paulsen, a recognized authority on the constitutional amendment process, wrote in 2019, “The Supreme Court's disposition of the [Idaho] case on mootness grounds logically entails the predicate conclusion that the proposed Equal Rights Amendment had failed of ratification and was no longer legally capable of being ratified.”

At the time the Supreme Court took this action in October 1982, implicitly recognizing the demise of the ERA, it was composed of seven justices appointed by Republican presidents (including the liberal justices Brennan and Stevens), and two justices appointed by Democratic presidents (including the often-conservative Justice White). Not a single dissent was noted to the Court's order.

That should have been the end of the 1972 ERA. But starting in 1993, some ERA proponents began operating on a new premise, often referred to as the “three-state theory.” In a nutshell, the premise was that deadlines did not really matter, either because they were unconstitutional, or because any Congress had the power to retroactively nullify them.

On Jan. 7, 2020, a federal lawsuit was filed by a well-known pro-ERA group called “Equal Means Equal,” in federal district court in Massachusetts, styled *Equal Means Equal v. Ferriero*. The case was assigned to federal Judge Denise J. Casper, an appointee of President Obama. Equal Means Equal counsel Wendy Murphy argued that the ERA’s ratification deadline was unconstitutional, as it appeared in the Proposing Clause (which she oddly claimed was “an extra-textual statute”), and that therefore the ERA would become part of the Constitution as soon as the Virginia legislature adopted its “ratification” resolution, which was expected to occur within weeks. Murphy urged Judge Casper to undertake a series of proactive actions to ensure that the Archivist accepted the anticipated Virginia “ratification” and certified ERA as part of the Constitution, lest “a federal judge in Alabama rules that the ERA is not valid” -- which, she argued, would block various legal benefits that Murphy asserted would flow to her clients and other women from adoption of the ERA.

After briefing and oral argument, on August 6, 2020, Judge Casper dismissed the case, ruling that the group and its members did not have legal standing to bring their claims (although she implied that states might have standing to pursue such issues). Equal Means Equal appealed to the First Circuit Court of Appeals, but also, in early September 2020, filed an “urgent” cert petition at the US. Supreme Court. The cert petition argued that the matter “is of such imperative public importance that deviation from normal appellate practice and an immediate determination from this Court is warranted.” The petition further asserted, “Review is warranted not only because the ERA is the most important and fundamental of all women’s rights, but also because everyone in America has a right and need to know whether it is now the Twenty-Eighth Amendment to the Constitution.”

On October 7, 2020, the president of Equal Means Equal, Kamala Lopez, sent out an alert stating, “We recently found out that SCOTUS will decide on October 9, 2020, in conference, if it will include our historic case among the few it agrees to hear this year. Only the votes of four Justices are needed for the Supreme Court to accept the case. Hopefully, Chief Justice Roberts will be that fourth vote.”

In other words, despite the then very recent death of Justice Ruth Bader Ginsburg, the group believed that three justices were likely to vote to accept their case (presumably they were counting Justices Sotomayor, Kagan, and Breyer), and thought that Chief Justice Roberts *might* provide the needed fourth vote to grant cert.

The Supreme Court did indeed consider the Equal Means Equal cert petition on October 9, 2020-- and, in a list of orders by the Court on Oct. 13, 2020, denied the petition. It is not uncommon for such orders to note the names of justices in dissent (i.e., those who voted to take a case), but not a single Supreme Court justice was recorded as wanting to consider Equal Means Equal's plea to decide whether the ERA was part of the Constitution. The Supreme Court at that time was made up of five justices appointed by Republican presidents, and three appointed by Democratic presidents.

Equal Means Equal attorney Wendy Murphy then pursued a conventional appeal of Judge Casper's ruling, to the U.S. Court of Appeals for the First Circuit. On June 29, 2021, a three-judge First Circuit panel unanimously upheld Judge Casper's dismissal of the case for lack of standing. The ruling was written by Chief Judge Jeffrey Howard, who was appointed by President George W. Bush; he was joined by Judges Sandra Lynch, appointed by President Clinton, and David Barron, appointed by President Obama.

Equal Means Equal then petitioned the full First Circuit to review the panel's decision ("petition for rehearing en banc"). This was grandstanding for the groundlings. The First Circuit has just six authorized judgeships (currently filled by one judge appointed by a Republican president and five appointed by Democratic presidents). Since three of the six had *already voted* to dismiss the lawsuit, it would have been *impossible* to get the four votes needed to overturn the panel's ruling, unless one of the original three flip flopped. Predictably, on January 4, 2022, the court announced that the petition for rehearing en banc was denied. None of the six judges entered a dissent.

This action brought to 26 the number of federal judges and justices who, by action or inaction, have rejected or turned their backs on the legal claims of the ERA-is-alive movement (14 appointed by Republican presidents, 12 by Democratic presidents). Not one of the 26 has offered even so much as a symbolic gesture in support of the ERA resurrectionists.

Justice Ginsburg's death on September 18, 2020 meant that she was not present to vote on the 2020 cert petition filed by Equal Means Equal. However, she publicly expressed herself twice on the ERA-is-alive campaign, in September 2019, and again in February 2020.

"I was a proponent of the Equal Rights Amendment," Ginsburg said on September 12, 2019. "I hope someday it will be put back in the political hopper and we'll be starting over again, collecting the necessary states to ratify it." Justice Ginsburg said this, of course, knowing full well that many of her fellow ERA advocates were invested in the notion that the 1972 ERA could be resurrected.

Ginsburg returned to the subject on February 10, 2020 – just three days before the U.S. House of Representatives was scheduled to take up an ERA "deadline removal" measure, H.J. Res. 79.

"I would like to see a new beginning," she said. "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'?"

(With those last two sentences, Justice Ginsburg went even beyond the legal positions argued in the January 2020 legal opinion from the Justice Department's Office of Legal Counsel, which did not reach the issue of whether a state may ever rescind its ratification.)

Certainly, there will be further federal litigation about the status of the ERA. In *Virginia v. Ferriero*, on May 3, 2021, the attorneys general of Virginia, Nevada, and Illinois filed an appeal of Judge Contreras' ruling at the U.S. Court of Appeals for the District of Columbia. Final briefs are due on February 23, 2022, with oral arguments presumably to follow.

Linda Coberly, an attorney who heads the legal task force for the ERA Coalition, said in a March 9, 2021 piece on Msmagazine.com that there would be new lawsuits, by unspecified plaintiffs in unspecified jurisdictions, starting in January 2022, "on the two-year anniversary of Virginia's ratification, when the ERA's protections go into effect." It seems that hope springs eternal among devotees of the ERA-is-alive cult.

But their prospects for success seem increasingly remote, given the cool reception received to date – three cases, five courts (counting the Supreme Court as

one court, although it was approached twice, 38 years apart), 26 judges, all rejecting or at least failing to lift a finger in support of any of the ERA revival pleas.

Why, then, do ERA advocates not turn to the option that Justice Ginsburg twice advised: Start over? I submit that it is because the ERA advocates know that their proposed constitutional text cannot come close to garnering the degree of political consensus required to amend the Constitution, under the Framers' design incorporated into Article V. In a March 10, 2021 editorial endorsing the pending congressional "deadline removal" measure, the editorial board of the *Los Angeles Times* said it out loud: "There is a bill [H.J. Res. 28] that would restart the entire ratification process, but that would be a giant step backward at a time when most state legislatures are controlled by a party opposed to constitutionally guaranteeing equal rights."

