APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

CONSTITUTIONAL PROVISIONS

OTHER DOCUMENTS

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (AUGUST 6, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EQUAL MEANS EQUAL, THE YELLOW ROSES and KATHERINE WEITBRECHT,

Plaintiff,

v.

DAVID S. FERRIERO, in his Official Capacity as Archivist of the United States,

Defendant.

Case No. 20-cv-10015-DJC

Before: Denise J. CASPER,
United States District Judge.

CASPER, J.

I. Introduction

Plaintiffs Equal Means Equal, The Yellow Roses (together, the "Organizational Plaintiffs") and Katherine Weitbrecht ("Weitbrecht" or "Individual Plaintiff") have filed this lawsuit against David S. Ferriero in his official capacity as Archivist of the United States ("Defendant" or the "Archivist") alleging constitutional violations

and seeking, among other things, an order compelling the Archivist to record all states' ratification of the Equal Rights Amendment (the "ERA") and otherwise prohibiting removal of previously recorded ratifications and an order declaring the Equal Rights Amendment ratified. D. 5 at 3, 25. The Archivist has moved to dismiss for lack of jurisdiction and failure to state a claim under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6). D. 11. For the reasons stated below, namely that Plaintiffs lack standing, the Court ALLOWS the motion to dismiss, D. 11.

II. Standard of Review

Pursuant to Fed. R. Civ. P. 12(b)(1), a defendant may move to dismiss an action for lack of subject matter jurisdiction. "[T]he party invoking the jurisdiction of a federal court carries the burden of proving its existence." *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995) (quoting *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57, 60 (1st Cir. 1993)). To determine if the burden has been met, the Court "take[s] as true all well-pleaded facts in the plaintiffs' complaints, scrutinize[s] them in the light most hospitable to the plaintiffs' theory of liability, and draw[s] all reasonable inferences therefrom in the plaintiffs' favor." *Fothergill v. United States*, 566 F.3d 248, 251 (1st Cir. 2009).

A defendant may also move to dismiss for a plaintiff's "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12 (b)(6) motion to dismiss, a complaint must allege "a plausible entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Although detailed factual allegations are not necessary to survive a motion to dismiss, the standard "requires more than

labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. "The relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint." *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 13 (1st Cir. 2011).

III. Background[1]

Unless otherwise noted, the following factual summary is taken from the allegations in the operative complaint and the Court assumes them to be true for the purposes of resolving the motion. *McCloskey v. Mueller*, 446 F.3d 262, 265 (1st Cir. 2006) (noting that under either rule applicable here that the court "accept[s] the plaintiffs' well-pleaded facts as true and indulging all reasonable inferences in their behoof").

A. The Parties

David S. Ferriero is the Archivist of the United States and as such is responsible for the National Archives and Records Administration including the recording of states' ratification of constitutional amendments and the amendments themselves. D. 5 ¶ 9; 1. U.S.C. § 106b. Equal Means Equal is a national 501(c)(4) organization whose sole purpose is to advocate for women's equality, ratification of the ERA and equal

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[1] The Court ALLOWS *nunc pro tunc* the Plaintiffs' motion to take judicial notice of the States' Amicus Brief filed in *Virginia v. Ferriero*, 1:20-cv-00242 (D.D.C.), D. 27, and the Court further ALLOWS amici curiae motions, D. 24; D. 28, to file briefs in support of Plaintiffs. The Court has considered the briefs, D. 25, as amended by D. 30; D. 27-1, D. 29, herein but notes that none of them concern the legal issue of standing.

rights for women and girls. D. 5 ¶ 10. Specifically, its goal "is to eradicate sex/gender inequality and advocate for sex/gender equality and fully equal rights for women and men." D. 5 ¶ 59. In 2016, Equal Means Equal produced a documentary film titled "Equal Means Equal" which examined the status of American women who experienced discrimination and considered whether the ERA would mitigate this pattern of discrimination. D. 5 ¶ 60. Equal Means Equal's executive director, Kamala Lopez ("Lopez"), testified in front of the Illinois legislature in support of the ERA. D. 5 ¶ 61. Equal Means Equal has been advocating for state and federal officials to begin the process of examining their laws and regulations, and to take steps "to repair all sex discriminatory provisions," but officials have declined, citing the Archivist's refusal to recognize the ERA as ratified. D. 5 ¶ 62. Equal Means Equal further alleges that because the Archivist has refused to recognize the ERA as ratified, women attorneys and other advocates have been reluctant to demand repair work and Equal Means Equal has had to expend significant resources educating its members and members of the general public about why the ERA is duly ratified despite the Archivist's opinion to the contrary. D. 5 ¶ 63. The diversion of these resources, Equal Means Equal asserts, has reduced the amount of resources available to Equal Means Equal that would otherwise be used to assist in the repair work of sex discrimination provisions in anticipation of the ERA taking effect. D. 5 ¶ 63.

The Yellow Roses is an organization of Massachusetts high school students, founded in 2016, for the sole purpose of advocating for ratification of the ERA. D. 5 ¶ 11. The Yellow Roses' mission is to advocate for

and raise public awareness about the ratification of the ERA. D. 5 ¶ 66. The Yellow Roses engages in numerous activities including circulating a petition for the ratification of the ERA, interviewing and being interviewed by the media, meeting with state and federal officials to advocate for the equal treatment of women and ratification of the ERA, collaborating with activists and making public appearances to advocate for and teach young people to be activists in their communities. D. 5 ¶ 67. The Yellow Roses asserts that its mission is impaired by the refusal of government officials to begin the process of examining and repairing sex discriminatory laws, regulations and policies and because they cannot effectively advocate on behalf of the ERA so long as the ERA is perceived by government officials as not valid. D. 5 ¶ 69.

Individual Plaintiff Katherine Weitbrecht is a female resident of Norfolk County, Massachusetts. D. 5 ¶ 12. Weitbrecht personally suffered a violent act because she is female when she was strangled in Massachusetts for wearing a rape whistle. D. 5 ¶ 71. Weitbrecht reported the perpetrator to law enforcement and he was charged with a single count of assault and battery, but Plaintiffs allege that he could not be charged under the Massachusetts hate crime statute, Mass. Gen. L. c. 265 § 39, because sex is not a protected class under that statute. D. 5 ¶¶ 72-73 (citing Mass. Gen. L. c. 265 § 39). Weitbrecht is now reluctant to report any sex-based criminal activity because of that experience. D. 5 ¶ 74. She fears that reporting crimes committed against her because she is female will lead to inadequate charges and unjust treatment by law enforcement and the legal system. D. 5 ¶ 74. Weitbrecht alleges that her rights and well-being are threatened and violated

by her lack of full constitutional equality and, as a result, she has been subjected to needless increased risk of violence because of her sex. D. 5 ¶¶ 75, 77.

B. The ERA

In March 1972, Congress approved a resolution proposing an Amendment to the Constitution, the Equal Rights Amendment, by a supermajority of each house and submitted it for ratification to the state legislatures. H.J. Res. 208, 86 Stat. 1523 (1972). The resolution includes the text of the proposed amendment and set a seven-year deadline from the date of submission for ratification. The resolution states:

> 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.
>
> "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.J. Res. 208, 86 Stat. 1523 (1972). States considered the ERA and thirty-five states ratified it, including Massachusetts, before the seven-year deadline passed. D. 5 ¶ 18. Five states also passed resolutions seeking to rescind their prior ratification, *see* Ratification of the Equal Rights Amendment, U.S. Dep't of Justice, Office of Legal Counsel, 44 Op. O.L.C. at *18-21 (Jan. 6, 2020).

In 1978, as the seven-year deadline approached, Congress passed a joint resolution by the majority of both houses extending the ERA's deadline to June 30, 1982. H.R.J. Res. 638, 95th Cong., 2d Sess., 92. Stat. 3799 (1978). No new states ratified the ERA between 1979 and 1982. D. 5 ¶ 18. One of these five states attempting to rescind the ERA was Idaho, whose rescission, along with Congress's 1978 extension, became the subject of a lawsuit, *Idaho v. Freeman*, 529 F. Supp. 1107, 1146-50 (D. Idaho 1981). The district court in *Freeman* held that Congress's 1978 extension was unsuccessful and states may rescind their ratification. *Id.* at 1146-54. The Supreme Court stayed the district court's judgment and granted certiorari before the Ninth Circuit ruled on the appeal, *Nat'l Org. for Women, Inc. v. Idaho*, 455 U.S. 918, 102 S. Ct. 1272 (1982) (mem.), but vacated and remanded the case to the district court with instructions to dismiss it as moot after Congress's June 30, 1982 extension of the

ratification deadline passed. *Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809, 103 S. Ct. 22 (1982) (mem.).

