March 29, 2024

The Honorable Kirsten Gillibrand
The United States Senate
478 Russell Senate Building
Washington, DC 20510

Dear Senator Gillibrand:

The League of Women Voters is a 104-year-old nonpartisan, nonprofit organization committed to ensuring that everyone is represented in our democracy. We are a grassroots group comprising over 500,000 members and supporters across more than 750 local and state Leagues nationwide. The League focuses on advocacy, education, organizing, and litigation to achieve our mission to empower voters and defend democracy. To this end, we have worked for ratification of the Equal Rights Amendment (ERA) for more than 50 years.

Despite the significant legal and legislative advances made in recent decades, women and others continue to face discrimination on the basis of sex. Under the Fourteenth Amendment's Equal Protection Clause, laws that discriminate on the basis of sex are not subject to the same strict scrutiny as laws that classify on the basis of other protected classifications. The ramifications are clear in the fight against systemic sex discrimination including unequal pay, workplace harassment, pregnancy discrimination, domestic violence, and more. Ratification of the ERA would provide needed protection from laws that cause harm on the basis of sex.

The League strongly believes the ERA has satisfied all ratification requirements outlined in Article V of the US Constitution, making it a valid part of the Constitution, and it should be promptly certified and published as the Twenty-Eighth Amendment to the US Constitution. The League also believes while Congress has authority to remove the timeline outlined in the amendment's proposing clause, additional action is needed to reassess the Office of Legal Counsel's (OLC) memo concerning ratification. In support of this, please find enclosed a memorandum prepared for the League by Paul, Weiss, Rifkind, Wharton & Garrison LLP. The memo examines the validity of the ERA as part of the US Constitution based on the constitutional requirements for amendments, relevant memoranda from the Office of Legal Counsel, and related case law.

Thank you for your attention to this memo, request, and essential work for our democracy. I am happy to answer any follow-up questions you or your staff might have.

Sincerely,

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March 27, 2024

MEMORANDUM

To League of Women Voters From Paul, Weiss Team

Subject Ratification of Equal Rights Amendment

This Memorandum analyzes the status of the Equal Rights Amendment ("ERA") in light of the constitutional requirements for amending the Constitution, as interpreted in Office of Legal Counsel ("OLC") Opinions and related case law. In particular, the Memorandum shows that the ERA became a valid amendment to the Constitution in 2020, when Virginia became the thirty-eighth state to ratify it.

To summarize: both houses of Congress concurred in proposal of the ERA by two-thirds majorities in 1972, and three-quarters of the states have ratified the amendment. Nothing more is required for adoption, and the ERA is therefore part of the Constitution.

This memorandum proceeds in three parts: Part I discusses the requirements for ratification under Article V and describes how they have been satisfied, referring to the ratification of the Twenty-Seventh Amendment as an example. Part II considers some of the primary counter-arguments raised in previous OLC opinions and associated cases, and shows that the OLC opinions largely support the validity of the ERA. To the extent they do not, they are internally contradictory and thus unpersuasive. Part III considers remaining arguments raised by opponents to the ERA's ratification, including recent litigation regarding this issue and the question of whether states' supposed rescissions of their prior ratifications are valid.

ANALYSIS

I. The Equal Rights Amendment Has Been Ratified Under Article V.

Article V of the U.S. Constitution sets out the exclusive process for proposing, promulgating, and ratifying amendments to its text. Article V states:

> 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.

U.S. CONST. art. V.