Despite the tendentious language employed by the editorial board members, they are not wrong in intuiting that many of the 30 state legislatures that ratified that ERA during the first year after its submission on March 22, 1972 (22 of them before the Supreme Court declared abortion legal in January 1973) are not likely to embrace amendment text that NOW says will invalidate "hundreds" of abortion-limiting laws, and NARAL says will "require judges to strike down anti-abortion laws."

To adherents of the ERA-never-dies movement, it makes perfect sense to disenfranchise the current generation of state legislators, while claiming ownership of the long-expired actions of their predecessors of a half-century ago. The same mindset deludes them into believing that the current Congress can time-travel to 1972 to revise the legislative compromise that produced the two-thirds votes for the ERA Resolution – even though not a single member of the 92nd Congress remains in Congress today.

It appears that the federal judges must continue to school these people for yet awhile longer that it does not work that way.

Author's Note: I have excluded from this analysis procedural litigation that flowed from the *Idaho v. Freeman* case. The National Organization for Women petitioned to be admitted to the litigation as intervenors. That motion was denied by Judge Callister, but later granted by a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit.

NOW also engaged in various judicial proceedings intended to remove Judge Callister from the *Idaho v. Freeman* case, in which they were unsuccessful. These proceedings did not really involve judicial review of the legal theories behind claims that the ERA remained alive after the March 22, 1979 deadline, nor did the proceedings require votes by judges on whether they wanted to consider those issues.

Likewise, I have excluded all proceedings involving *Alabama v. Ferriero*, filed in December 2019 by three attorneys general (Alabama, Louisiana, and Tennessee) who asserted that the ERA is long expired. Although a pro-ERA group made a motion to intervene in the case, the anti-ERA attorneys and the Department of Justice quickly reached agreement that the ERA had expired in 1979. That automatically brought at rapid end to the case, on terms favorable to the anti-ERA side, but before the judge could rule on any substantive issues.

THE "EQUAL RIGHTS AMENDMENT"

An In-Depth Special Report

Executive Summary

Pro-abortion groups, seeking a replacement for *Roe v. Wade*, are engaged in an intensive effort to flatten constitutional guardrails and ram the long-expired 1972 Equal Rights Amendment into the U.S. Constitution. Many elected Democratic officeholders have enlisted in this extra-constitutional campaign. However, for decades federal judges of every political stripe have rebuffed the politically contrived, legally untenable claims of the ERA revivalists. During 2023, the ERA-revival movement will continue to depend on a misinformation-heavy, "repetition creates reality" strategy, and on a largely sympathetic and often willfully gullible news media, but the movement is likely to also encounter increasing headwinds in the courts and in Congress.

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.

To those ends, pro-abortion activists are pulling out all stops to try to ram the 1972 ERA into the Constitution. Yet their effort could only succeed if multiple constitutional guardrails were first bulldozed, with far-reaching ramifications for possible future revisions to the text of the Constitution.

The ERA Resolution submitted to the states by Congress on March 22, 1972, contained a seven-year ratification deadline, which expired on March 22, 1979. Nevertheless, after winning adoption of ostensible "ratification" resolutions from the legislatures of Nevada (2017), Illinois (2018), and Virginia (2020), ERA revivalists now assert that the ERA is already part of the Constitution, or will be so upon completion of endorsement by the Archivist of the United States, or the Congress, or both.

ERA revivalists, including President Biden, have urged that Congress adopt a joint resolution purporting to retroactively "remove" the ratification deadline, an action that some claim would "remove any ambiguity" regarding the ERA's status. There is compelling legal authority to the contrary. In any event, Congress has not adopted any such measure, nor is any such congressional action likely to occur during the years just ahead, if ever.

Far from eliciting media outcries about attacks on the rule of law or the constitutional order, during 2021-2022 the anything-goes ERA-revival campaign was overtly promoted in prestigious organs of the national media such as *The New York Times*, *The Atlantic*, *NBC News*, and National Public Radio.

Published January 23, 2023



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Nevertheless, so far, the constitutional rule of law has prevailed. The federal courts have remained uniformly unreceptive, over a 41-year period, to the legal claims advanced by the ERA revivalists. As *Washington Post* Fact Checker noted on February 9, 2022:

[E]very 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.... Moreover, two major court rulings have concluded that the ERA's ratification deadline, as set by Congress, has expired — a position embraced by both the Trump and Biden Justice Departments. The Supreme Court in 1982 also indicated support for the idea that the deadline has passed. ("[The ERA and the U.S. archivist: Anatomy of a false claim](#)," *Washington Post*, February 9, 2022, also awarding Congresswoman Carolyn Maloney "Four Pinocchios" for her claims that the Archivist of the U.S. could and should unilaterally add the ERA to the U.S. Constitution.)

As this 10th edition of *The State of Abortion* goes to press in mid-January 2023, a landmark ruling on the status of the ERA could come at any time from the U.S. Court of Appeals for the District of Columbia. A three-judge panel heard oral arguments in the case of *Illinois v. Ferrero* on September 28, 2022. The case pits two states that assert that the ERA has been ratified (Illinois and Nevada) against the Biden Administration's Justice Department (which says that the pro-ERA states lack legal standing, but also that the ERA has not been ratified), and against five "anti-ERA" states. The anti-ERA states argue that the ERA expired in 1979, and that even if the deadline were disregarded, the ERA failed ratification due to pre-deadline rescissions by multiple states.

The three-judge panel considering the case is made up of Judges Robert Wilkins (appointed by President Obama), Naomi Rao (Trump), and J. Michelle Childs (Biden). If the appeals court upholds a 2021 ruling by federal District Judge Rudolph Contreras (an Obama appointee), holding that the ERA's ratification deadline was valid and that the ERA has not been ratified, it may become more difficult for even a highly sympathetic news media to continue to unskeptically amplify the misinformation of the ERA revivalists.

The balance of this Special Report is divided as follows:

- The Rise and True Demise of the 1972 ERA (1972-1982)
- The Origin and Execution of the Unconstitutional "Three-State Strategy" (1993-2020)
- The Fake-It-To-Make-It Misinformation Campaign (2020-date)
- The Campaign Against the Archivists (2019-date)
- Overt Attacks on Article V and on the Role of the Judiciary
- The ERA Revival Campaign Fizzled in the 117th Congress (2021-2022) and Faces Dim Prospects in the 118th Congress (2023-2024)
- How Support for the Equal Rights Amendment in the U.S. House of Representatives Has Plunged Over a 50-Year Period
- Doublethink by Democrats on Rescissions
- The ERA-Abortion Connection: The Mask Comes Off
- Additional Resources
- NRLC Letter to the U.S. Senate (November 16, 2022)

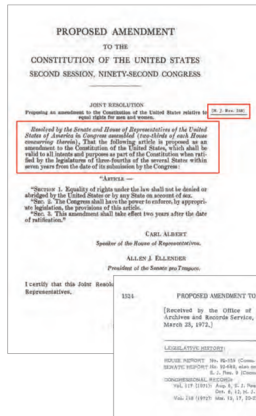
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The Rise and True Demise of the 1972 ERA (1972-1982)

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. The proposed text to be added to the Constitution is *always* preceded by a "Proposing Clause" specifying the "mode of ratification." If three-quarters of the states (currently, 38) ratify the amendment, then the amendment becomes part of the Constitution. In 1921, a unanimous Supreme Court held that Congress has the power to include a deadline for ratification.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the sixth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.