C. Recent Developments with the ERA

In 2012, Defendant issued an opinion letter stating that he would record States' ERA ratification votes if they occurred after expiration of the challenged deadline and publish the ERA if three-fourths of the States voted to ratify it. *See* Letter from David S. Ferriero, Archivist of the United States, to Hon. Carolyn Maloney (October 25, 2012), https://www.congress.gov/116/meeting/house/109330/documents/HHRG-116-JU10-20190430-SD007.pdf. In 2017, the ERA regained national attention when Nevada passed a resolution intent on ratifying the ERA. S.J. Res. 2, 79th Leg. (Nev. 2017). Illinois followed suit the following year. S.J. Res. Const. Amend. 0004, 100th Gen. Assemb. (Ill. 2018). The Archivist recorded both Nevada and Illinois's ratifications. D. 5 ¶ 28. Because following Illinois's efforts, thirty-seven states in total had passed resolutions seeking to ratify the ERA, certain members of Congress wrote to the Archivist requesting information as to what actions he would take in the event that a 38th state, the last necessary vote for ratification, attempted to the ratify the ERA. *See* Letter from Gary M. Stern, General Counsel, Nat'l Archives and Records Admin., to Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice (Dec. 12, 2018), https://www.archives.gov/files/press/press-releases/2020/olc-letter-re-era-ratification-12-12-2018.pdf. Following the inquiry from Congress, on December 12, 2018, the general counsel to the National Archives wrote the Department of Justice, Office of Legal Counsel ("OLC") requesting guidance on the Archivist's responsibilities to record state's

efforts to ratify the ERA after the congressional deadlines. *Id.* On January 6, 2020, the OLC issued a memorandum opinion (the "OLC ERA Opinion") that the "deadline in the proposing clause of the ERA Resolution was a valid and binding exercise of Congress' authority to set a deadline on ratification" and regardless of whether the 1979 Congressional Extension was valid, the ERA deadline has come and gone and, therefore, advised the Archivist not to certify the ERA as ratified if any state subsequently attempted to ratify the ERA. *See* Ratification of the ERA, 44 Op. O.L.C. at *12, *24. On January 8, 2020, the Archivist issued a statement that he "defers to DOJ on this issue and will abide by the [OLC ERA Opinion] unless otherwise directed by a final court order." NARA Press Statement on the Equal Rights Amendment (Jan. 8, 2020), https://www.archives.gov/press/press-releases-4.

A week later, the Virginia General Assembly passed a joint resolution intending to ratify the ERA. H.R.J. 1, 2020 Sess. (Va. 2020). As of the date of the filing of the amended complaint in this action, the Archivist had not recorded Virginia as having ratified the ERA, D. 5 ¶ 41, but the Archivist subsequently recorded Virginia's ratification. D. 12 at 30; *see* Nat'l Archives and Records Admin., Equal Rights Amendment: List of State Ratification Actions (Mar. 24, 2020), https://www.archives.gov/files/foia/pdf/era-list-of-state-ratification-actions-03-24-2020.pdf.

IV. Procedural History

Plaintiffs instituted this action on January 1, 2020, D. 1, and amended the complaint on February 29, 2020, D. 5. Defendants has now moved to dismiss. D.

11. The Court heard the parties on the pending motion and took the matter under advisement. D. 17.

V. Discussion

A. Standing

Article III of the Constitution limits federal courts to deciding cases or controversies. *See* U.S. Const. art. III § 2; *Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 52 (1st Cir. 2014). The justiciability doctrines of standing and ripeness are rooted in Article III and must be addressed as a threshold inquiry prior to adjudication of the merits of the underlying case. *See Reddy v. Foster*, 845 F.3d 493, 499-500 (1st Cir. 2017). Standing doctrine reflects both prudential and constitutional limitations. *Conservation Law Found. of New England, Inc. v. Reilly*, 950 F.2d 38, 40 (1st Cir. 1991).

The constitutional requirement of standing necessitates that a plaintiff show "a concrete and particularized injury in fact, a causal connection that permits tracing the claimed injury to the defendant's actions, and a likelihood that prevailing in the action will afford some redress for the injury." *City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 92 (1st Cir. 2008) (internal quotation marks omitted) (quoting *Me. People's All. & Nat. Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006)). As the standing requirement is rooted in the principal that courts should only decide cases and controversies, plaintiffs must allege more than a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens," must assert "his own legal rights and interests, and cannot rest his claim to relief on the legal rights

or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The prudential limitations prevent courts from "adjudicating 'questions of broad social import where no individual rights would be vindicated and . . . limit access to the federal courts to those litigants best suited to assert a particular claim.'" *Conservation Law Found. of New England, Inc.*, 950 F.2d at 41 (alterations in original) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985)). Plaintiffs identify several theories of standing for both organizational and individual plaintiffs. D. 13 at 41-58. Because the Defendant disputes the Plaintiffs' standing to bring these claims, D. 12 at 19-29, this Court turns to this threshold issue.

1. Standing to All Persons Protected by the ERA

Most broadly, Plaintiffs assert that all persons protected under the ERA have standing to bring suit. D. 13 at 41-47. Specifically, Plaintiffs argue that all persons that would be protected under the ERA are injured by the Archivist's actions because they have a legal interest in the "continued vitality of the ERA." D. 13 at 41. Plaintiffs also argue that the Archivist's failure to publish the ERA perpetuates the status of women as unequal resulting in disproportionately higher rates of harm because of that inequality. D. 13 at 43. But cognizable injuries must be both concrete and particularized. *Spokeo, Inc. v. Robins*, ___U.S. ___, 136 S. Ct. 1540, 1548 (2016) (reiterating that the Court has "made it clear time and time again that an injury in fact must be both concrete and particularized"). These generalized injuries to all those protected by the ERA fail in both respects.

a) Injury to All Persons Protected By the ERA Is Not Particularized

As an initial matter, Plaintiffs appear to suggest that since the members of the Organizational Plaintiffs and the Individual Plaintiff are female, they have standing to bring this complaint. D. 13 at 41-42. Such a nation-wide standing principal has been squarely rejected. *See Allen v. Wright*, 468 U.S. 737, 755-56 (1984), *abrogated on other grounds*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 (2014). In *Allen*, the Court rejected the plaintiffs' standing argument by reasoning that "[i]f the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school." *Id.* at 755-56. Plaintiffs' theory here is no different. It embraces standing to "all individuals protected by the ERA." D. 13 at 41.

Plaintiffs argue that this case is distinguishable because unlike in *Allen*, the Plaintiffs here are not merely concerned bystanders. D. 13 at 42. Rather, according to Plaintiffs, "in this unprecedented case where our nation's foundational governing document has been changed, there can be no bystanders" and because women and others protected by the ERA should be guaranteed a "place in the Constitution as fully equal persons, [and] Defendant's actions have denied them that status," they have suffered injury.[2] D. 13 at 42.

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[2] Plaintiffs cite the Ninth Circuit's ruling on intervenor's rights in *Freeman* holding that the interest in the vitality of the ERA was sufficient to allow a women's group to intervene to support their proposition that such a generalized interest is sufficient to

This argument asserts that because the Plaintiffs' challenge is rooted in the constitution, it is distinguishable from the tax related challenge in *Allen*. First, the Supreme Court's jurisprudence regarding the requirement that standing be individualized is not limited to its holding in *Allen*. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992) (explaining that an injury which "no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy"); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (standing requires that plaintiffs "show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent") (internal quotations omitted) (quoting *Warth*, 422 U.S. at 502). This is because "[a]t bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to

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confer standing. *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980). Although the circuits are split on this issue, *Mangual v. Rotger-Sabat*, 317 F.3d 45, 61 (1st Cir. 2003) (acknowledging a circuit split); *see Cotter v. Mass Ass'n of Minority Law Enf't Officers*, 219 F.3d 31, 34 (1st Cir. 2000) (acknowledging that there may be "unusual cases" where an intervenor could satisfy the interest requirement of Rule 24(a)(2) without having a stake in the controversy needed to satisfy Article III), some have held that Article III standing is not required to intervene, *see e.g., Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1251-52 & n. 4 (10th Cir. 2001). Indeed, the Ninth Circuit has explained that "the Article III standing requirements are more stringent than those for intervention under rule 24(a)." *Yniguez v. State of Ariz.*, 939 F.2d 727, 735 (9th Cir. 1991). Given this distinction and that this Court is not otherwise convinced Plaintiffs' interest in the vitality of the ERA demonstrate an individualized and concrete stake in the outcome here, the Court does not accept the ruling in *Freeman* as persuasive authority on this issue.

assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Accordingly, Article III jurisdiction requires that the "party bringing suit must show that the action injures him in a concrete and personal way." *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring). Second, standing does not exist on a sliding scale in relation to the gravity of the legal issue. The individual is either injured or not, it does not matter how deeply felt the individual's interest in the problem may be. The test "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

b) Nor Have Plaintiffs Identified a Concrete Injury Suffered By All Those Protected By the ERA

Although the fact that an injury is widely shared does not defeat a plaintiff's claim to injury, it must nonetheless be sufficiently concrete and individualized. Plaintiffs may plausibly allege standing regardless of "how many persons have been injured by the challenged action" if they plausibly allege that their individual rights have been or will be infringed in some "concrete and personal way." *Massachusetts v. E.P.A.*, 549 U.S. at 517 (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)). In *Fed. Election Com'n v. Akins*, 524 U.S. 11, 20-25 (1998), the Supreme Court held that voters had standing to challenge the Federal Election Commission's refusal to compel the American Israel Public Affairs Committee to register as a "political committee." *Id.* The Court identified the injury as a

failure to obtain relevant information that was mandated by statute and explained that "the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts." *Id.* at 24-25.

This is not the case, as was in *Akins*, where parties have identified a concrete injury—such as a lack of information that is related to their right to vote. Here, the Plaintiffs have not identified a particular injury suffered by all people protected by the ERA generally that concretely or tangibly harms them. Instead, Plaintiffs assert that all individuals that would be protected under the ERA are denied that status of equal person. This theory suffers from two flaws. First, it is not the case that because the constitution does not affirmatively protect rights, it impinges on them. Indeed, some state constitutions protect rights beyond the floor the federal constitution sets, yet courts do not understand federal constitutional omissions in regard to what states protect to impede or burden those rights. *See Am. Legion v. Am. Humanist Ass'n*, ___U.S. ___, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) (recognizing that "the Constitution sets a floor for the protection of individual rights," one that "is sturdy and often high, but it is a floor" and that "other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution"). Second, the injury plaintiffs allege, is that if the ERA were to be fully recognized, individuals would be afforded more protection under the law than they would be without the ERA. This amounts to no

more than an injury flowing from the application of the law and the Supreme Court has made clear that plaintiffs who claim only a harm related to the "proper application of the Constitution and laws . . . [that] no more directly and tangibly benefits him than it does the public at large —does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74.