The text thus sets out two alternative procedures for introducing amendments. As one option, Congress may propose amendments by a two-thirds majority in both the House of Representatives and the Senate. As the other option, two thirds of the States may call for a "Convention for proposing Amendments," and proceed to propose amendments at that convention. *Id.* Regardless of which vehicle is chosen, the resulting proposals become valid amendments to the Constitution if they are "ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof." *Id.* Beyond proposing amendments—if that vehicle is chosen—the text commits to Congress the power to select "one or the other Mode of Ratification," *i.e.*, whether the amendment is ratified by State Legislatures or by constitutional conventions in the States. *Id.*

Importantly, the text says nothing about the *time* in which the ratification process must occur: it says nothing about when amendments must be sent to the States after passing both houses

of Congress, nothing about the amount of time States have to ratify amendments once they are received, and nothing about whether Congress can impose a set deadline by which ratifications must occur. *See Dillon* v. *Gloss*, 256 U.S. 368, 371 (1921) ("It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress."). Indeed, the only two powers the Article expressly gives Congress are the powers to propose amendments and to select which State bodies ratify the amendments: the Legislatures or the Conventions. Given that the Founders were capable of imposing deadlines by which events must occur—and did so in other clauses[1]—the absence of any such deadline for ratifications in Article V shows that the Founders did not believe such a requirement was necessary for constitutional amendments.

There also does not appear to be any significant evidence that the Founders debated or discussed a timeliness requirement for amendments to be ratified. References to the Article V power to amend the Constitution appear in several of the Federalist Papers, but none suggest any need for amendments to be ratified within a particular time period after their proposal. *See* Federalist Papers Nos. 43, 85. Rather, the Founders were primarily concerned with ensuring that amending the Constitution was neither too easy nor difficult, *see* Federalist No. 43,[2] and that

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[1] For instance, the Constitution states that: the first census needed to be conducted within three years of the Constitution's ratification and every ten years thereafter; Presidents must veto bills within ten days after presentment; and that Congress may set the time for electors to be chosen and the day on which they must cast their votes. *See* U.S. CONST. art. I, §§ 2, cl. 3; 7, cl. 2; II, § 1, cl. 4.

[2] *See also* Art V.2 Historical Background on Amending the Constitution & n.32, CONSTITUTION ANNOTATED: ANALYSIS AND INTERPRETATION OF THE U.S. CONSTITUTION, https://constitution.congress.gov/browse/essay/artV-2/ALDE_00013047/#essay-32 (accessed Mar. 6, 2024) (discussing Anti-Federalist concern with avoiding making amendment too difficult (citing Centinel II, Freeman's J. (Phila.), Oct. 24, 1787, reprinted in 2 The Complete Anti-Federalist (Herbert L. Storing ed., 1981)).

Congress would not stand in the way of the States when the latter wished to amend the Constitution, *see* Federalist No. 85.[3]

Historical precedent also shows no particular focus on the timeline for ratification.[4] Before 1917, no constitutional amendment included any ratification deadline, either in the resolution proposing the amendment or in the text of the proposed amendment itself. Notably, the first twelve potential amendments, proposed in 1789, contained no such limitation, and the twelfth—preventing changes to compensation for members of Congress from taking effect until after the following election—was ratified over 200 years after it was first proposed. Ratification deadlines thus have never been understood as constitutional requirements.

The practice changed beginning in 1917 with the Eighteenth Amendment[5]—although Article V's basic requirements of course remained unchanged. Thereafter, the Twentieth, Twenty-First, and Twenty-Second Amendments all contained clauses—within the text of the amendments themselves—specifying that they would be inoperative if not ratified within seven years of proposal (all were).[6] Then, in the mid-twentieth century, Congress again changed course, setting ratification deadlines not in the text of proposed amendments, but in the resolutions proposing the amendments. The first such occasion was in 1960 with the proposal of the Twenty-Third Amendment granting the District of Columbia citizens the right to participate in presidential

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[3] *See also* Orrin G. Hatch, *Equal Rights Amendment Extension: A Critical Analysis*, 2 HARV. J. L.& PUB. POL'Y 19, 27 (1979) ("Allowing Congress to revise time limits at its pleasure is disruptive of the balance of power established in Article V between the national government and the States. This was a matter to which the Founding Fathers were exceedingly sensitive.").

[4] See Jessica Neuwirth, *Time for the Equal Rights Amendment*, 43 HARBINGER 155, 158–59 (2019).

