March 21, 2022

The Honorable Carolyn B. Maloney
Chair, Committee on Oversight and Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairwoman Maloney,

I respectfully submit this response to your March 14, 2022, request for my views on the current legal status of the Equal Rights Amendment ("ERA"), including a legal analysis of the authority of the Archivist of the United States to certify and publish the ERA with or without further action by the executive branch or Congress. As a former state legislator and United States Senator, law professor, and now President of the American Constitution Society, I have had the opportunity to consider the Equal Rights Amendment ("ERA") from several vantage points. It is my opinion that the ERA has met all constitutional requirements and the Archivist can and should certify and publish the ERA as the 28th Amendment to the Constitution without delay.

All Constitutional Requirements Have Been Satisfied

Article V of the Constitution plainly states that once two-thirds of each chamber of Congress deem it necessary to propose an amendment to the Constitution, the amendment *shall* be considered part of the Constitution when ratified by the legislatures of three-fourths of the states.[1]

On March 22, 1972, the 92nd Congress passed House Joint Resolution 208, proposing and sending the ERA to state legislatures for ratification.[2] By a vote of 354-24 in the House[3] and 84-8 in the Senate[4], each chamber comfortably surpassed the required two-thirds threshold.

On January 27, 2020, Virginia ratified the ERA, becoming the 38th and final state to do so.

The ERA, having been proposed by over two-thirds of Congress and ratified by more than three-fourths of the states, has met all requirements prescribed in Article V and should be considered "valid to all Intents and Purposes, as Part of [the] Constitution." While there are a number of legal issues that have arisen over the course of the ERA's long journey to

[1] U.S. CONST., art. V.
[2] H.R.J.Res. 208, 92d Cong. (1972).
[3] 117 CONG. REC. 35815 (daily ed. Oct. 12, 1971) (House Roll Call vote No. 293 on the ERA).
[4] 118 CONG. REC. 9598 (daily ed. Mar. 22, 1972) (Senate Roll Call vote No. 533 on the ERA).

enshrinement in our Constitution, several of which are matters of first impression, none should encumber the Archivist from performing his duties. I address a few of these issues here in brief.

The Deadline Located in the Preamble of H. J. Res. 208 is Not Binding Upon the States

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.[5] However, 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 and sent to the states for their consideration.[6]

H.J. Res. 208 contains a seven-year deadline within the preamble of the bill, but critically, this deadline does not appear within the text of the ERA as put before the states for ratification. This deadline was then extended to 1982 by a subsequent act of Congress.[7] While the Court has not addressed a deadline found in prefatory text and later extended before expiration, it is my view that neither deadline is binding upon the states and the post-1982 ratifications of Nevada, Illinois, and Virginia are valid.

As was explained in testimony before your committee last year, "[The preamble] is not what the states ratified. If we look at the amendment itself, there is prefatory language, and then it says 'Article,' and there is Section 1, 2, and 3. That is what the states ratified, not the deadline."[8] When taking up a proposed amendment, states "have the opportunity to vote on any deadline in the text of an amendment [… and] thus bind themselves to the deadline constraint upon their ratification vote."[9] But states are afforded no such opportunity when the deadline appears in prefatory text on which the states cannot vote and therefore should not be bound by deadlines therein.

The Purported Recissions of Five Ratifying States are Invalid

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[5] Dillon v. Gloss, 256 U.S. 368 (1921).

[6] *Id.* at 370–71.

[7] H.R.J. Res. 638, 95th Cong. (1978).

[8] *The Equal Rights Amendment: Achieving Constitutional Equality For All: Hearing Before the Comm. on Oversight and Reform*, 117th Cong. 27 (2021). *See also* H.R. REP. NO. 116-378, at 8 (2020) (citing H. REP. NO. 95-1405, at 7 (1978)) ("Critically, the 1978 Committee Report further noted the ERA's original ratification deadline was not in the text of the proposed amendment itself. Rather, the seven-year deadline was in the 'proposing clause' of the ERA, meaning it was contained in the introductory language in H.J. Res. 208, which proposed the amendment.").