Plaintiffs attempt to ground their injury arguments in the concrete harm they allege women face as a result of the ERA not being recognized. D. 13 at 43-44. In doing so, Plaintiffs point to several harms women face from society at large. For example, Plaintiffs explain that women face increased and disproportional levels of violence, are subject to bias in education and "offenders of violence against women are less likely to be held responsible compared to offenders of other types of violence." D. 5 ¶¶ 51-58. But these generalized injuries are not cognizable injuries to the class of persons protected by the ERA as a whole. *Simon*, 426 U.S. at 40 n.20; *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378-81 (D.C. Cir. 1984) (finding no standing for a large group of plaintiffs who alleged a "chilling effect" resulting from an Executive Order establishing the framework of foreign intelligence and counterintelligence operation).

Moreover, even assuming these injuries conferred standing upon all women, *but see Equal Means Equal et al. v. Dep't of Educ. et al.*, No. 17-cv-12043-PBS, 2020 WL 1284149, at *7 (D. Mass. Mar. 18, 2020) (rejecting plaintiffs' standing argument that plaintiffs established injury by alleging the denial of equal treatment by the challenged discriminatory conduct), it cannot be said that these injuries are fairly attributable to the Archivist's action. Injuries that stem from independent

acts of third parties are ordinarily not cognizable because they are neither fairly traceable to the defendant nor likely to be redressed by the requested relief. *See Katz v. Pershing, LLC*, 672 F.3d 64, 71-72 (1st Cir. 2012) (explaining that "[b]ecause the opposing party must be the source of the harm, causation is absent if the injury stems from the independent action of a third party"); *NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 519 (1st Cir. 1979) (agreeing that a federal court can only redress "injury that can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court") (quoting *Simon*, 426 U.S. at 41-42). The disproportional levels of violence women face, bias in education and the fact gender-based offenders of violence are less likely to be held responsible compared to offenders of other types of violence, all relate to independent acts of third parties: the perpetrators of violence, education systems and those policing violence, not the Archivist.

2. Individual Plaintiff

Defendant also challenges the standing of the Individual Plaintiff, Weitbrecht, to bring suit in this instance. D. 12 at 27-29. Plaintiffs assert that Weitbrecht has standing in this action because she "has personally suffered violence and unequal protection and enforcement of the laws based on sex." D. 13 at 54. Weitbrecht experiences heightened vigilance and concern about being less safe because she is female and further alleges a reluctance to seek redress for sex-based harm due to fear that this will lead to inadequate charges and unjust treatment by law enforcement. D. 13 at 54.

Although Weitbrecht has alleged such harm, that harm does not confer standing in this suit. The injury must be tied to the relief requested to confer standing. *Conservation Law Found. of New England, Inc.*, 950 F.2d at 43 (explaining that the alleged injury was of particular concern because "plaintiffs seek relief far beyond any injury they have established"). The relief requested here, namely the declaration and injunctive relief concerning the ERA, cannot remedy the violence Weibrecht faced and the fact that Weibrecht suffered violence in the past does not establish that she is likely to suffer violence in the future. *See Asociación de Periodistas de Puerto Rico v. Mueller*, 680 F.3d 70, 85 (1st Cir. 2012).[3]

Weitbrecht's other alleged injuries also do not confer standing in this instance. Weitbrecht also asserts that her "rights and well-being are threatened and violated by her lack of full Constitutional equality because she is not equally protected by the United States Constitution, or Massachusetts law." D. 5 ¶ 75. But as explained above, this type of generalized injury cannot be the basis for a plaintiff's standing because it is neither particularized nor concrete. Indeed, another session of this Court has rejected the assertion that persons denied generalized equal treatment by anticipated discriminatory conduct, alleges injury in

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[3] Nor can this relief remedy any alleged unequal treatment Weibrecht faced by virtue of the allegation that she is not a member of a protected class under Massachusetts hate crime statute, Mass. Gen. L. c. 265 § 39. D. 5 ¶¶ 72-73. This harm stems from the independent act of a third party—the Massachusetts legislature, and, therefore, is not fairly attributable to the Archivist. *See Katz*, 672 F.3d at 71 (explaining that "[b]ecause the opposing party must be the source of the harm, causation is absent if the injury stems from the independent action of a third party").

fact. *Equal Means Equal et al.*, 2020 WL 1284149, at *7 (holding that such injuries were "merely speculative"). Next, Weitbrecht claims a chilling effect on her speech namely that she is reluctant to seek redress for any sex-based harm she may endure due to fear that the charges or crimes will be inadequate and she will receive unjust treatment by law enforcement and the legal system. D. 13 at 54-55. To the extent this injury is premised on a First Amendment chill injury, such an injury is "peculiar to the First Amendment context," *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996), and despite apparent contentions to the contrary, D. 13 at 55, injuries must be related to the claim brought to assert standing—Plaintiffs bring no First Amendment claim here.[4] In any event, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). "The mere allegation of a 'chill,' . . . will not suffice to open the doors to federal court." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 47 (1st Cir. 2011). Here, Weitbrecht has alleged only that she has been personally chilled by the Archivist's action, not that this chill was objectively reasonable or that she has suffered any other harm.[5] *Blum v. Holder*, 744 F.3d 790, 796 (1st

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[4] To the extent this chill injury asserts that Weitbrecht has been denied access to the courts, D. 13 at 55, this injury cannot be said to be attributable to the Archivist as it involves the independent acts of third parties. *Katz*, 672 F.3d at 71-72.

[5] Weitbrecht's chill arguments suffer from an additional deficiency —they are not fairly attributable to the Archivist. The fact that Weitbrecht fears that she will receive unjust treatment by law enforcement or the legal system if she reports a crime is not fairly attributable to the Archivist's failure to certify the ERA because

Cir. 2014) (reiterating that mere allegations of subjective chill are insufficient to state an Article III injury). For these reasons, the Individual Plaintiff, Weitbrecht, has failed to establish that she has standing to bring this suit.

3. Organizational and Associational Standing

Organizational plaintiffs may demonstrate standing by: (1) showing associational standing, i.e., that the member of the organization would have standing to sue as an individual and the interests the organization seeks to protect are germane to its purposes; or (2) by showing that the organizational plaintiffs have standing to sue on their own. *See Equal Means Equal et al.*, 2020 WL 1284149, at *3. In either instance, the organization must demonstrate more than a "mere interest in a problem." *Sierra Club*, 405 U.S. at 739 (internal quotations omitted). As such, they must make the same showing as is required in the case of an individual: injury, causation and redressability. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) (explaining that the court "conduct[s] the same inquiry as in the case of an individual" to assess organizational standing). Defendants assert that neither Equal Means Equal nor the Yellow Roses have standing. D. 12 at 20-27. Since Equal Means Equal asserts its basis for standing on both theories (and Yellow Roses asserts standing on the basis of organizational standing), the Court addresses both.

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it relies on independent acts of third parties. *See Katz*, 672 F.3d at 71-72.

a) Associational Standing

"[A]n association may have standing solely as the representative of its members even in the absence of injury to itself, in certain circumstances." *Camel Hair & Cashmere Inst. Of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 10 (1st Cir. 1986) (citing *Warth*, 422 U.S. at 511). To meet the Constitution's standing requirement the associations must demonstrate that (1) its members have an injury "that would make out a justiciable case had the members themselves brought suit," *Warth*, 422 U.S. at 511, and (2) the "interests served by the suit are pertinent to the mission of the organization . . . ." *Town of Norwood v. F.E.R.C.*, 202 F.3d 392, 406 (1st Cir. 2000). Moreover "[r]epresentative standing is inappropriate for prudential reasons, for example, if 'the nature of the claim and of the relief sought' requires the participation of individual members." *Parent/Prof'l Advocacy League v. City of Springfield*, 934 F.3d 13, 33-34 (1st Cir. 2019).

Plaintiffs assert that Equal Means Equal,[6] has associational standing in this instance because two of its members, Lopez and Weitbrecht, had a cognizable interest in the validity of the ERA. D. 13 at 52-53. The Archivist asserts that it is not apparent from the amended complaint that Equal Means Equal has members at all, much less that Lopez and Weitbrecht were members. Indeed, it does not appear from the amended complaint that Equal Means Equal alleges

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[6] Other than a single line in their surreply brief, D. 22 at 12 n.9, Plaintiffs have not endeavored to argue that the Yellow Roses have associational standing. *See* D. 13 at 53-54; D. 20 at 6 n.2; D. 22 at 11-12. To the extent that they do make this contention, the Court concludes that they have not made sufficient showing of same.

that it has members that have standing to sue in their own right (although it asserts in its opposition that Lopez and Weitbrecht are members), as the operative pleading does not individually identify any of Equal Means Equal's members. *See generally*, D. 5. Equal Means Equal alleges that it has "over twenty-thousand active supporters including members of the entertainment and media community," D. 5 ¶ 65, and otherwise alleges that it "engages with its members/supporters who donate funds and volunteer," D. 5 ¶ 61, and that its involvement in this litigation is intended to represent its own interests and the interests of its members/ supporters and women at large, D. 5 ¶ 64. Associational standing, however, requires that the organization "at the very least, 'identify [a] member[ ] who ha[s] suffered the requisite harm.'" *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)) (alteration in original). Equal Means Equal's failure to allege facts in this regard is alone fatal to its associational standing theory. *See Equal Means Equal*, 2020 WL 1284149, at *4 (holding that Equal Means Equal's allegations that "they have supporters who 'voluntarily associate[ ] themselves with [Equal Means Equal] . . . is not sufficient to establish standing").