[5] *See* U.S. CONST. amend. XVIII § 3.

[6] *See* U.S. CONST. amends. XX § 6, XXI § 3, XXII § 2.

elections.[7] The resolutions proposing the Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments also contained such deadlines.[8]

Like these other universally acknowledged amendments, the Equal Rights Amendment's ratification process followed the precise requirements set out by Article V. The Amendment was adopted by the House in October 1971, and by the Senate in March 1972.[9] The Amendment was then put before the state legislatures, and thirty-five states ratified it over the following seven years.[10] Then, Nevada ratified the Amendment in March 2017, Illinois ratified it in May 2018, and Virginia ratified the Amendment in January 2020, becoming the thirty-eighth state to do so. The constitutional requirements set forth in Article V thus have been satisfied.

The process undertaken to ratify the Twenty-Seventh Amendment underscores the validity of the ERA's ratification. The Congressional Pay Amendment was proposed in 1789, and took effect in May 1992—more than 200 years later—as the Twenty-Seventh Amendment to the

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7 74 Stat. 1057 (1960).

8 76 Stat. 1259 (1962), 79 Stat. 1327 (1965), 85 Stat. 825 (1971). Congress believed that shifting its intended time limit into the proposing clause and declining to actually amend the Constitution was equally effective, and the "sole purpose" for the change in approach was to avoid "'cluttering up' the Constitution with language that was meaningless and obsolete from the instance of an amendment's ratification." Hatch, *supra* note 3, at 30–.

9 As with the other recent amendments, the ERA too contained a clause in the proposing resolution purporting to limit the time permitted for ratification to seven years: "*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 . . . ." 86 Stat. 1523 (1972).

10 Several states purported to "rescind" or cancel their ratifications during this period, and, with the initial seven-year deadline approaching, Congress acted to extend the deadline until 1982. *See* Hatch, *supra* note 3, at 19–20, nn.3-5. The Office of Legal Counsel was called upon to opine on both questions: the effect of purported rescissions and whether Congress could constitutionally act to extend its own self-set time limit post-proposal. *See infra* notes 17–20. The OLC concluded that rescissions were void and the extension valid.

Constitution.[11] All three branches of government have recognized the Amendment. *First*, the executive expressed its supporting position in a 1992 opinion of the Office of Legal Counsel,[12] and the Archivist, as the specified federal officer authorized by law, duly certified the Amendment as operative.[13] *Second*, both the House of Representatives and Senate passed concurrent resolutions confirming the validity of the Twenty-Seventh Amendment.[14] *Third*, numerous federal courts of appeals have since recognized the existence and operative force of the Twenty-Seventh Amendment,[15] and the Supreme Court has declined to grant certiorari on the question.[16]

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[11] Initially, the ratification of Michigan on May 7, 1992 was thought to be the thirty-eighth ratification and thus governed the Amendment's efficacy. Eventually, it came to light that Kentucky had ratified the amendment in 1792, making Alabama's and Missouri's prior ratifications on May 5, 1992 the final required acts and date of entry into force. *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 466–67 (Univ. Press of Kans. 1996) ("Michigan's action on May 7 was declared to be the thirty-eighth and final necessary ratification. If the Kentucky ratification had been recognized, however, the Twenty-seventh Amendment would have been declared completed two days earlier with the approval of Missouri." (footnote omitted)).

[12] *See infra* notes 21–24.

[13] Archivist of the United States of America, Certification of Amendment to the Constitution of the United States Relating to Compensation of Members of Congress, 57 Fed. Reg. 21187 (1992).

[14] H.R. Con. Res. 320, 102d Cong. (1992); S. Con. Res. 120, 102d Cong. (1992).