An early version of the Equal Rights Amendment was first introduced in Congress a full century ago, in 1923, at the urging of feminist leader Alice Paul. However, until 1972, no such proposal ever received the level of congressional support required under Article V — a two-thirds vote in each house, during a single two-year Congress.

In the 92nd Congress (1971-1972), a compromise was struck that broke the long deadlock: A seven-year deadline for ratification was added. With the change, the ERA cleared both the Senate and the House by more than the two-thirds margins required by Article V, and was submitted to the states on March 22, 1972. As federal district Judge Rudolph Contreras observed in a March 2021 ruling, "Inclusion of a deadline was a compromise that helped Congress successfully propose the ERA where previous attempts to pass a proposal had failed." The chief sponsor of the ERA in the U.S. House of Representatives, Rep. Martha Griffith (D-Mich.), observed at the time, "I think it is perfectly proper to have the 7-year statute so that it should not be hanging over our heads forever. But I may say I think it will be ratified almost immediately."

(The ERA's ratification deadline was placed in the Proposing Clause, as has been the practice for every successful constitutional amendment submitted by Congress to the states since 1960. The Proposing Clause is not a mere "preamble," but a constitutionally required element of every constitutional amendment submission.)

As the March 22, 1979 deadline approached, the ERA was three states short of the required 38 state ratifications — and four of the states that had ratified during an initial rush had rescinded their ratifications.



National Right to Life Committee | 3

Under pressure from pro-ERA groups, in 1978 Congress passed a resolution — by simple majority votes — that purported to extend the deadline for 39 months. Many members of Congress, and many constitutional experts, criticized the ostensible “deadline extension” as clearly unconstitutional. The only federal court to ever consider the matter subsequently ruled that the “deadline extension” was unconstitutional in two different ways (and that the rescissions were valid) (*Idaho v. Freeman*, 1981). But no additional states ratified during the 39-month pseudo-extension, so as of June 30, 1982, everyone agreed that the 1972 ERA had failed. The U.S. Supreme Court declared that the legal disputes about the deadline extension and the rescissions were moot, because any way you cut it, the 1972 ERA was dead.

At that point, 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. When Congress convened in 1983, a top priority of the Democratic majority leadership of the U.S. House of Representatives was restarting the constitutional amendment process for the ERA.

**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 15, 1972
Delaware	March 25, 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 25, 1972	South Dakota*	Feb. 5, 1973
Kentucky*	June 27, 1972	Tennessee*	April 4, 1972
Louisiana	not ratified	Texas	March 30, 1972
Maine	Jan. 15, 1974	Utah	not ratified
Maryland	May 26, 1972	Vermont*	March 4, 1973
Massachusetts	June 21, 1972	Virginia**	January 27, 2020
Michigan	May 22, 1972	Washington	March 22, 1973
Minnesota	Feb. 9, 1973	West Virginia	April 22, 1972
Mississippi	not ratified	Wisconsin	April 26, 1972
Missouri	not ratified	Wyoming	Jan. 26, 1973

* *Proposed Rescission* ** Ratification actions occurred after Congress's deadline expired. See U.S. Dept of Justice, Office of Legal Counsel, *Ratification of the Equal Rights Amendment, 44 Op. O.L.C. 200*, Slip Op. (Jan. 9, 2020).

The National Archives' official list of state legislative actions on the Equal Rights Amendment as of January 2020.



A House Judiciary subcommittee held five hearings on a new ERA resolution (H.J. Res. 1) (containing exactly the same language as the 1972 proposal), after which the full Judiciary Committee voted to reject all proposed amendments and sent the start-over ERA to the full House. 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. The measure received the support of 65% of the voting House members — short of the two-thirds margin required under Article V.

In 1983 and since, National Right to Life has expressed strong opposition to any federal ERA, *unless* an “abortion-neutralization” amendment is added, which would state: “Nothing in this Article [the ERA] shall be construed to grant, secure, or deny any right relating to abortion or the funding thereof.” ERA proponents have vehemently rejected such a modification to any “start over” ERA.

explaining its full legal reasoning, reaffirming the authority of Congress to set ratification deadlines, but noting that Congress had not done so with respect to the CPA. The memo also noted that no state had attempted to rescind its ratification of the CPA.

(In December 2022, Wilson co-authored an odd opinion piece, published in *Ms.*, in which he claimed he had certified the CPA on his own authority. Not only did Wilson fail to mention the binding guidance he had received from the OLC, but he even went on to criticize his successors for heeding OLC's conclusion that the ERA had not been ratified. This was an exercise in historical fiction on Wilson's part, since the well-documented record shows that Wilson properly deferred to the OLC's legal guidance with respect to the certification of the CPA, just as his successors have done with respect to the ERA.)

The odd history of the CPA really has little relevance to the ERA, since the CPA contained no deadline and involved no rescissions. Nevertheless, in 1993 ERA advocates seized on the certification of the CPA to concoct the "three-state strategy." They asserted deadlines didn't matter and that rescissions should not be allowed, and therefore, the ERA could still become part of the Constitution, if only three more states would adopt "ratification" resolutions.

Operating on this shoddy mishmash of constitutional novelties, beginning in 1994, "ratification" resolutions were proposed repeatedly in legislatures in the 15 states that had never ratified the ERA. For more than two decades -- from 1994 through 2016 -- none of those attempts was successful, with opposition from NRLC affiliates and other pro-life forces in many instances decisive in defeating such resolutions. Finally, in 2017, the Nevada legislature adopted such a "ratification," followed by Illinois in 2018 and Virginia in January 2020.

In 2019, Archivist David Ferriero (appointed by President Obama in 2009), although personally an ERA supporter, properly recognized that the status of the ERA was quite distinct from that of the 1992 CPA, because the ERA contained a deadline and implicated the rescissions issue. Therefore, Ferriero properly sought authoritative guidance from the Justice Department OLC.



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On January 6, 2020, Assistant Attorney General for the Office of Legal Counsel 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; the opinion rejected the legal rationale for the 1978 "deadline extension." The opinion asserted that a post-deadline Congress could no more alter the *expired* deadline than now act to override a veto by President Carter.

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.

The "Fake-It-To-Make-It" Propaganda Campaign (2020-date)

Since January 2020, ERA revivalists have pressed forward on multiple fronts with their "deadline denial" theory that the 1972 ERA has been ratified and is part of the Constitution, requiring at most minor steps to formalize its inclusion.

Many elected officeholders (Democrats, with few exceptions), seeing political advantage, have lent their weight to the misinformation-based narrative. To cite just one example, on November 16, 2021, House Speaker Nancy Pelosi (D-Calif.) said that the ERA was on "the cusp of being enshrined into the Constitution."

This essentially demagogic approach to the constitutional amendment process was well illustrated [in an exhortation by Kate Kelly](#), an attorney-activist, author, PBS commentator, and former congressional staffer prominent in the ERA revival campaign, in remarks directed to other ERA-revivalists in the legal community, during an event sponsored by the Washington & Lee Law School on October 28, 2022. Kelly said:

I would just say the number one thing is just actively talking about it though it exists. You say, in law school, for example, in a class, 'What about the 28th Amendment?...' Act as though the Equal Rights Amendment exists. Act as though it is enforceable. Proceed to tell everyone you know that that is the case...