Even considering the additional facts alleged in its opposition, Equal Means Equal has not established standing. Equal Means Equal asserts in its briefing that Weitbrecht and Lopez are both members and both have standing in their own right. D. 13 at 53. As this Court discussed above, Weitbrecht has not alleged a cognizable injury attributable to the Archivist's action and, therefore, does not have standing in this instance. Nor does Lopez's alleged injury—that she has devoted

personal resources and funds to conduct training sessions, produce educational material and communicate with government officials around the country, urging them to disregard Defendant's actions—amount to a concrete injury. D. 13 at 53. As an interest in a problem is insufficient to confer standing, *Sierra Club*, 405 U.S. at 739 (quotations omitted), Equal Means Equal's associational standing argument fairs no better with respect to Lopez.

b) Organizational Standing

"It is well-accepted in the standing context that organizations may have interests of their own, separate and apart from the interests of their members." *Mass. Delivery Ass'n v. Coakley*, 671 F.3d 33, 44 n.7 (1st Cir. 2012). Organizational standing is analyzed under the same inquiry as individual standing. That is to say, for an organization to allege standing in its own right, it must allege "(1) an injury in fact, which is (2) fairly traceable to the defendant's misconduct, and which can be (3) redressed through a favorable decision of the court." *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 324 (D. Mass. 2013). Especially germane to the organizational injury inquiry is whether the injury is sufficiently concrete or merely an abstract social interest. *See Havens Realty Corp.*, 455 U.S. at 378-79; *Abigail All. For Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) (explaining that "[t]he court has distinguished between organizations that allege that their activities have been impeded from those that merely allege that their mission has been compromised"). This is because although organizations may be formed to remedy certain problems or advance certain goals, mere interest in a

problem is insufficient to support standing. *See Sierra Club*, 405 U.S. at 739.

The Supreme Court in *Sierra Club* addressed the standing of the Sierra Club, a membership corporation group with a special interest in conservation, to bring suit enjoining federal officials from approving an extensive skiing development in the Mineral King Valley. *Id.* at 729-30. Recognizing that "[t]he Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations," the Supreme Court held that this "special interest" in the problem did not satisfy Article III's standing requirements. *Id.* at 739. This is because if "'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so." *Id.* at 739-40. Accordingly, *Sierra Club* is understood as rejecting the idea that lobbyist or advocacy groups had standing when they assert no injury other than an injury to its advocacy. *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 n.4 (D.C. Cir. 2005) (explaining that "in *Sierra Club*, the Supreme Court recognized that to hold that a lobbyist/advocacy group had standing to challenge government policy with no injury other than injury to its advocacy would eviscerate standing doctrine's actual injury requirement"); *Blunt v. Lower Merion*

Sch. Dist., 767 F.3d 247, 288 (3d Cir. 2014) (summarizing that "it is clear that a nonprofit entity cannot create standing in a lawsuit in which it has no direct economic interest by having its representatives attend meetings regarding the issue that the entity intends to raise in the suit, or by making expenditures to 'educate' the public on what it regards as the factual or legal basis for its agenda"); *Pa. Prison Soc. v. Cortés*, 508 F.3d 156, 163 (3d Cir. 2007) (explaining that organizations are "unable to establish standing solely on the basis of institutional interest in a legal issue").

Organizational injury, however, may also be established when the organization suffers an injury to its organizational activities. For example, in *Havens Realty Corp.*, 455 U.S. at 379, the Supreme Court held that the organizational plaintiff had suffered a concrete injury because the defendant's action impeded the organizational purpose and consequentially caused a drain on its resources. *Id.* There, HOME, a nonprofit corporation whose purpose was to make equal opportunity in housing a reality in the Richmond metropolitan area, brought suit against a realty company and individual alleging discrimination in violation of the Fair Housing Act. *Id.* at 368-69. HOME alleged that it had been frustrated by the "defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services" and "has had to devote significant resources to identify and counteract" the defendant's actions. *Id.* at 379. The Supreme Court explained that "[if as alleged] petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income home seekers, there can be no question that the organization has suffered injury in fact." *Id.*

The Supreme Court held that "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.*

The Supreme Court differentiated the injury suffered—having to devote significant resources to combat discrimination and thereby impeding its ability to provide counseling services—from the abstract social interest in combatting racial discrimination that the Supreme Court previously found insufficient to state standing in *Sierra Club*. *Id.* (citing *Sierra Club*, 405 U.S. at 739). In *Havens*, it was not enough that the plaintiff organization was generally interested in combating racial discrimination, rather it was that its activities of providing housing counseling and referral services had been impeded that gave rise to its standing. *Id. Havens* and *Sierra Club* together require organizations to have an injury distinct from an interest in the problem. Courts, therefore, do not find standing when the organizational goal is one in the same with the injury because those organizations have only a "mere interest" in a problem. *See Lane v. Holder*, 703 F.3d 668, 674-75 (4th Cir. 2012) (ruling that a second amendment group whose goal was to promote the exercise of the right to keep and bear arms, educate and research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms did not have standing to challenge firearm law based on its diversion of resources to educate and litigate based on the law); *Pa. Prison Soc.*, 508 F.3d at 162-64 (holding that a group interested in prison rights did not have standing to challenge amendment to Pennsylvania's constitution regarding recommendations of pardons). This is because

"[a]n organization's expenses in the pursuit of its agenda are self-effectuating and claiming them as injury-in-fact would allow any advocacy group to manufacture standing by choosing to expend resources to advocate against policy decisions made by the federal government." *Blunt*, 767 F.3d at 288 (quoting *Ctr. For Law and Educ. v. U.S. Dep't of Educ.*, 315 F. Supp. 2d 15, 24-25 (D.D.C. 2004)).

Yellow Roses and Equal Means Equal are both advocacy organizations. Equal Means Equal's "sole purpose is to advocate for sex equality and ratification of the ERA." D. 13 at 50; D. 5 ¶¶ 10, 59. Yellow Rose's mission is to advocate for and raise public awareness about sex equality and the ERA. D. 13 at 53; D. 5 ¶¶ 11, 66. Both organizations allege that their missions have been frustrated because they assert that the Archivist's refusal to publish the ERA and dissemination of misinformation about its validity has obstructed the organizations' ability to advocate for sex equality under the ERA. D. 13 at 50, 54. Because the Archivist has not declared the ERA valid, they cannot effectively advocate for equality under it. D. 13 at 49-51, 53-54. The organizations argue that they have had to divert funds away from their advocacy efforts and instead have had to dedicate funds to educating the public about the Archivist's actions. D. 13 at 49-51, 53-54. If these allegations were sufficient to claim standing, an organizational plaintiff would have standing anytime a defendant's action interfered with their organizational goal of advocacy. This is precisely the principal the Supreme Court rejected in *Sierra Club* when it held that the Sierra Club's special interest in the "[n]ational natural heritage from man's depredations" were not

enough to entitle Sierra Club to commence [that] litigation. *Sierra Club*, 405 U.S. at 739. Undisputedly, the Organizational Plaintiffs are dedicated advocates to women's rights, "but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982).

Other courts reviewing similar organizational injuries have been reluctant to find standing because such injuries are not distinct from the organizations' mere interest in the problem. For example, the D.C. Circuit has explained that courts do not find standing where "the only 'injury' arises from the effect of the regulations on the organizations' lobbying activities (as opposed to the effect on non-lobbying activities)." *Ctr. For Law & Educ.*, 396 F.3d at 1161. Similarly, the Seventh Circuit has explained that "finding it difficult to advocate and educate on home-sharing in Chicago before a court rules on the individual plaintiffs' challenges to the constitutionality" of an ordinance does not amount to constitutional standing. *Keep Chicago Livable v. City of Chicago*, 913 F.3d 618, 625 (7th Cir. 2019). Here, the Organizational Plaintiffs allege similarly policy and advocacy based injuries explaining that both had to expend significant resources educating, advocating and "communicating with the public around the country to counteract Defendant's unlawful actions," D. 13 at 51, and "[t]his has frustrated [the organization's] mission because [they] unable to advocate at all for the repair work that should be already underway, and would already be underway, if the Archivist had not stated his refusal to recognize the ERA." D. 5 ¶ 62; *see* D. 5 ¶ 63. This interference with organizational

advocacy goals is insufficient to confer standing. *See Ctr. For Law and Educ.*, 396 F.3d at 1161; *Keep Chicago Livable*, 913 F.3d at 625; *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (citing cases and explaining that "[o]ur precedent makes clear that an organization's use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise to an Article III injury").

Nor are the organizations' efforts to educate members of the public/supporters sufficient to sustain standing. The Organizational Plaintiffs argue that they have devoted resources "to educate and inform members and the general public about why the ERA is duly ratified" despite the Archivist's actions. D. 5 ¶ 63. Essentially, these resources have been devoted to educate the public about the legal status of the ERA, but an organization may not establish "Article III standing merely by virtue of its efforts and expense to advise others how to comport with the law, or by virtue of its efforts and expense to change the law." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 460 (6th Cir. 2014); *see Boston's Children First v. Boston Sch. Comm.*, 183 F. Supp. 2d 382, 403 (D. Mass. 2002) (rejecting the standing argument that plaintiff "has 'expended considerable resources in providing counseling and information to its members and general public about the challenged . . . policy'").[7]

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[7] Plaintiffs argue that *Boston's Children First* is inapplicable because they argue that the plaintiffs there alleged no diversion of resources or frustrated its mission. D. 13 at 51. As a preliminary matter, it appears that the plaintiffs in *Boston Children First* did allege a diversion of resources as its argument was based on the "sunk costs" injury the organization sustained as a result of the defendant's action. *Id.* at 403. In any event, the

To hold otherwise and decide that the Organizational Plaintiffs here, whose purpose is to advocate for the ERA, have standing to assert the constitutional validity of the ERA would be in tension with this Court's obligation to decide only actual cases and controversies. "At bottom the Article III standing limitation prevents a plaintiff from bringing a federal suit to resolve an issue of public policy if success does not give the plaintiff (or one of an associational plaintiff's members) some relief other than the satisfaction of making the government comply with the law." *Fair Elections Ohio*, 770 F.3d at 460. The Organizational Plaintiffs here ultimately assert that the ERA is the law and advocate for compliance with it. Undoubtedly, the relief the organizations seek would allow them to focus their efforts toward advocacy to state legislatures and may well make their advocacy efforts more effective, but that does not confer standing for these Plaintiffs to bring this suit. *See Akins*, 524 U.S. at 20 (explaining that the cases and controversies limitation of Article III ensures that "courts will not pass upon. . . . abstract, intellectual problems but adjudicate concrete, living contest[s] between adversaries") (alterations in original) (citations omitted). "Otherwise, the implication would be that any individual or organization wishing to be involved in a lawsuit could create a[n organization] for the purpose of conferring standing, or could adopt [a mission] so that the [organization] expressed an interest in the subject matter of the case, and then spend its way into having standing." *Blunt*, 767 F.3d at 288.