[15] *See, e.g.*, *Turner* v. *United States*, 885 F.3d 949, 961 n.13 (6th Cir. 2018) (Bush, J., concurring) ("The second article was ratified two centuries later in 1992 as the Twenty-Seventh Amendment."); *Johnson* v. *U.S. Off. of Pers. Mgmt.*, 783 F.3d 655, 668 n.4 (7th Cir. 2015) ("The Twenty-Seventh Amendment bars changes to a Senator's or Representative's compensation from taking effect until after the next congressional election. U.S. Const. amend. XXVII."); *Silveira* v. *Lockyer*, 312 F.3d 1052, 1085 n.51 (9th Cir. 2002) ("Additionally, the provision that was recently ratified as the Twenty–Seventh Amendment, but was originally promulgated with the original twelve amendments, relates to Congressional compensation, not individual rights."), *abrogated on other grounds by District of Columbia* v. *Heller*, 554 U.S. 570 (2008); *Williams* v. *United States*, 264 F.3d 1089, 1091–92 (Fed. Cir. 2001) ("By imbedding an automatic COLA mechanism, the Ethics Reform Act avoids the 27th Amendment's prohibition of current term pay adjustments for Members of Congress."); *Schaffer* v. *Clinton*, 240 F.3d 878, 880–82 (10th Cir. 2001); *Massie* v. *Pelosi*, 590 F. Supp. 3d 196, 220–23 (D.D.C. 2022), *aff'd*, 72 F.4th 319 (D.C. Cir. 2023), *cert. denied sub nom. Massie* v. *Johnson*, No. 23-566, 2024 WL 674742 (U.S. Feb. 20, 2024).

[16] *Massie* v. *Johnson*, No. 23-566, 2024 WL 674742 (U.S. Feb. 20, 2024), *denying cert. to Massie* v. *Pelosi*, 72 F.4th 319 (D.C. Cir. 2023), *aff'g* 590 F. Supp. 3d 196 (D.D.C. 2022); *see also Williams* v. *United States*, 535 U.S. 911, 122 S. Ct. 1221 (mem.) (2002) (Breyer, J., dissenting from denial of certiorari) (writing for himself and Justices Scalia and Kennedy, and referring to the existence of the "Twenty-seventh Amendment" in connection with a Compensation Clause question).

There is no constitutionally valid reason that the ERA should not receive the same recognition. The principal arguments to the contrary are laid out and refuted in more detail below.

II. The Relevant OLC Memoranda Largely Support the Validity of the ERA, and to the Extent They Do Not, They Are Internally Contradictory and Non-Persuasive.

Several opinions of the Office of Legal Counsel have addressed issues related to the ERA's ratification in some manner, and the weight of the opinions counsels in favor of the ERA's validity. While one opinion from 2020 seeks to undermine the ERA, it directly contravenes the remainder of the OLC's reasoning—dating back decades—and should thus be disregarded.

The 1977 Opinions. The first two opinions were issued in 1977, around the time that Congress was considering a resolution to extend the ratification period for the ERA, which was set to expire in 1979. The earlier of the two opinions considered the efficacy of a state purporting to withdraw or rescind its prior ratification of an amendment under Article V.[17] The opinion cited favorably the finding of Congress in 1868 that "a State cannot withdraw its ratification," and noted that "[v]arious commentators have agreed with the 1868 congressional ruling." *Id.* at 14. A second OLC opinion in 1977 more thoroughly analyzed whether Congress's pending resolution to extend the ratification period was constitutionally permissible,[18] concluding broadly that it was,[19] and

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[17] *Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment*, 1 Op. O.L.C. 13 (Feb. 15, 1977).

[18] The narrow question before the OLC in this second memorandum was whether a deadline implemented by Congress could be extended. The memorandum did not directly address the ultimate question of whether an amendment that was not ratified by the requisite number of states within such a Congressionally-instituted time period could later be adopted through subsequent ratifications.