Yet even in January 2020, claims that the 1972 ERA remained viable already ran counter to multiple earlier ERA-related actions by the federal courts. Since then, in the judiciary — the branch of government charged “to say what the law is” — things have only gotten worse for the ERA revival movement.

Douglas Johnson, director of the National Right to Life *ERA Project*, authored [a detailed review of all of the federal court actions pertaining to the ERA](#) that have occurred since the ERA’s March 1979 expiration date. He summarized: “So far, 26 federal judges and justices have been presented with opportunities to act on one or more substantive or jurisdictional issues presented by ERA-revival litigators. The pro-ERA side has yet to get a *single* judge’s vote on any component of their theories, although the judges were *evenly divided* in party affiliation. During 2021 and 2022, the federal judges who ruled against ERA-revival legal claims were appointed by Democratic presidents 7 to 1.”



“Congress set deadlines for ratifying the ERA that expired long ago. Plaintiffs’ ratifications [those of Virginia, Nevada, and Illinois] came too late to count...Congress’s power to set a ratification deadline comes directly from Article V [of the Constitution]...A contrary result would be absurd.”

U.S. District Judge Rudolph Contreras (appointee of President Obama), ruling in *Virginia v. Ferriero*, March 5, 2021

After Archivist Ferriero declined to certify the ERA as part of the Constitution — properly following the guidance of the January 6, 2020 OLC opinion — he was sued by the attorneys general of Virginia, Nevada, and Illinois (the three “late-ratifying” states). The case was assigned to federal district Judge Rudolph Contreras in the District of Columbia,

an appointee of President Obama. Contreras subsequently allowed the Republican attorneys general of five “anti-ERA” states (Alabama, Louisiana, Nebraska, Tennessee, and South Dakota) to become “intervenor-defendants” in the case; these five states argued in support of the constitutional validity of both the deadline and the rescissions.

On March 5, 2021, Judge Contreras handed a major legal defeat to ERA-cannot-die movement. He [ruled](#) that even if the Archivist had certified the ERA, that action would not have determined the legal status of the ERA; that the ratification deadline was constitutionally valid; and that the “ratifications” by the three states “came too late to count.” He observed, twice, that it would have been “absurd” for the Archivist to disregard the deadline.

The idea that Congress can decide whether or not a proposed constitutional amendment has achieved ratification is known as the “congressional promulgation theory.” Since Congress had not taken any action to endorse the notion that the ERA had been ratified, Judge Contreras did not rule on whether Congress has anything to say about it. Contreras did observe in a footnote, “Commentators have widely panned the theory as out of sync with the text of Article V, prior precedent, and historical practice. ...Indeed, Plaintiffs and the Archivist both denounce the theory.” Contreras



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also wrote that "the effect of a ratification deadline is not the kind of question that ought to vary from political moment to political moment... Yet leaving the efficacy of ratification deadlines up to the political branches would do just that."

The pro-ERA states appealed to the U.S. Court of Appeals for the District of Columbia. In February, 2022, a newly elected attorney general in Virginia withdrew that state from the litigation, asserting that Judge Contreras' ruling was correct. Therefore, the case is currently styled as *Illinois v. Ferriero* (even though Ferriero retired as Archivist at the end of April 2022).

After rounds of written briefings by the plaintiffs, the Justice Department, and the anti-ERA intervenor states, and the submission of innumerable amicus briefs, a three-judge panel of the D.C. Circuit heard oral arguments on September 28, 2022. The *Washington Post* reported that "a panel of federal judges [expressed skepticism](#)" regarding the ERA's viability.



Judge Robert Wilkins: "Why shouldn't the archivist just certify and publish [the ERA], and let Congress decide whether the deadline should be enforced...?"

Deputy Assistant Attorney General Sarah Harrington: "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."

-from the oral argument session in *Illinois v. Ferriero*, U.S. Court of Appeals for the District of Columbia, September 28, 2022

In one noteworthy exchange during the oral argument, the very senior Justice Department lawyer arguing on behalf of the Archivist, Deputy Assistant Attorney General Sarah Harrington, was asked by Judge Robert Wilkins, "Why shouldn't the Archivist just certify and publish [the ERA], and let Congress decide whether the deadline should

be enforced...?" Harrington replied: "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."

Harrington's answer could only be understood as dismissive of the "congressional promulgation" theory.

The Campaign Against the Archivists (2019-date)

Illinois and Nevada carried forward the legal case during 2020-2022, but ERA revivalist leaders inside and outside of Congress spoke seldom about the courts. For the most part, in their public pronouncements, whether to journalists or others, they glossed over or simply did not mention the adverse judgments of federal courts, such as the ruling of Judge Contreras.

Instead, they directed their rhetoric and pressure campaigns mainly towards officials within the Executive Branch, insisting that the Justice Department withdraw the 2020 OLC opinion and agree that the ERA had been ratified, demanding that the Archivist certify the ERA notwithstanding ongoing federal court proceedings, and calling on President Biden to order his subordinates to do these things.

However, the ERA revivalists failed to achieve any of those goals during 2020-2022.

The Biden Administration's Justice Department did re-examine the 2020 OLC memo on the ERA, concluding with issuance of [a short memorandum opinion on January 26, 2022](#). Assistant Attorney

General for Legal Counsel Christopher Schroeder wrote that some of the issues addressed in the 2020 OLC opinion related to congressional powers "were closer and more difficult than the opinion suggested," but he did not repudiate any of them, and he did not alter the core conclusions that the deadline was valid and that the ERA has not been ratified.

Schroeder also wrote that "Congress is entitled to take a different view," which was understood to refer to a pending joint resolution that purported to retroactively remove the ERA's ratification deadline. Since OLC guidance is binding only upon agencies of the Executive Branch, Schroeder's observation that Congress was free to disagree was simply a truism. Pro-ERA activists misrepresented Schroeder's observation as a judgment that the "deadline removal" resolution, if adopted by Congress, would be legally effective, but Schroeder conspicuously expressed no judgment regarding that constitutional question.

Schroeder's memorandum also indicated that upcoming court rulings "may soon determine or shed light upon" the constitutional status of the ERA, a position consistent with statements by Attorney General Merrick Garland (previously a federal court of appeals judge) and Schroeder during their Senate confirmation proceedings in 2021.



The day after Schroeder's memorandum was released, January 27, 2022, President Biden issued a statement stating, "I am calling on Congress to act immediately to pass a resolution recognizing ratification of the ERA. As the recently published Office of Legal Counsel memorandum makes clear, there is nothing standing in Congress's way from doing so."

Douglas Johnson, director of the National Right to Life *ERA Project*, commented at the time, "The President is urging the Senate to adopt a resolution 'recognizing ratification of the ERA,' even though the official position of the Justice Department, which they are defending in court, is that the ERA has not been ratified. This memo appears to be an awkward attempt to appease political activists, while not displaying open

contempt for the judgments and proceedings of federal courts. The President's gesture will not affect any votes in the Senate." (The 117th Congress ended on January 3, 2023, without Senate Majority Leader Chuck Schumer ever forcing any kind of vote on the "deadline removal" resolution.)

Schroeder's January 26, 2022 memorandum was a far cry from the answer that ERA activists in Congress or outside of Congress had been pressing for. At a media event the next day (January 27, 2022), Congresswoman Maloney — the then-chair of the Oversight and Reform Committee in the House of Representatives, which has statutory oversight authority over the National Archives and Records Administration — [lashed out at Ferriero](#): "He's the one holding it back. It's a technicality...It's ridiculous that he's holding this up."