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mission the defendant's action impairs here is that of advocacy and "when the service impaired is pure issue-advocacy" standing is not established. *PETA v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093-94 (D.C. Cir. 2015).

4. Procedural Injury

Plaintiffs also assert a procedural injury in their opposition. D. 13 at 40. "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all of the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7. Article III still imposes a "irreducible constitutional minimum" and although Congress is "well position to identify intangible harms" that does not mean that a plaintiff "automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo, Inc.*, 136 S. Ct. at 1548-49.

Although Plaintiffs do not assert a procedural injury in their complaint, in their opposition they appear to identify 1 U.S.C. § 106b and the Archivist's decision not to certify the ERA as the basis for their procedural injury.[8] D. 13 at 23-25. Plaintiffs argue that Section 106b creates a mandate for the Archivist to record ratified amendments because it provides that the Archivist "shall forthwith cause the amendment to be published." 1 U.S.C. § 106b. Examples of procedural

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[8] Plaintiffs also assert a procedural right because "thirty-eight states voted to ratify the ERA, thus satisfying Article V" and, therefore, Plaintiffs also have a cognizable legal interest in ensuring compliance with the states' judgment that the ERA is now law. D. 22 at 10-11 n. 7. In support, Plaintiffs cite *Salazar v. Buono*, 555 U.S. 700, 712 (2010) for the proposition that party who obtains a judgment in his favor "acquires a 'judicially cognizable' interest in ensuring compliance with hat judgment." Here, Plaintiffs have not obtained a judgment in their favor that the ERA is ratified and cannot use their arguments that it is ratified to assert standing to obtain that very judgment.

injuries include: an agency's failure to prepare an environmental impact statement, *see City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975), adoption of a regulation without notice or comment period, *United States v. Johnson*, 632 F.3d 912, 920-21 (5th Cir. 2011), violation of publication and notification procedural duties prior to an eminent domain taking, *Brody v. Vill. of Port Chester*, 345 F.3d 103, 108-13 (2d Cir. 2003), and failure to comply with its certification procedures, *Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374, 1379 (9th Cir. 1989). In all these cases, plaintiffs sought to enforce a procedural requirement which could impair their separate concrete interests.

Even assuming there was some procedural violation here, Plaintiffs "cannot satisfy the demands of Article III by alleging a bare procedural violation." *Spokeo, Inc.*, 136 S. Ct. at 1550. Here, Plaintiffs have not alleged any concrete interest in tandem with the Archivist's failure. It "is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)." *Lujan*, 504 U.S. at 572. Rather, here Plaintiffs seek to establish an injury in procedural violation—the Archivist's failure to certify the ERA—and argue that a myriad of generalized consequences (the unequal status of women, violence against women and unequal treatment) flow to all women and all those otherwise affected by the Archivist's failure to act. As this court

explained above, this is not a concrete and particularized stake in the outcome. Accordingly, Plaintiffs' procedural standing argument fare no better than their class-wide, individual and organizational arguments.

5. The Claims Here Further Illustrate That Plaintiffs Do Not have Standing

Plaintiffs ask, among other things, that this Court declare certain states' purported rescissions invalid and declare the ERA ratified despite the fact that several states have passed intended rescissions of these ratifications. D. 5 at 25. In short, the Plaintiffs ask this Court to adjudicate the efficacy of states ratification, which *Freeman* observed is "the mechanism whereby the will of the people is expressed." *Freeman*, 529 F. Supp. at 1128. Standing is meant to sharpen "the presentation of issues upon which the court so largely depends for illumination," *Massachusetts v. E.P.A.*, 549 U.S. at 517 (quoting *Baker*, 369 U.S. at 204) (internal quotations omitted), but no states are parties in this suit. *Freeman* and *Dyer* both considered whether Idaho and Illinois had ratified the ERA. *See Dyer v. Blair*, 390 F. Supp. 1291, 1308-09 (N.D. Ill. 1975); *Freeman*, 529 F. Supp. at 1146-50. Both considered the process by which Idaho and Illinois had approved and rescinded their approval for the amendment. *See Dyer*, 390 F. Supp. at 1308-09; *Freeman*, 529 F. Supp. at 1147-50. *Freeman* and *Dyer* both considered the states' legislative actions in an attempt to determine the "will of the people of those states." *See Dyer*, 390 F. Supp. at 1308-09; *Freeman*, 529 F. Supp. at 1150. Here, the Court does not have before it any state as a party for this litigation but is nonetheless asked to decide their ratifications.

For all of the aforementioned reasons stated, Plaintiffs have not demonstrated standing in this suit. Accordingly, the Court lacks jurisdiction to decide the underlying merits and, therefore, does not address the Defendant's remaining arguments for dismissal. *See United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir. 1992) (explaining that "[i]f a party lacks standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case").

VI. Conclusion

For the foregoing reasons, the Court ALLOWS Defendants' motion to dismiss. D. 11.

So Ordered.

/s/ Denise J. Casper
United States District Judge

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND JUDICIAL RULES

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.

1 U.S. Code § 106b
Amendments to Constitution

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, 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.

28 U.S. Code § 2101(e)
Supreme Court; Time for Appeal or Certiorari; Docketing; Stay

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES SECOND SESSION, NINETY-SECOND CONGRESS: EQUAL RIGHTS AMENDMENT

JOINT RESOLUTION
[H.J. RES. 208]

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.

"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."

CARL ALBERT
Speaker of the House of Representatives.

ALLEN J. ELLENDER
President of the Senate pro Tempore.

I certify that this Joint Resolution originated in the House of Representatives,

W. PAT JENNINGS
Clerk

BY
W. RAYMOND COLLEY

[Received by the Office of the Federal Register, National Archives and Records Service, General Services Administration, March 23, 1972.]

LEGISLATIVE HISTORY:

HOUSE REPORT
No. 92-359 (Comm. on the Judiciary).

SENATE REPORT
No. 92-689, also accompanying
S. J. Res. 8 and S. J. Res. 9 (Comm. on the Judiciary).

CONGRESSIONAL RECORD:

Vol. 117 (1971):
Aug. 6, S. J. Res. 150 considered in Senate. Oct. 6, 12, H. J. Res. 208 considered and passed House.

Vol. 118 (1972):
Mar. 15, 17, 20-22, considered and passed Senate.

AMENDED COMPLAINT FOR EQUITABLE AND INJUNCTIVE RELIEF AND FOR RELIEF UNDER THE ALL WRITS ACT (FEBRUARY 29, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

EQUAL MEANS EQUAL, THE YELLOW ROSES, KATHERINE WEITBRECHT,

Plaintiffs,

v.

DAVID S. FERRIERO, in his official capacity as Archivist of the United States,

Defendant.

Civil Action No. 20-cv-10015

Equal Means Equal, The Yellow Roses, and Katherine Weitbrecht bring this action for equitable and injunctive relief and relief under the All Writs Act.

INTRODUCTION

1. This action concerns the recent ratification of the Equal Rights Amendment ("ERA") and raises novel questions of public importance. Review by this Court will offer significant pragmatic benefits and provide needed guidance to the litigants, as well as to

government officials responsible for complying with the ERA.

2. Thirty-eight states (three-fourths) are needed to ratify a constitutional amendment. Nevada and Illinois became the 36th and 37th States to ratify the ERA in 2017 and 2018, respectively. Virginia became the 38th State to ratify the ERA on January 27, 2020.

3. On December 16, 2019, Attorneys General from Alabama, Louisiana and South Dakota ("Alabama Plaintiffs") preemptively filed suit in Alabama federal court suit against the United States Archivist, seeking to block ratification of the ERA when Virginia ratified. *Alabama et al. v. Ferriero*, N.D. Alabama, No. 7:2019-cv-02032. The Alabama Plaintiffs seek declaratory and injunctive remedies, including preliminary and permanent injunctions, directing the Archivist not to record Virginia's ratification, and to remove the already-recorded ratifications of Nebraska, Idaho, Tennessee, Kentucky, and South Dakota.

4. On December 19, 2019, just days after the Alabama lawsuit was filed, Defendant Archivist (National Archives and Records Administration) issued a statement declaring that it "does not intend to take any action regarding the ERA until, at a minimum, it receives the guidance it previously requested [from the Justice Department's Office of Legal Counsel] and in no event before February 15, 2020." *U.S. National Archives and Records Administration, Press Release*, December 19, 2019.

5. On January 8, 2020, the day after this action was filed, the Department of Justice Office of Legal Counsel released to the public a formal legal opinion (slip opinion) dated January 6, 2020, stating, *inter alia,*

" . . . even if one or more state legislatures were to ratify . . . " the Equal Rights Amendment, " . . . it would not become part of the Constitution, and the Archivist could not certify its adoption under 1 U.S.C. § 106b." *Ratification of the Equal Rights Amendment, Memorandum Opinion for the General Counsel National Archives and records Administration*, https://www.justice.gov/olc/file/1235176/download.