[19] This second opinion of the OLC was not published in the official reporter of such opinions. However, it was entered into the record during the testimony of U.S. Assistant Attorney General John Harmon in the hearings by the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of November 1, 4, and 8, 1977; and May 17, 18 and 19, 1978, and has been cited to in that source. *See* Equal Rights Amendment Extension Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 95th Congress, first and second sessions, on H.J. Res. 638, at 5–38 (Nov. 1, 1977) (the incorporated memorandum dated October 13, 1977 at pp.7–27 is referred to as the "1977 OLC Opinion").

reiterated that a state could not rescind its ratification, this time tracing the principle back to the writings of Founder James Madison.[20]

The 1992 Opinion. A third OLC opinion was issued in 1992 in connection with the ratification of the Twenty-Seventh Amendment some two centuries after its original submission for ratification.[21] Although it did not address the ERA directly, the 1992 OLC Opinion refuted the position that the Constitution requires that amendments be ratified on any particular timeline.[22] In declaring that the Twenty-Seventh Amendment became part of the Constitution upon ratification by the thirty-eighth state, effective immediately upon that ratification,[23] the 1992 OLC Opinion reasoned that, because the amendment had been proposed by Congress with two-thirds of each chamber concurring, and ratified by three-quarters of the states, it "has met all of the requirements for adoption set forth in Article V."[24] The very same reasoning supports the validity of the ERA.

The 2020 Opinion. When Virginia ratified the ERA in 2020, bringing the total of ratifying states to thirty-eight, the requisite three-quarter majority, the Archivist of the United States sought

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[20] 1977 OLC Opinion at 18–26.

[21] In fact, there were two such memoranda. *See Congressional Pay Amendment*, 16 Op. O.L.C. 85 (May 13, 1992); *Memorandum Opinion for the Counsel to the President*, 16 Op. O.L.C. 87 (Nov. 2, 1992). Technically, the former memorandum answered the question, and the latter was issued six months later to address the executive's request for a more thorough analysis of the underlying reasoning and the duty of the Archivist. Because they are consecutively paginated and address the same subject, for convenience, both will be referred to collectively as the "1992 OLC Opinion".

[22] *Id.* at 88–97.

[23] "The effective date of the Amendment is the date on which it was ratified by the thirty-eighth State to do so." *Id.* at 86.

[24] *Id.* at 85–90 ("Article V contains no time limits for ratification. It provides simply that amendments 'shall be valid to all Intents and Purposes . . . when ratified.' Thus the plain language of Article V contains no time limit on the ratification process. Nor are we aware of any other basis in law for adding such time limits to the Constitutional amendment process, other than pursuant to the process itself. Indeed, an examination of the text and structure of Article V suggests that the absence of a time limit is not an accident. The procedure prescribed in Article V necessarily implies that some period of time must pass between the proposal of an amendment and its final ratification by the requisite number of States. This suggests that if a time limit on the process were intended, the time limit would be stated in terms.").

the opinion of the OLC as to his duty. Here, the OLC diverged sharply from its prior advice, concluding that because the ERA had not been ratified within the deadline set by Congress, the Archivist could not certify its adoption.[25] Contradicting the OLC's analysis from 1977, the 2020 opinion further rejected the power of Congress to modify the details of the ratification process once proposed to the states.[26]

The 2020 OLC Opinion relies heavily on *Dillon* v. *Gloss*, which stated that "the fair inference or implication from article 5 is that the ratification [of a proposed amendment] must be within some reasonable time after the proposal." 256 U.S. at 375. But the Supreme Court itself subsequently recognized that this statement was dicta, as it was unnecessary to decide the case.

In *Coleman* v. *Miller*, 307 U.S. 433 (1939), the Supreme Court made clear that the question at issue in *Dillon* was whether "Congress had the power to fix a reasonable time for ratification." *Id.* at 452. The *Dillon* Court ultimately held that the presence of a congressional ratification deadline did not invalidate an amendment. Thus, in *Dillon*, the separate question of whether there is a constitutional requirement that amendments be ratified within a certain amount of time after their proposal was not properly before the Court. Further, as discussed above, the historical precedent of the Twenty-Seventh Amendment, which was ratified over a period of 200 years, likewise decidedly refutes *Dillon*'s dicta—which, indeed, mentions what is now the Twenty-Seventh Amendment as an example of an amendment that was supposedly past any reasonable time for ratification. *See Dillon*, 256 U.S. at 375.