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At the same press event, Rep. Jackie Speier (D-Calif.) played "good cop": "If the Archivist wants to go down in history for a good reason, he should certify it...Then it will be law... [In our minds, it is law.](#)"

Linda Coberly, head of the legal task force for the ERA Coalition, agreed that "the Archivist could go ahead and certify it today, and we need to continue the pressure to go ahead and do that."

This political pressure campaign aimed at getting a federal agency head to disregard federal court rulings drew not condemnation, but promotional amplification in such major media organs as [The New York Times](#), [NPR](#), [NBC News](#), and [The Atlantic](#).



"Even if you are a political junkie, there's a good chance you didn't realize that the United States Constitution grew 58 words longer this week," wrote *The New York Times* editorial board member Jesse Wegman in an essay titled, "[The ERA Is Now the Law of the Land. Isn't It?](#)" Although the piece ran on for 2300 tendentious words, Wegman didn't find room to mention that federal District Judge Contreras (the Obama appointee) had ruled that the ERA had not been ratified.

However, there were some exceptions to the general pattern of media amplification of misinformation — notably, 2200-word rebuke from the *Washington Post* Fact Checker, which in February 2021 awarded Congresswoman Maloney "Four Pinocchios" (the maximum-deception rating) for her claims about status of the ERA and the Archivist's duties with respect to the ERA. The critique noted that "...two major court rulings have concluded that

the ERA's ratification deadline...expired, a position embraced by both the Trump and Biden Justice Departments." ("[The ERA and the U.S. archivist: Anatomy of a false claim.](#)" February 9, 2022)

On February 24, 2022, NARA issued a new statement reiterating that neither its position nor that of the OLC had changed regarding the certification of the ERA. NARA explained that the 2020 OLC memo stated that the ERA "could not be certified," and that the January 26, 2022 OLC memorandum "acknowledges and does not modify this conclusion."

Nevertheless, Maloney and other prominent Democrats in Congress continued to insist that the ERA had been ratified and should be certified by the Archivist as part of the Constitution. On March 8, 2022, Maloney and six other House members wrote to Senate Majority Leader Chuck Schumer, asserting that "the ERA went into effect" on January 27, 2022. (Section 3 of the ERA says that it "shall take effect two years after the date of ratification.")

Press Statement in Response to Media Queries About the Equal Rights Amendment

Media Alert - Thursday, February 24, 2022

Washington, DC
In response to recent media reports that generated a large number of queries about the Equal Rights Amendment, we have issued the following statement to the media beginning in late January 2022:

In its January 6, 2020 opinion, the Office of Legal Counsel (OLC) concluded "that Congress had the constitutional authority to impose a deadline on the ratification of the ERA and, because that deadline has expired, the ERA Resolution is no longer pending before the States." (OLC 2020 Opinion, at p.2.) Accordingly, the 2020 OLC opinion goes on to state that "the ERA's adoption could not be certified under 5 U.S.C. § 506b." (OLC 2020 Opinion, at p.37.) OLC's recently issued January 26, 2022 memorandum on the "Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment" [acknowledges and does not modify this conclusion.](#) That new memorandum also states (pp. 2-3) that "as a co-equal branch of government, Congress is entitled to take a different view of these complex and unsettled questions" and that therefore "the 2020 OLC Opinion is not an obstacle either to Congress's ability to act with respect to ratification of the ERA or to judicial consideration of the pertinent questions."



On March 22, 2022, Maloney sent Archivist Ferriero a letter, again urging him to immediately certify the ERA. She made no reference to Judge Contreras' ruling that the ERA had failed ratification, but she did explicitly invoke her position as chairwoman of the House committee with oversight authority over the agency directed by Ferriero, the National Archives and Records Agency (NARA).

Higher-ranking congressional Democrats also lent their voices to the ongoing misinformation campaign. On November 16, 2021, House Speaker Nancy Pelosi (D-Calif.) said that the ERA was on "the cusp of being enshrined into the Constitution." On September 28, 2022, House Majority Leader Steny Hoyer (D-Md.) said that certification was "long overdue."



Judge M. Margaret McKeown: "Leaving aside whether any deadlines could be extended, what's your prognosis on when we will get an Equal Rights Amendment on the federal level?"

Justice Ruth Bader Ginsburg: "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?'"

-February 10, 2020 remarks at Georgetown University Law Center

Ferriero, who was personally strongly pro-ERA, retired at the end of April 2022. In an exit interview on C-SPAN (May 1, 2022), [Ferriero explained](#), "I can tell you that Ruth Bader Ginsburg twice told me, in this building, we need to start over [on the Equal Rights Amendment]... the time limit has expired, so that's a constitutional question."

When Ferriero announced his retirement, Chairwoman Maloney told *The Atlantic's* Russell Berman that a commitment to certify the ERA "should be a litmus test for whoever is appointed" to replace Ferriero (February 2022).



"I was a proponent of the Equal Rights Amendment. I hope someday it will be put back in the political hopper and we'll be starting over again, collecting the necessary states to ratify it."

Justice Ruth Bader Ginsburg
September 12, 2019
Georgetown Law School

In August 3, 2022, President Biden nominated Dr. Colleen Shogan as Archivist. In testimony before the Senate Homeland Security & Governmental Affairs Committee on September 21, 2022, Senator Rob Portman (R-Ohio) asked Shogan, "If confirmed, would you continue to abide by the January 2020 OLC opinion, as your predecessor did?" [Shogan replied](#), "Yes, I would," adding, "I think who will decide the fate of the ERA is the federal judiciary and/or Congress."

For reasons not related to the ERA controversy, Shogan's nomination died without action by the full Senate at the end of the 117th Congress. On January 3, 2023, President Biden renominated Shogan. As she awaits another round of confirmation proceedings, ERA activists continue to demand that President Biden order the Acting Archivist, Debra Wall, to certify the ERA as part of the Constitution.

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Overt Attacks on Article V and on the Role of the Courts

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.

Kamala Lopez, co-director of the activist group Equal Means Equal, in an April 15, 2022 alert, exhorted supporters to "pressure" the Archivist to publish the ERA, noting, "What we really DON'T want is for the D.C. Court to hand down a ruling against us BEFORE the ERA is published..."

According to [a report by Lisa Rabasca Roepe on fastcompany.com on September 15, 2022](#), "Advocates are now reluctant to have the Supreme Court decide the fate of the ERA given the court's recent *Dobbs v. Jackson Women's Health Organization* ruling that overturned *Roe v. Wade*, says Ting Ting Cheng, director of the ERA Project at Columbia Law School Center for Gender and Sexuality Law."

Implicitly recognizing the utter flimsiness of their legal claims, some prominent ERA advocates go further, and now openly assert that the federal courts simply have no authority to say whether or not the ERA is part of the Constitution.

For example, longtime pro-ERA activist-attorney Kate Kelly, while serving as counsel to Congresswoman Maloney, said on Twitter on January 16, 2022: "Running tally of roles given by Article V of the U.S. Constitution to the judiciary in the amending process: 0."

In an opinion piece published in the *Washington Post* on November 22, 2021, David Pozen and Thomas P. Schmidt of Columbia Law School asserted, "On many matters of constitutional law, the legal community has accepted that the Supreme Court enjoys the final word. Questions about whether an amendment has become part of the Constitution are an important exception. Congress, not the courts, is the primary arbiter of an amendment's validity."