[9] Brief for Catharine A. MacKinnon, et al. as Amici Curiae in Support of Plaintiffs-Appellants and Reversal at 14, Virginia v. Ferriero, No. 21-5096 (D.C. Cir. Jan. 10, 2022).

The state legislatures of Idaho, Kentucky, Nebraska, South Dakota, and Tennessee, having properly ratified the ERA, cannot subsequently rescind their ratifications. While the Supreme Court has never directly addressed the question of whether a state may rescind their ratification, Congress has had multiple opportunities to address the issue and has consistently rejected the validity of recissions.[10] And while "acceptance by Congress is not relevant under the Article V process," absent clear guidance from the Court or the text of Article V, historical "precedent is instructive."[11]

The Archivist Can and Should Certify and Publish the ERA as the 28th Amendment

Having received the certificates of ratification from the requisite 38 states, the Archivist should certify and publish the ERA as the 28th amendment to the Constitution.

Article V creates no role for the executive branch in the amendment process and the Archivist's limited responsibilities are governed by federal statute. Section 106b of 1 U.S.C. reads in full:

> Whenever official notice is received by the National Archives and Records Administration ["NARA"] 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, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.[12]

Neither the Constitution nor federal law authorizes the Archivist "to judge the legal sufficiency of the ratifications he has received."[13] NARA has acknowledged receipt of official notice of ratification from all 38 states,[14] and yet the Archivist has not fulfilled his duty to certify and publish.

As you noted, the Archivist has thus far refrained from certifying and publishing the ERA because of a 2020 Department of Justice Office of Legal Counsel ("OLC") slip opinion that

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[10] Danaya C. Wright, "*An Atrocious Way to Run a Constitution": The Destabilizing Effects of Constitutional Amendment Recissions*, 59 DUQ. L. REV. 12, 33 (discussion on attempted recissions of state ratifications of the 14th, 15th, and 19th Amendments).

[11] *Id.*

[12] 1 U.S.C. § 106b.

[13] Wright, *supra* note 10, at 33.

[14] Nat. Archives & Records Admin., *Equal Rights Amendment – Proposed March 22, 1972: List of State Ratification Actions*, (last updated Mar. 24, 2020), https://www.archives.gov/files/foia/pdf/era-list-of-state-ratification-actions-03-24-2020.pdf.

concluded the deadline for ratification had passed and may not be revived by Congress.[15] This highly flawed memo, issued in the final year of the Trump administration, has rightly been revisited by OLC in a slip opinion issued this year.[16]

I agree with the 2022 slip opinion's conclusion that "the 2020 OLC Opinion will not be the last word on the constitutional status of the ERA" and that "the 2020 OLC Opinion does not preclude the House or Senate from taking further action regarding ratification of the ERA."[17]

The Archivist's very limited role in the amendment process, defined by federal statute, is widely understood to be "ministerial" in nature[18] and the text of Article V ascribes no role to the executive branch at all. Congress, having passed the ERA by a two-thirds vote in both chambers and sent the proposed amendment to the states for ratification, has fulfilled its constitutional role. The Archivist can publish without further action from the executive branch or Congress.

I sincerely appreciate your efforts and sustained advocacy in the movement to enshrine gender equality in the constitution. If there is any further assistance I or ACS can provide as the Committee continues to focus on the ERA, please reach out.

Respectfully,

Hon. Russ Feingold
President
American Constitution Society

[15] Ratification of the Equal Rights Amendment, 44 Op. O.L.C. , slip op. at 1 (Jan. 6, 2020).
[16] Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment, 46 Op. O.L.C., slip op. at 1 (Jan. 26, 2022).
[17] *Id.* at 2. This letter does not address the scope of Congress's potential role in the process going forward, as it is my view that no further action from Congress is required for the ERA to be certified and published as the 28th Amendment.
[18] Wright, *supra* note 10, at 15.