6. On January 8, 2020, citing the Office of Legal Counsel's opinion, the Defendant Archivist of the United States released an official statement declaring he would not certify adoption of the Equal Rights Amendment, and citing, *inter alia*, this litigation, would " . . . abide by the OLC opinion, unless otherwise directed by a final court order." *NARA Press Statement on the Equal Rights Amendment*, https://www.archives.gov/press/press-releases-4

7. By its terms, the ERA becomes enforceable two years after ratification. This two-year period is designed to give state and federal officials time to examine and repair laws, regulations, and policies, to remove all sex discriminatory features. Plaintiffs have an interest in ensuring that state officials begin taking these steps now that Virginia has ratified.

8. Plaintiffs filed this action to ensure the proper recording of Virginia's ratification, and the ERA's ratification. Plaintiffs also seek to prevent the Archivist from improperly removing prior ratifications by any state. Plaintiffs, therefore, seek by this complaint all appropriate writs, injunctions, judgments and orders to ensure the ERA is recorded as the duly ratified 28th Amendment to the U.S. Constitution.

PARTIES

9. Defendant, David S. Ferriero, is the Archivist of the United States. The Archivist directs and supervises the National Archives and Records Administration and is responsible for administering the process of recording states' ratifications of constitutional amendments, and for recording the amendments. *See* 1. U.S.C. § 106b. The Archivist is sued in his official capacity.

10. Plaintiff Equal Means Equal is a national 501(c)(4) organization whose sole purpose is to advocate for women's equality and ratification of the ERA and equal rights for women and girls.

11. Plaintiff The Yellow Roses is an organization of Massachusetts high school students, founded in 2016 for the sole purpose of advocating for ratification of the ERA.

12. Plaintiff Katherine Weitbrecht is a female resident of Plymouth County Massachusetts.

JURISDICTION

13. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1361 and 28 U.S.C. § 1651, because this case seeks equitable relief, a Writ of Mandamus, and relief under the All Writs Act, and arises under the Constitution and laws of the United States.

14. Venue is proper under 28 U.S.C. § 1391(e) because Defendant is an officer of the United States sued in his official capacity, this case does not involve real property, and Plaintiff The Yellow Roses and Plaintiff Katherine Weitbrecht reside in Massachusetts.

FACTS

15. In 1972, Congress proposed the Equal Rights Amendment as an amendment to the United States Constitution, and sent it to the states for ratification. The ERA states, "[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." As the same time, however, Congress enacted a separate provision as a preamble to the ERA, purporting to give the States only seven years to ratify (by March 22, 1979). This separate deadline, as a preamble provision and not part of the ERA itself, thus was not subject to approval by the States. Indeed, only some of the states that voted to ratify mentioned the deadline.

16. The extra-textual deadline is unconstitutional as it imposes unlawful constraints on the States to elect a schedule of their choosing on which to consider and ratify-or decline to ratify-a proposed constitutional amendment.

17. The first sixteen amendments to the U.S. Constitution had no ratification deadlines. The first time Congress imposed a deadline was relatively recently, with the Eighteenth Amendment (prohibition) in 1917. Notably, the deadline for ratification of the Eighteenth Amendment was not extra-textual; it was included in the text of the proposed amendment itself.

18. In 1978, as the extra-textual deadline approached, Congress passed a joint resolution by simple majority of both houses, extending the ERA's extra-textual deadline to June 30, 1982. Like the extra-textual deadline, the extension bill was enacted separately from the ERA itself and was not sent to the states for approval. That the extra-textual deadline was

extended by routine statutory process without congressional action on the ERA itself, and was passed by a simple majority in both houses rather than the two-thirds required for amendments, illustrates not only its extra-textual nature, but also that Congress perceived the deadline to be untethered to the ERA. When the extra-textual deadline expired in 1979, 35 states, including Massachusetts, had ratified the ERA. No additional states ratified between 1979 and 1982.

19. When the ERA extension bill deadline expired in 1982, women's rights groups continued to work toward ratification, especially after 1992, when the 27th Amendment ("Madison Amendment") was ratified 203 years after it passed Congress. Proponents of the ERA were incredulous that a congressional pay-raise amendment was ratified centuries after Congress dispatched it to the States, while a proposed constitutional amendment granting equality of citizenship to women was given only ten years. The ERA's proponents were also aware that the Madison Amendment was ratified and approved by Congress despite the fact that the United States Supreme Court had ruled, in *Dillon v. Gloss*, 256 U.S. 368, 376 (1921), that the Madison Amendment was already too old in 1921 to ratify.

20. Despite expiration of the extra-textual deadline and its subsequent extension, women's rights groups and others have worked continuously to ratify the ERA, succeeding in Nevada in 2017, and Illinois in 2018. The Archivist recorded both ratifications.

21. Now that Virginia has become the thirty-eighth state to ratify, the ERA is a valid amendment to the Constitution despite the extra-textual deadline because the deadline is a constitutional nullity.

22. Article V of the U.S. Constitution, which sets out the process for ratification, nowhere grants Congress the power to restrict States' rights concerning ratification by enacting a separate provision to limit the time period within which the States must ratify. Article V only gives Congress authority to "propose amendments" and to "propose" whether they may be ratified "by state legislature or constitutional convention . . . " These allocations of proposal power in Article V neither require nor permit-nor warrant-a grant of implied power to Congress to use an extra-textual statute to impose a deadline on ratification.

23. The Tenth Amendment limits the power of the federal government to constrain legislatively the States' power to ratify proposed amendments: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people."

24. If Congress may impose deadlines on ratification of amendments, it must do so in a constitutional manner, by placing the deadline within the text of a proposed amendment itself, as happened with the 20th, 21st, and 22nd Amendments. This at least allows the States to decide for themselves, as a matter of process and substance, whether they want to ratify an amendment on a proposed schedule. Congress may not, as occurred with the ERA, enact a provision separately from the ERA itself that substantively-and, therefore, unconstitutionally-constrained the States' ratification powers and subverted the plain language of Article V by limiting the States' sovereign rights. It would be equally inappropriate for the States to impose a deadline on the Congress in circumstances where the States initiated an amendatory process through

Convention. The extra-textual deadline, therefore, offends the constitutional allocation of equal amendatory power between the federal and state governments established by the Framers in Article V, and required by the Tenth Amendment.

25. After a state has ratified a proposed amendment, nothing in Article V or United States Supreme Court precedent permits it to rescind its ratification. Indeed, the Fourteenth Amendment was successfully ratified despite rescissions by two states, at a time when, had those rescissions counted, the Fourteenth Amendment could not have been added to the Constitution. The text of the Constitution allows nullification of amendments only by subsequent repealing of amendments, as was the fate of the Eighteenth Amendment. Further, nothing in Article V allows some states to nullify the value of other states' ratifications, which is inevitable if states are permitted to rescind.

26. The only court to pass on the issue of whether states may rescind was a single District Court judge in Idaho. *Idaho v. Freeman,* 529 F. Supp. 1107, 1128 (D. Idaho 1981). The District Court ruled that states may rescind their ERA ratifications, but the ruling was appealed to the 9th Circuit, and a certiorari petition was filed with the United States Supreme Court. The Supreme Court granted pre-judgment certiorari and stayed the judgment of the District Court. When the 1982 ERA deadline extension expired, the case was dismissed as moot. *N.O.W. v. Idaho*, 459 U.S. 809 (1982). Thus, there is no case law from any federal court addressing whether a state may rescind its ratification of an amendment and recent attempts by several states to rescind their ratifications are without legal support.

27. Whether an amendment becomes part of the Constitution is determined solely by the state-ratification process: an amendment " . . . 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 . . . " Nothing more is needed than the vote of three-fourths of the states, by legislature or by convention. Once that happens, the amendment becomes law and the Archivist of the United States performs the purely ministerial task of recording the last state's ratification decision, followed by a recording of the ratified amendment itself. *Dillon* at 376 (The Eighteenth Amendment "was consummated January 16, 1919. That the Secretary of State [now the Archivist] did not proclaim its ratification until January 29, 1919, is not material, for the date of its consummation, and not that on which it is proclaimed, controls.)

28. The Archivist has properly recorded ratification documents from thirty-seven states, including recent post-deadline ratifications by Nevada (2017) and Illinois (2018). The Archivist has no obligation, duty or authority to record unlawful attempts to rescind ratifications, or to decline to record Virginia's ratification or ratification by any additional state. Nor may the Archivist decline to record an amendment once the requisite three-fourths of the States have ratified.

29. The Archivist acted legally in recording ratifications of thirty-seven states. His actions respect the Constitution, the plain language of Article V, and the Tenth Amendment.

30. Notwithstanding the Archivist's compliance with the law thus far, the Alabama Plaintiffs allege that

the Archivist acted illegally by recording the ratifications of Nevada and Illinois, and by not recording attempted rescissions of prior ratifications by five states.

31. Plaintiffs here, like the Alabama Plaintiffs, seek to ensure that the Archivist performs his duties. But unlike the Alabama Plaintiffs, Plaintiffs seek to ensure that the Archivist performs his duties lawfully, so that the Constitution formally recognizes women's equality of citizenship for the first time in history.

32. Article V clearly gives Congress and the States separate, co-*equal* and distinct roles in the amendatory process. *See* The Federalist No. 43 (Hamilton) (explaining that Article V "equally enables the general and the States governments"). This balance was by design, as it makes the amendment process "neither wholly national nor wholly federal." The Federalist No. 39 (Madison). Article V accomplishes this balance by giving Congress and the States "carefully balanced and approximately equally distributed" powers. *Idaho v. Freeman,* 529 F. Supp. at 1128.

33. Although Article V states that Congress has the power to control the "mode of ratification," *see United States v. Sprague*, 282 U.S. 716, 732 (1931), this refers solely to the choice between ratification by convention or by state legislatures.

34. The United States Supreme Court has said that Congress may set "reasonable" time limits on ratification, *Dillon v. Gloss,* 256 U.S. 368, 376 (1921). However, the Amendment at issue in that case-the Eighteenth-expressly included a deadline within the text of the amendment itself. (*See* Section 3 of the

Eighteenth Amendment: "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.") Thus, *Dillon* is authority for at, at most, the proposition that an amendment may include a deadline-or anything else-in its text.