However, even the prospect of making the text of the Constitution a plaything for shifting bare majorities in Congress is too moderate a remedy to suit some leading ERA advocates. For example, on December 5, 2022, *The New Republic* published an essay by Julie C. Suk, professor of law at Fordham University and author of a popular advocacy-history book about the ERA, *We the Women: The Unstoppable Mothers of the Equal Rights Amendment* (2020).

In the essay, titled "[The Oft-Neglected Enemy of Democracy: Article V](#)," Suk argued for "a constitutional revolution — a new constitution written without following the amendment rules of the eighteenth-century Constitution we now live under." Only by such extra-constitutional means, Suk argued, could one achieve "a new constitution, fit to govern all of us in the twenty-first century." In the alternative, Suk said, "If this country is too big to reach agreement on that or other constitutional essentials, could healthier democracies emerge from peacefully negotiated secessions?"

The ERA Revival Campaign Fizzled in the 117th Congress (2021-2022) and Faces Dim Prospects in the 118th Congress (2023-2024)

Even though ERA revivalists claim that the ERA “is already part of the Constitution,” they have also clamored for Congress to adopt a joint resolution that purportedly would retroactively remove the ratification deadline from the 1972 ERA resolution. As NRLC explained most recently in a letter to the U.S. Senate dated November 16, 2022 (reproduced on pages 20-21), this proposal “is unconstitutional in at least four different ways.”

Under Democratic control in 2021, the U.S. House of Representatives passed the “deadline removal” resolution (H.J. Res. 17) on a vote of 222-204. It had the support of all 218 voting Democrats, but only four out of 208 voting Republicans. Douglas Johnson, director of National Right to Life’s *ERA Project*, commented at the time, “This was ERA’s poorest showing in the House in 50 years. The tally was 62 votes below the two-thirds margin that the Constitution requires when it actually exercises its powers under Article V, as opposed to engaging in cheap theatrical performances.” (See table on the next page.)

At about the same time, the ERA Coalition unveiled a “Roadmap to 60” campaign—its plan to muster the 60 votes needed to pass the measure over an anticipated filibuster in the 100-member Senate. They started with the declared support of all 50 Democratic senators and two Republicans (Murkowski of Alaska and Collins of Maine), so they needed to pick up eight additional supporters.

Twenty-one months after the House approval, H.J. Res. 17 died not with a bang but a whimper. Senate Majority Leader Chuck Schumer (D-N.Y.) never forced a vote on the measure, and it expired on January 3, 2023, with the end of the 117th Congress. ERA advocates were unable to publicly point to even a single new supporter among Senate Republicans, beyond the two Republican senators who had been on board for years.

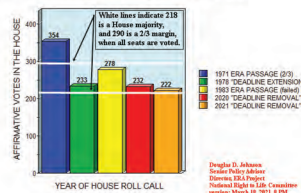
On December 22, 2022, Congresswoman Cori Bush (D-Mo.) and four other House ERA supporters issued a statement indicating that Schumer told them “he will aim to hold a vote on the ERA before the end of next March.” Yet 60 votes will still be required in the Senate – and in the meantime, the 2022 election shifted control of the House of Representatives to Republicans, which creates a very steep slope for those who may wish for the House to again approve a “deadline removal” joint resolution.

“The entire ‘deadline removal’ enterprise is pure political theater, anyway,” commented National Right to Life’s Douglas Johnson. **“Retroactive deadline nullification is a constitutional and temporal absurdity. ERA advocates want us to believe that the Constitution can be amended without two-thirds of the House and Senate, and three-quarters of the states, ever agreeing on a single fixed proposition, and yet that is clearly what Article V requires.”**

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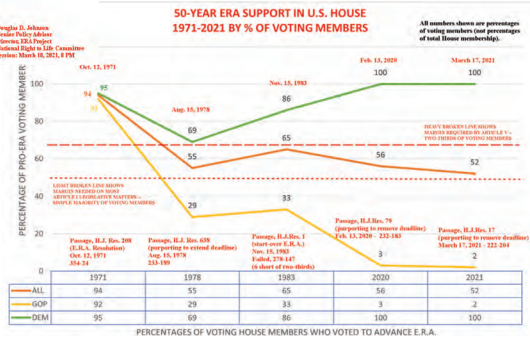
ERA's Sinking Support in Congress: How Support for the Equal Rights Amendment in the U.S. House Has Plunged Over a 50-Year Period

Affirmative Votes for ERA Measures, U.S. House, 1971-2021



When Congress approved the Equal Rights Amendment resolution for submission to the states in 1971-1972, it did so by lopsided margins — but that occurred only after ERA sponsors reluctantly concluded that they must accept a ratification deadline in order to overcome opposition from ERA skeptics. ("Proponents eventually relented and inserted a seven-year time limit," noted federal Judge Rudolph Contreras in his March 2021 ruling upholding the ratification deadline.)

Since 1972, the U.S. Senate has voted only once on an ERA-related matter — in 1978, when a Congress controlled by strong Democratic majorities approved, by simple majority votes (not two-thirds) a resolution that purported to extend the ERA's ratification deadline by 39 months, to mid-1982. The only federal court ever to consider the matter ruled that this was unconstitutional, but the issue was never definitively resolved because no additional states ratified during the pseudo-extension period.



However, over a 50-year period, the U.S. House of Representatives has voted five times on ERA and directly related measures: The original ERA resolution in 1971; the "deadline extension" in 1978; a start-over ERA in 1983 (defeated on the House floor); and measures purporting to retroactively "remove" the ratification deadline in 2020 and 2021.

Analysis of these roll calls shows a precipitous drop off in overall support for the ERA in the House, from 94% of voting members in 1971 to only 52% in 2021. Support among Republican House members fell from 92% in 1971 to 2% in 2021.

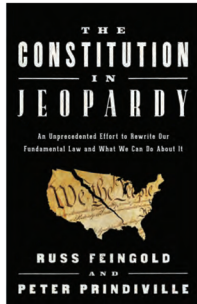
The single biggest factor (although not the only factor) in this erosion in Republican support has been recognition that the 1972 ERA language would lend itself to use as a powerful pro-abortion legal weapon — an intended effect belatedly acknowledged and indeed now loudly proclaimed by pro-ERA activists.

Doublethink by Democrats on Rescissions

Four state legislatures (Nebraska, Tennessee, Idaho, and Kentucky) ratified the ERA, but then, before the ratification deadline of March 22, 1979, adopted new resolutions rescinding their previous ratifications. On lists of rescinding states, South Dakota usually also appears, but 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.

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 that rescissions therefore 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 Democratic Congressman Jamie Raskin of Maryland — 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.



Activist-author Russ Feingold, in his 2022 book opposing an Article V constitutional convention (*The Constitution in Jeopardy*), celebrates rescissions as a tool for preventing the convening of an Article V constitutional convention. Yet in March 2022, Feingold sent a letter to Congresswoman Carolyn Maloney asserting that the state legislative rescissions on the ERA were constitutionally "invalid."

Feingold, a former U.S. senator, also said in the letter that the ERA's ratification deadline was constitutionally invalid. Yet when Feingold was himself the chairman of the Constitution Subcommittee of the U.S. Senate Judiciary Committee in 2009, he personally authored a proposed constitutional amendment (S.J. Res. 7, to require that Senate vacancies be filled by election) that contained a seven-year deadline in the Proposing Clause — *identical in wording and placement to the ratification deadline found in the 1972 ERA*. Feingold even chaired a hearing on the proposal, and shepherded it to approval by the full Senate Judiciary Committee, without ever altering the deadline formulation and placement that he now characterizes as unconstitutional.