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[25] *Ratification of the Equal Rights Amendment*, 44 Op. O.L.C. ---, 2020 WL 402222 (January 6, 2020) ("2020 OLC Opinion").

[26] *Id.* at 15–17.

The 2022 Opinion. The OLC again addressed questions related to the ERA in 2022.[27] The OLC stressed that the validity of the ERA would be "resolved not by an OLC opinion but by the courts and Congress,"[28] and stated that its prior 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."[29]

In sum, while the bulk of the relevant OLC opinions support the ERA's validity, the OLC has taken contradictory positions, and has itself recognized that its persuasive authority is limited and that the legislative and judicial branches will decide the relevant questions.

III. Other Arguments

There are several other arguments that have been raised in opposition to the ERA. Below, we consider the arguments that (1) recent litigation undermines the validity of the ERA's ratification; and (2) states may "rescind" their ratifications, such that fewer than thirty-eight states now have ratified the ERA. We conclude that both arguments should be rejected.

A. Recent Litigation Does Not Undermine the ERA's Validity.

The D.C. Circuit recently decided an appeal based on a lawsuit brought to compel the Archivist of the United States to certify that the ERA had been ratified and was part of the Constitution. *See Illinois* v. *Ferriero*, 60 F.4th 704 (D.C. Cir. 2023).[30] By way of background, in 2020, shortly after Virginia became the thirty-eighth State to ratify the ERA, Illinois and Nevada

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[27] *Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment*, 46 Op. O.L.C. ---, 2022 WL 301750 (Jan. 26, 2022) ("2022 OLC Opinion").

[28] *Id.* at *2.

[29] *Id.* at *3.

[30] Another lawsuit previously brought by private citizen groups who alleged they were harmed by the failure to enforce the duly enacted amendment was dismissed on standing grounds, which dismissal was affirmed by the First Circuit. *See Equal Means Equal* v. *Ferriero*, 3 F.4th 24 (1st Cir. 2021). As such, neither the district nor appellate court reached the merits of the proposition that the Twenty-Eighth Amendment was in force. *Id.* at 27.

"urged the Archivist to certify and publish the amendment as part of the Constitution." *Id.* at 713. Several states resisted, however, and sought an injunction and a declaratory judgment against such an action. *Id.* Relying on the OLC's 2020 Opinion, discussed above, "the Archivist refused to certify and publish the amendment," thus effectively resolving the litigation brought by the objecting states. *Id.*

The recently ratifying states then brought a new case in the U.S. District Court for the District of Columbia, seeking to compel the Archivist to publish the Amendment via a writ of mandamus. The district court dismissed the action, and the States appealed.

The D.C. Circuit affirmed the district court's decision in February 2023. The court explained that mandamus is "only available in 'extraordinary situations,'" and that, to succeed, the party seeking mandamus must (i) have a "clear and indisputable right to relief," (ii) show that the individual whose action is sought to be compelled had a "clear duty to act," and (iii) lack any alternate remedy. *Id.* at 714. The court specified that it was required to "deny mandamus even if a petitioner's argument, though 'pack[ing] substantial force,' is not clearly mandated by statutory authority or case law." *Id.* at 714–15 (quoting *In re Al Baluchi*, 952 F.3d 363, 369 (D.C. Cir. 2020)). The court ultimately concluded that the states seeking to have the Amendment published failed to meet this "exacting" standard because their arguments did not "meet the high threshold of being clearly and indisputably correct." *Id.* at 715.

First, the court determined that it was at least theoretically permissible for the Archivist to consider "whether the fact that some of the [thirty-eight states'] ratification occurred after Congress's seven-year deadline affects their validity." *Id.* at 716. *Second*, the court reasoned that, under *Dillon* and *Coleman*, it is not "'clear and indisputable' that Congress lacks the authority to set deadlines for ratification." *Id.* at 718–19. *Third*, the court found it was not beyond dispute that

such deadlines may be placed in the proposing clause of an amendment, and not just in the amendment's text. *Id.* at 719.