35. Further, it is arguable that *Dillon* is no longer good law as the underlying basis for *Dillon* no longer applies. The United States is a much more complex nation today than it was when *Dillon* was decided in 1921. In *Dillon*, the Court was primarily concerned with ensuring national consensus for proposed amendments. It ruled that substantial contemporaneity between the date when Congress proposes an amendment, and the date when the last of three-fourths of the States ratifies would demonstrate consensus. Contemporanaeity, however, is no longer necessary to show consensus. Indeed, recent rigorous survey research demonstrates overwhelming national support for the ERA. *CISION*, PR Newswire.com, *Americans–by 94%-Overwhelmingly Support the Equal Rights Amendment,* June 17, 2016. Indeed, imposing a short ratification deadline can undermine consensus, as occurred with Prohibition. The seven-year deadline put artificial pressure on the states to ratify quickly, without giving sufficient attention to the consequences of ratification, a reality that quickly became clear when prohibition was repealed soon after it became law.

36. *Dillon's* viability is questionable not only because its underlying premise about demonstrating consensus through contemporaneity is anachronistic,

but also because it was effectively voided when Congress disregarded the decision by validating the Madison Amendment in 1992 after it languished with insufficient numbers of ratifying states since its original proposal in 1789. Congressional approval of the Madison Amendment's ratification in 1992 ignored the *Dillon* court's admonition that the Amendment was already too old, in 1921, to ratify. *Dillon* at 375 ("proposal and ratification . . . are not to be widely separated in time.")

37. The States have exclusive authority over the ratification process, an authority that cannot be mitigated by ratification deadlines enacted by Congress outside the scope of its power to propose amendments. Congress exceeded its Article V authority by enacting an extra-textual deadline, thus denying the States their right to exercise exclusive control over the ratification process. *Dyer v. Blair*, 390 F. Supp. 1291, 1307 (N.D. Ill. 1975) (Stevens, J.) ("[Article V's] failure to prescribe any particular ratification procedure, or required vote to effectuate a ratification, is certainly consistent with the basic understanding the state legislature should have the power and the discretion to determine for themselves how they should discharge the responsibilities committed to them by the federal government.")

38. Since Congress began imposing deadlines in the early 1900s, it has done so inconsistently, adding deadlines for some amendments, but not all. For example, a deadline was imposed on the Eighteenth but not the Nineteenth Amendment. And even when imposing deadlines, Congress has done so capriciously by placing some deadlines in the text of proposed amendments (Eighteenth, Twentieth, Twenty-First,

and Twenty-Second) and in separate provisions for others (Twenty-Third, Twenty-Fourth, Twenty-Fifth and Twenty-Sixth Amendments). The constitutionality of extra-textual statutory deadlines has never been addressed by any court, but it should be obvious that amending the Constitution is not run-of-the-mill lawmaking. The process should be consistent, predictable, and strictly obedient to the Constitution.

39. Congress' inconsistent handling of ratification deadlines and disregard for *Dillon* support Plaintiffs' request that this Court declare the extra-textual ERA deadline a constitutional nullity.

40. This Court should also prohibit the Archivist from recording any state's attempt to rescind a prior ratification of the ERA.

41. After Virginia ratified, the Archivist refused to record Virginia's ratification. In turn, the Archivist violated his duty to "cause the [ERA] 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." 1 U.S.C. § 106b.

42. The Archivist's duties are narrow in scope and purely ministerial in function because the date when an amendment becomes law is the date when the last state ratifies. *Dillon* at 376. The Alabama Plaintiffs seek to disrupt a constitutionally valid process by obtaining a court order nullifying existing ratifications of the ERA, and forbidding the Archivist to recognize the ERA itself as duly ratified. Plaintiffs here seek a remedy from this Court to ensure that the Archivist is not unlawfully prohibited from performing

his ministerial duties, and recording the ERA as duly ratified.

43. The ERA is critically important to American Democracy; it guarantees women full equality of citizenship. Presently, women enjoy less than full citizenship. For example, the United States Supreme Court has held that the Fourteenth Amendment's Equal Protection Clause prohibits sex discrimination less effectively than it prohibits other forms of discrimination because the applicable legal standard denies women the strictest level of legal scrutiny, thus permitting more sex discrimination than is legally tolerated against other social classes. *See*, *e.g., United States v. Virginia,* 518 U.S. 515, 532 (1996).

44. The issues presented here are justiciable, non-political questions. "[G]ving plenary power to Congress to control the amendment process runs completely counter to the intentions of the founding fathers." *Freeman*, 529 F. Supp. at 1126. Because Article V "split[s]" the amending power "between Congress and the states," "it is evident . . . that the framers did not intend either of those two parties to be the final arbiter of the process"; rather, "the courts, as a neutral third party . . . [would] decide . . . questions raised under article V." *Id.* at 1134. Courts are "not . . . free" to dismiss challenges to the ratification process as political questions, as then-Judge Stevens explained, because "the [Supreme] Court has on several occasions decided questions arising under article V, even in the face of 'political questions' contentions." *Dyer,* 390 F. Supp. at 1300; *accord Freeman*, 529 F. Supp. at 1122-23 (collecting cases).

45. Plaintiffs have standing to seek a remedy because government officials are refusing to identify

and repair sex discriminatory provisions in laws, regulations and policies based on the Archivist's refusal to recognize the ERA as a duly ratified amendment, thus exposing them to an unnecessary risk of harm, and denying them their legal interest in having government officials begin said repair work. *See Buckley v. Valeo,* 424 U.S. 1, 117 (1976) (per curiam) ("Party litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights"). *See also, N.O.W. v. Idaho*, *supra* (National Organization for Women granted standing as intervenor-Defendant to address constitutionality of ERA rescissions and deadline extension).

46. Plaintiff Katherine Weitbrecht, The Yellow Roses, and all women in Massachusetts are experiencing an increased risk of harm because of the Defendants' actions and inactions because women as a class are currently excluded from protection under the state's hate-crime statute, Mass.G.L.c.265, § 39, which means they are being denied equal protection from sex/gender-based hate-crimes and associated deterrence of gender-based hate-crimes ensuing from their enforcement. The Massachusetts hate crime statute is facially discriminatory, thus causing injury to all Plaintiffs because unequal treatment is a cognizable legal injury. The Massachusetts hate crime statute should be repaired so that it is no longer discriminatory based on sex, but lawmakers and other government officials will not take steps to fix the hate crime statute so long as the Archivist refuses to record the ERA as a valid constitutional amendment.

47. Relief from this Court will protect Plaintiffs and all women, as well as the States, from suffering

irreparable injury. *See Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.")

48. Precluding the enforcement of the Constitution, like "the threat of enforcement of [an unconstitutional law,] is an Article III injury in fact." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 16 (2014).

49. Plaintiffs seek to vindicate their rights, and the rights of the States to exercise fully their co-equal constitutional role in the amendatory process, on par with the national government, by respecting the plain language of Article V, and the Tenth Amendment.

50. Thus, Plaintiffs ask this Court to issue any and all appropriate writs, orders, and judgments to ensure proper recording of the ERA as the duly enacted twenty-eighth Amendment to the U.S. Constitution.

FACTS REGARDING THE CLASS OF PEOPLE AFFECTED

51. Violence against women is the product of women's inequality and is reinforced by discriminatory laws and exclusionary social norms.[1]

52. Nearly 1 in 2 women experiences some form of sexual violence in their lifetime, 37% between the

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[1] U.N. General Assembly, 2006, *In-Depth Study on All Forms of Violence against Women: Report of the Secretary General*. A/61/122/Add.1; United Nations, New York, http://www.un.org/womenwatch/daw/vaw/v-sg-study.htm, February 2010; D. Rhode, Speaking of Sex, 1997, the Denial of Gender Inequality.

ages of 18-24.[2] Females are 5 to 8 times more likely than men to be victimized by an intimate partner and they suffer disproportionately high rates of domestic and dating violence,[3] sexual assault,[4] and stalking.[5] Only a small percentage of victims report sexual assaults to government officials because, inter alia, they expect the government not to provide effective

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[2] *Rape Prevention and Education Program*, Centers for Disease Control and Prevention, 2013. http://www.cdc.gov/violenceprevention/rpe/>.

[3] U.S. DEPARTMENT OF JUSTICE, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, (March 1998) (violence by an intimate partner accounts for about 21% of violent crime experienced by women and about 2% of the violence experienced by men.) 92% of all domestic violence incidents are committed by men against women; accord, U.S. DEPARTMENT OF JUSTICE, *Violence Against Women, Bureau of Justice Statistics*, January, 1994; and Koss, M.P. (1988), *Hidden Rape: Incidence, Prevalence and Descriptive Characteristics of Sexual Aggression and Victimization in a National Sample of College Students*. In Burgess, A.W. (ed.) Sexual Assault. Vol. II. New York: Garland Pub. (84% of raped women know their assailants and 57% of rapes occur on a date.)

[4] U.S. DEPARTMENT OF JUSTICE, *2003 National Crime Victimization Survey* (nine out of ten rape victims are female); Koss, M.P., id, (women aged 16-24 are four times more likely to be raped than any other population group.)