Many Democrat-aligned interest groups have actively lobbied state legislatures to rescind their Article V applications for a constitutional convention, often successfully. In 2020, Ellen Nissenbaum, senior vice-president for government affairs for the Center on Budget and Policy Priorities, was among the activists who privately expressed concern about the contradiction. "We (working with other national and state groups) have been able to prevent a new Constitutional Convention ONLY by getting several states to rescind their previously approved BBA [balanced budget amendment] resolutions," Nissenbaum wrote in a 2020 email to allies, which later leaked. "So if Democrats or ERA proponents argue...that 'rescissions don't count,' they will hand a powerful argument to the right that will be used in court... and we could find ourselves on the way to a new Constitutional Convention." Likewise, Democracy 21 President Fred Wertheimer wrote in a leaked memo that he agreed this was "a new and potentially serious problem..."

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“ERA revival activists have shown they will run roughshod over any norm or precedent that stands in their way, and all too many Democratic office holders have shown themselves to be utterly compliant,” said National Right to Life *ERA Project* Director Douglas Johnson. **“The doublethink of many Democratic activists and office holders about state legislative rescissions under Article V is one glaring example of an unprincipled approach to the constitutional amendment process.”**

The ERA-Abortion Connection: The Mask Comes Off

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.

National Right to Life’s consistent position was reiterated in a November 16, 2022 letter to U.S. senators, which concluded, “Any vote to advance the resolution will be accurately characterized as supportive of inserting language into the U.S. Constitution intended to severely jeopardize any limits on abortion, including late abortions, and intended to require government funding of elective abortion.” (The letter is reproduced on pages 68-69.)

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.” As recently as 2019, the pro-ERA leader in the House of Representatives, Rep. Carolyn Maloney (D-N.Y.), lectured Republicans at a hearing on the ERA, [stating](#), “The Equal Rights Amendment has absolutely nothing to do with abortion... saying so is divisive and a tool to try to defeat it. So please don’t ever say that again.” Likewise, on February 13, 2020, Speaker Nancy Pelosi said on the floor of the U.S. House, “This [the ERA] has nothing to do with the abortion issue.”

Some prominent ERA advocates now acknowledge that such denials were merely a strategic deception. Feminist journalist Barbara Rodriguez explored this history in an article titled, [“Key Equal Rights Amendment activists long avoided tying it to abortion.”](#) that appeared on *The19th* on August 17, 2022. Excerpts:

“For a long time, it was kind of, ‘Don’t talk about that.’ Or, ‘That will just scare off the Republicans, or that will make people in Congress not support the ERA,” said Ting Ting Cheng, director of the ERA Project at the Center for Gender and Sexuality Law at Columbia University.

[Activist-attorney Kate] Kelly said older ERA activists made a strategic decision to separate the amendment’s impact on abortion. “These are pro-choice people. It was a strategic question,” said Kelly. “They thought that connecting the two caused them to lose.” [ERA Coalition President Zakiya] Thomas said she would agree with that assessment.

But even in 2019 and 2020, the Maloney and Pelosi statements quoted above were outdated as talking points. Most pro-ERA and pro-abortion activists, attorneys, and [allied officeholders had already dropped the pretext](#), and were openly proclaiming that the ERA is needed precisely to reinforce and expand federal “abortion rights.” 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 U.S. Supreme Court overturned *Roe v. Wade* in June 2022, these proclamations have only become louder and more insistent.

A few examples:

- ERA Project, Columbia Law School ([May 3, 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." 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.



- 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..."
- 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 . . ."
- 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 . . ."



"Emily Martin, general counsel for the National Women's Law Center — which supports the ERA...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

- 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.'" Later that month, 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).

- *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."

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- 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*."
- Kate Kelly also wrote an essay titled "[The Equal Rights Amendment Is a Comprehensive Fix That Can Save *Roe*](#)," published March 22, 2022. Here are two quotes to give you the flavor: "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."

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 powerful pro-abortion legal weapons. For example, 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](#)).

At this writing (January 2023), the Women's Law Project, in alliance with Planned Parenthood, has a lawsuit appeal pending before the Pennsylvania Supreme Court, arguing that a limitation on state funding of elective abortion violates the Pennsylvania ERA (*Allegheny Reproductive Health Center v. Pennsylvania Dept. of Human Services*). The groups have asserted that a 1986 state supreme court decision that held otherwise should be overturned as "contrary to a modern understanding" of an ERA. Briefs in support of this ERA-equals-abortion doctrine have been filed by many groups, including the Columbia Law School ERA Project, [which argued](#) that the abortion-funding limitation is "disparate treatment on the basis of sex," to the detriment of "pregnant people," and perpetrates "odious sex-stereotyping."

Abundant additional documentation on the ERA-abortion connection, including [this quote sheet](#), is available on the [NRLC website ERA page](#).

ADDITIONAL RESOURCES

Additional historic documentation on the Equal Rights Amendment can be found at nrlc.org/federal/era.

Douglas Johnson, director of the ERA Project for National Right to Life Committee, is the pro-life movement's subject matter expert on the Equal Rights Amendment. Mr. Johnson has been extensively involved in the legislative and legal disputes surrounding the Equal Rights Amendment since 1982, and has written for many publications on the subject, including *American Politics*, *America*, and *The New York Sun*.

Mr. Johnson is also a contributor to a non-NRLC Twitter account @ERANoShortcuts, which tracks ERA-related developments "from an ERA-skeptical perspective." He can be reached through the National Right to Life Media Relations Department at 202-626-8825, mediarelations@nrlc.org



November 16, 2022

202-378-8863

Re: Scorecard alert on H.J. Res. 17 / S.J. Res. 1, purporting to retroactively “remove” deadline on the long-expired, pro-abortion 1972 Equal Rights Amendment

Dear Senator:

Before the end of the current Congress, the Majority Leader may force a cloture vote on a motion to proceed to a measure (H.J. Res. 17) that purports to retroactively “remove” the ratification deadline that the 92nd Congress included in the Equal Rights Amendment Resolution submitted to the states on March 22, 1972 – over 50 years ago.

After H.J. Res. 17 passed the House of Representatives on a near-party-line vote on March 17, 2021, it was held at the desk under Rule 14. The Senate companion, S.J. Res. 1, introduced by Senators Cardin and Murkowski, has been in the Judiciary Committee for 22 months without action; it currently has 52 co-sponsors (every Senate Democrat, plus Senators Murkowski and Collins).

For the reasons summarized below, the National Right to Life Committee, the federation of state right-to-life organizations, urges you to oppose the motion to advance H.J. Res. 17, and will include this roll call in its scorecard of key votes of the 117th Congress.

Leaders of prominent pro-abortion and pro-ERA advocacy groups now openly proclaim that they believe the 1972 ERA should be construed to erect a federal constitutional barrier to virtually any limits on abortion or government funding of abortion. For decades, leading ERA advocates denied that was the case, 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 pro-life senators 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 somehow ever becomes part of the Constitution.

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.” If H.J. Res. 17 is presented to you during the lame-duck session, it should be seen as a last-minute attempt to muddy the waters and confuse the public before the court of appeals rules. On the ERA, “the rule of law” is not what leading ERA-revivalists are seeking.

H.J. Res. 17 is unconstitutional in at least four different ways.