Critically, none of the court's reasoning undermines the arguments discussed above—at most, the D.C. Circuit simply recognized that the arguments raised by ERA opponents are not so obviously baseless as to justify the "drastic" and "extraordinary" remedy of mandamus, which "is hardly ever granted." *Id.* at 714 (quoting *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005)). The court made clear that it was not itself deciding which arguments had more weight: "Even if we 'might have come to a different conclusion had the question of [statutory] construction been presented to [us] in a distinct proceeding,' 'such a difference of opinion between the court and the officer' does not justify mandamus relief." *Id.* at 715 (quoting *Reichelderfer* v. *Johnson*, 72 F.2d 552, 554 (D.C. Cir. 1934)). *Ferriero* does not, then, pass upon the question of whether the ratification process for the ERA has satisfied the requirements of Article V.

B. Rescission

Several states have purported to "rescind" their ratification of the ERA, but historical precedent shows that such rescissions are ineffectual. Specifically, the Fourteenth Amendment was certified and published in 1868 despite two states (Ohio and New Jersey) purporting to rescind their ratifications.[31] The Fifteenth Amendment was certified despite New York's attempt to withdraw its ratification.[32] And the Nineteenth Amendment was certified and published in 1920 despite Tennessee purporting to rescind its ratification.[33] As the Supreme Court recognized, once state resolutions ratifying the Amendment were received by the Secretary of State (who had the

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[31] *See* Michelle Kallen & Morgan Maloney, *"In Toto" and "Forever": Why States Cannot Rescind Ratification of Constitutional Amendments*, 38 J.L. & POL. 27, 33–34 (2023).

[32] *Id.* at 34.

[33] *Id.* at 35.

duty of certifying and publishing the ratification of constitutional amendments before that duty was conferred on the Archivist), such resolutions were "conclusive upon him, and, being certified to by his proclamation, [were] conclusive upon the courts." *Leser* v. *Garnett*, 258 U.S. 130, 137 (1922).

Thus, Congress has consistently rejected states' attempts to rescind their ratifications of amendments, and the Supreme Court has in turn deferred to Congress on that issue as a non-justiciable political question. *Coleman*, 307 U.S. at 449 ("Thus the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification." The Court went on to state "that in accordance with this historic precedent the question . . . should be regarded as a political question . . . .").

Two opinions of the OLC issued in 1977 squarely embraced the history and logic that Article V does not contemplate the possibility of rescinding a ratification, grounded in the original view of constitutional drafter James Madison.[34] As the 1977 OLC Opinion acknowledged, "as a textual matter, it is arguable that only affirmative acts taken in the proposal or ratification process have any constitutional significance and that such acts are to be regarded as final."[35] Contemporary scholars and advocates have reiterated this position.[36]

One District of Idaho decision from 1981 takes a contrary position, but that decision was vacated by the Supreme Court as moot. *See Idaho* v. *Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), v*acated sub nom. Nat'l Org. for Women, Inc.* v. *Idaho*, 459 U.S. 809 (1982). Other courts have

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[34] *See* 1977 OLC Opinion at 18–26 ("We think that the whole thrust of history is that Art. V, as interpreted, does not permit States to rescind or otherwise place conditions upon their ratifications.").

[35] *Id.* at 18.

[36] *See generally, e.g.*, Kallen & Maloney, *supra* note 31 (showing that "permitting state rescission violates the text, structure, original intent, and consistent historical understanding of Article V").

declined to reach the question. *See Virginia* v. *Ferriero*, 525 F. Supp. 3d 36, 49 n.5 (D.D.C. 2021); *Equal Means Equal* v. *Ferriero*, 478 F. Supp. 3d 105, 125 (D. Mass. 2020).

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For the reasons set forth above, we urge that the validity of the ERA be recognized.