First, on the ERA, 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.” H.J. Res. 17 is an exercise in political theater that shows contempt for long-established constitutional requirements.

Defending Life in America Since 1968

THE EQUAL RIGHTS AMENDMENT

NATIONAL RIGHT TO LIFE IN OPPOSITION TO ERA “DEADLINE REMOVAL” 2

Second, Article V does not allow Congress to engage in a retroactive “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 the compromise. Judge Contreras also noted that 30 of the states that ratified the ERA specifically quoted or referred to the deadline in their ratification instruments.

(If Congress actually had bait-and-switch powers, they could as easily be used 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.)

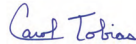
Third, even if Congress somehow did hold power to execute a retroactive bait-and-switch, the authors of H.J. Res. 17 have [formally declared the resolution to be an exercise of Congress’ Article V powers](#). That means approval would require a *two-thirds* vote, as is always the case when Congress acts under Article V. 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)

Fourth, even setting aside the specific requirements of Article V, no Congress has power to act on any measure after it has *expired*. The current Congress can no more act on the long-expired ERA Resolution than it can now override a veto by President Carter. 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, within a single Congress. As the late Justice Ruth Bader Ginsburg said on February 10, 2020:

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 intends to score and weigh heavily any roll call on advancing this manifestly unconstitutional resolution. In our communications with our members, supporters, and affiliates nationwide, any vote to advance the resolution will be accurately characterized as supportive of inserting language into the U.S. Constitution intended to severely jeopardize any limits on abortion, including late abortions, and intended to require government funding of elective abortion. Should you have any questions, please contact us at (202) 378-8863, or via e-mail at jjpopik@nrlc.org. Thank you for your consideration of NRLC's position on this matter.

Respectfully submitted,



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CONCERNED
WOMEN *for* **AMERICA**
LEGISLATIVE ACTION COMMITTEE

February 23, 2023

The Honorable John Cornyn
United States Senator
Washington, D.C. 20515

The Honorable Ted Cruz
United States Senator
Washington, D.C. 20515

Dear Senators Cornyn and Cruz,

We write in strong opposition to S.J.Res.4, a joint resolution removing the deadline for the ratification of the Equal Rights Amendment.

- As a threshold matter, S.J.Res.4 is an attempt to pursue ratification through improper procedural means that must fail.
- Rather than help women, the Amendment would have a reverse effect on women's progress. If properly ratified, it would constitutionalize a right to end the lives of the unborn and to discriminate against women.

Procedural defects. Thirty-five states ratified the Amendment before the congressionally self-imposed deadlines of 1979 and 1982. But the Amendment missed the ratification threshold for three-quarters of the states. Five states withdrew ratification after the deadlines, and three other states ratified the Amendment after the deadlines.¹

Despite the deadlines and the withdrawals, advocates assert that the Amendment must be certified because a total of 38 states, at some point in time over the past 46 years, ratified the Amendment. There is no principled justification why ratifications after the deadline count while ratification withdrawals do not. Moreover, in 2021, U.S. District Judge for the District of Columbia Rudolph Contreras, who was appointed by President Barack Obama, correctly rejected an attempt to force ERA certification in part because the deadlines are "effective."²

As the late Justice Ruth Bader Ginsburg said, efforts to ratify the Amendment must "start over."³

¹ Alex Cohen & Wilfred U. Codrington III, "The Equal Rights Amendment Explained," Brennan Center for Justice (Jan. 30, 2020), <https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained>.

² Tal Axelrod, "Judge rules states were too late in ratifying Equal Rights Amendment," The Hill (March 5, 2021), <https://thehill.com/regulation/court-battles/541892-federal-judge-rules-states-were-too-late-in-ratifying-equal-rights/>.

³ Julie Suk, "A New Beginning? Justice Ginsburg and the Equal Rights Amendment," American Constitution Society (March 25, 2021), <https://www.acslaw.org/expertforum/a-new-beginning-justice-ginsburg-and-the-equal-rights-amendment/>.

Reversing women’s progress. Any difference in treatment between men and women can be considered denial or abridgment of equality. Activists will use the Equal Rights Amendment to constitutionalize abortion and discrimination against women.

Right to end the lives of the unborn. Amendment ratification would result in a right to abortion and undo passage of state laws estimated to have already saved almost two hundred thousand baby boys and girls.⁴

Connecticut and New Mexico have Equal Rights Amendments in their state constitutions. Supreme courts in both states interpreted these Equal Rights Amendments to require abortion access in their state health programs.⁵ Groups that support abortion access—NARAL Pro-Choice America, National Organization for Women, and Planned Parenthood—have explicitly stated that they would use a federal Equal Rights Amendment to strike down laws that protect the unborn. Should it become law, the Amendment would insert a right to abortion in the U.S. Constitution.

Right to discriminate against women. The Amendment opens the door for the elimination of commonsense distinctions based on sex and would create female victims in the process.

Girls and women today are experiencing historic marginalization. They are forced to be with males in private spaces where they are most vulnerable, such as locker rooms,⁶ domestic violence shelters,⁷ and detention centers.⁸ They are forced to compete against males in athletic competitions and suffer stolen titles, records, and scholarship opportunities,⁹ and worse yet, physical harm.¹⁰ The Amendment would throw into question the legality of any female-only spaces. Rather than protect girls and women, the Amendment sanctions and enables silence of females forced to endure violation of their safety and privacy.

⁴ “Life-Saving Laws in the States,” Susan B. Anthony Pro-Life America (last updated Jan. 5, 2023), <https://sbaproflife.org/lifesavinglaws>.

⁵ *Doe v. Maher*, 40 Conn. Supp. 394, 515 A.2d 134 (Conn. Super. Ct. 1986); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998).

⁶ Joseph Kiran, “‘Gaslit into silence’ - Swimmer Riley Gaines explains her stand against trans swimmer Lia Thomas,” Sportskeeda (modified Feb 17, 2023), <https://www.sportskeeda.com/swimming/news-gaslit-silence-swimmer-riley-gaines-explains-stand-trans-swimmer-lia-thomas>.

⁷ Frequently Asked Questions, “Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013,” U.S. Department of Justice (Apr. 9, 2014), <https://www.justice.gov/archives/ovw/file/29386/download> (“A [Violence Against Women Act grant] recipient may not make a determination about services for one beneficiary based on the complaints of another beneficiary when those complaints are based on gender identity.”).

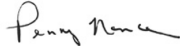
⁸ Christian Martinez, “Suit takes aim at law that lets transgender inmates choose housing based on gender identity,” Los Angeles Times (Nov. 24, 2021), <https://www.latimes.com/california/story/2021-11-24/lawsuit-takes-aim-at-law-that-allows-transgender-inmates-to-choose-housing-location-based-on-gender-identity>.

⁹ Kassi Jackson, “Girls sue to block participation of transgender athletes,” NBC News (Feb. 13, 2020), <https://www.nbcnews.com/feature/nbc-out/girls-sue-block-participation-transgender-athletes-n1136261>.

¹⁰ “Highlands volleyball incident makes national news,” Macon County News (Oct. 27, 2022), <https://themaconcountynews.com/highlands-volleyball-incident-makes-national-news/>.

The Equal Rights Amendment would destroy unborn boys and girls and devastate girls and women. We urge you to OPPOSE S.J.Res.4, a joint resolution removing the deadline for the ratification of the Equal Rights Amendment.

Signed,



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