[5] 8% of women and 2% of men in the United States have been stalked at some time in their life. 78% of stalking victims identified in a survey were women, and 22 percent were men. Thus, four out of five stalking victims are women. By comparison, 94 percent of the stalkers identified by female victims and 60 percent of the stalkers identified by male victims were male. Overall, 87 percent of the stalkers identified by the victims were male. NATIONAL INSTITUTE OF JUSTICE *Stalking in America: Findings from the National Violence Against Women Survey*, 1998.

redress, and they fear the legal system will cause additional harm.[6]

53. 9% of all rapists are prosecuted, 5% lead to conviction, and less than 3% spend even one day behind bars.[7]

54. Offenders' sense of entitlement, caused in part by women's constitutional inequality, fosters rape-supportive attitudes and behaviors, which is correlated with sexual aggression.[8]

55. One in three to one in four women is victimized by sexual assault during college.[9] Given that approximately 916,000 women graduated from post-secondary schools in 2009,[10] this means over 200,000 women

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[6] D. Kilpatrick et al., Drug-facilitated, incapacitated, and Forcible Rape: A National Study, 2007; U.S. Bureau of justice Statistics, M. Planty and L. Langton, Female Victims of Sexual Violence, 1994-2010," 2010.

[7] Probability Statistics Calculated by the Rape, Abuse and Incest National Network, "Reporting Rats," 2013.

[8] L. Bouffard, Exploring the Utility of Entitlement in Understanding Sexual Aggression, 38 Journal of Criminal Justice, pp.870-879 (2010).

[9] https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf, pp. xii-xiii and 2-1 (2007); U.S. Department of Justice Office of Community Oriented Policing Services, Acquaintance Rape of College Students, March 28, 2002, http://www.cops.usdoj.gov/pdf/e03021472.pdf; https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf; Freyd, J. Rosenthal, M. & Smith, C., Preliminary Results from the University of Oregon Sexual Violence and Institutional Behavior Campus Survey, 2014, http://dynamic.uoregon.edu/jjf/campus/UO-campus- results-30Sept14.pdf.

[10] http://www.census.gov/prod/2012pubs/p20-566.pdf.

are victimized by sexual assault during college. Some studies find as few as 5% of college victims file reports.[11]

56. Female students in the United States endure pervasive unequal treatment, harassment and violence, on the basis of sex, throughout all levels of education.[12] Women also suffer disproportionately high rates of

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[11] B. Fischer, et al., *Sexual Victimization of College Women*, National Institute of Justice, (2000), http://www.nij.gov/publications/pages/publication-detail.aspx?ncjnumber=182369 (5%).

[12] Sadker, & Zittleman, *Still Failing at Fairness, How Gender Bias Cheats Girls and Boys in School and What We Can Do About It*, Scribner Press 2009; www.hks.harvard.edu/centers/carr/research-publications/carr-center-working-papers-series/caplan-and-ford-%22the-voices-of-diversity-%22.

domestic and dating violence,[13] sexual assault[14] and stalking.[15]

57. Because women do not enjoy full constitutional equality, they suffer disproportionately higher rates of violence, and offenders of violence against women are less likely to be held responsible compared to offenders of other types of violence.

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[13] Women are less likely than men to be victims of violent crimes overall, but women are 5 to 8 times more likely than men to be victimized by an intimate partner. *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, U.S. Department of Justice, March, 1998; violence by an intimate partner accounts for about 21% of violent crime experienced by women and about 2% of the violence experienced by men. *Id.* 92% of all domestic violence incidents are committed by men against women. *Violence Against Women, Bureau of Justice Statistics*, U.S. Department of Justice, January, 1994; 84% of raped women know their assailants and 57% of rapes occur on a date. Koss, M.P. (1988). *Hidden Rape: Incidence, Prevalence and descriptive Characteristics of Sexual Aggression and Victimization in a National Sample of College Students*. In Burgess, A.W. (ed.) Sexual Assault. Vol. II. New York: Garland Pub.

[14] Nine out of ten rape victims are female, U.S. Department of Justice, *2003 National Crime Victimization Survey. 2003*; Women aged 16-24 are four times more likely to be raped than any other population group. Koss, M.P., *id.*

[15] 8% of women and 2% of men in the United States have been stalked at some time in their life. 78% of stalking victims identified in a survey were women, and 22 percent were men. Thus, four out of five stalking victims are women. By comparison, 94 percent of the stalkers identified by female victims and 60 percent of the stalkers identified by male victims were male. Overall, 87 percent of the stalkers identified by the victims were male. National Institute of Justice 1998. *Stalking in America: Findings from the National Violence Against Women Survey*).

58. The relief sought here is, therefore, necessary to protect the rights of the Plaintiffs and similarly situated others.

PLAINTIFF EQUAL MEANS EQUAL

59. Equal Means Equal (EME) is a national 501(c)(4) non-profit organization whose sole mission and purpose is to eradicate sex/gender inequality and advocate for sex/gender equality and fully equal rights for women and men.

60. In 2016, EME released an award-winning film entitled *Equal Means Equal*. This documentary film, a decade in the making, examined the status of American women in over two dozen areas where women experienced sex discrimination, and analyzed whether ratification of the ERA would mitigate this overall pattern of discrimination in American society.

61. Along with producing the film, EME has been instrumental in raising awareness about the ERA and helping to pass ERA ratification bills in Nevada, Illinois, and Virginia. EME's executive director, Kamala Lopez, testified in front of the Illinois legislature in support of the ERA. EME has engaged in direct political action and educational campaigns in many states, related to ratification of the ERA, including Virginia, Arizona, North Carolina, South Carolina, Missouri, Nevada, Illinois, Utah, Georgia, Louisiana, Florida, and Oklahoma. EME engages with its member/supporters who donate funds and volunteer their services, which enable EME to carry out its mission.

62. Since Virginia became the thirty-eighth state to ratify the ERA in January 2020, EME has been

frustrated in its mission because of the Archivist's refusal to recognize Virginia's ratification, and record the ERA as the validly enacted twenty-eighth Amendment to the United States Constitution. EME has been advocating for state and federal officials to begin the process of examining their laws and regulations, and to take steps to repair all sex discriminatory provisions, but officials have declined, citing the Archivist's refusal to recognize the ERA as ratified. This has frustrated EME's mission because it is unable to advocate at all for the repair work that should already be underway, and would already be underway, if the Archivist had not stated his refusal to recognize the ERA as a valid amendment to the United States Constitution.

63. Because the Archivist has refused to recognize the ERA as ratified, victims of sex discrimination represented by EME have been unable to assert their rights under the ERA with regard to insisting that government officials begin the task of examining and repairing sex discriminatory provisions. EME has personally witnessed reluctance on the part of women, attorneys, and other advocates to demand that such repair work begin because of the Archivist's refusal to record the ERA as a validly enacted amendment to the United States Constitution. In turn, EME has had to divert resources to educate and inform its member/supporters and the general public about why the ERA is duly ratified despite the Archivist's opinion to the contrary, why the Archivist's view is incorrect as a matter of law, and why government officials should already be taking steps to repair sex discriminatory laws, regulations, and policies. EME has also had to divert significant time and resources to advocating for

government officials to accept that the ERA is a validly enacted amendment, and that they are legally obligated to begin the process of identifying and repairing sex discriminatory laws, regulations and policies. This diversion of resources has reduced the amount of resources available to EME that they would otherwise be using to assist in said repair work in anticipation of the ERA taking effect in January 2022.

64. EME's involvement in this litigation is intended to represent EME's own interersts, as well as the interests of its members/supporters, and women everywhere who have suffered and are at increased risk of suffering harm because they are female and do not enjoy equal protection of law. Because the ERA is a validly enacted amendment to the United States Constitution, EME and all women have a protectable legal interest in having all government officials, state and federal, immediately begin the process of repairing all sex discriminatory laws, regulations and policies, before the ERA becomes enforceable in January 2022. EME as an organization, and all women, also have a protectable legal interest in ensuring that sex discriminatory laws, regulations and policies are repaired as quickly as possible because if government officials do nothing until January 2022 out of deference to the Archivist's unlawful refusal to record the ERA as duly ratified, then women, EME and other advocacy groups will be forced to expend significant resources filing lawsuits against government officials to repair such laws, regulations and policies simply because government officials did nothing to repair them during the two-year repair period provided in the ERA itself.

65. EME has over twenty-thousand active supporters including members of the entertainment and

media community. The organization is well known as a leader in the modern strategy for ratification of the ERA and has worked in collaboration with major labor unions such as the Teamsters, Screen Actors Guild, American Federation of Radio and Television Artists, the United Nations (UN Women), the National Women's Political Caucus, the YWCA, the AAUW, the ACLU, the League of Women Voters, Yale Women, the National Association of Women's Commissions, Veteran Feminists of America, Women Matter, the National Black Women's Caucus, Black Voters Matter, Common Cause, Indivisible, Women Occupy Hollywood, NOW Hollywood, Hispanics Organized for Political Equality (HOPE), the Latino Legislative Caucus of the State of California, among others. Since 2009, the ERA Education Project and EME have actively engaged in advocacy and educational services, including working directly with government officials to address discriminatory laws, regulations, and policies related to women's equality and the ERA. They have received many commendations for their work in the service of advancing women's equality and ensuring ratification of the ERA.

PLAINTIFF THE YELLOW ROSES

66. Plaintiff The Yellow Roses is a volunteer student organization, founded in Quincy, Massachusetts in 2016 by a group of middle school girls who were surprised to learn in school that women were not yet equal citizens under the U.S. Constitution. The organization's sole mission is to advocate for and raise public awareness about ratification of the ERA.

67. The Yellow Roses has engaged in numerous activities, including circulating a Petition for the ratification of the ERA; interviewing and being interviewed by local and national publications; meeting with state and federal officials to advocate for the equal treatment of women and ratification of the ERA; collaborating with activists such as Gloria Steinem, and making public appearances to advocate for and teach young people to be activists in their communities.

68. The Yellow Roses have been subjected to a needless increased risk of violence because they are female, and government officials are not currently undertaking any steps to identify and repair sex discriminatory laws, regulations and policies. They have a protectable legal interest in ensuring that government officials regard the ERA as a validly enacted amendment to the United States Constitution, and begin the process of examining and repairing sex discriminatory laws, regulations and policies, including the Massachusetts hate crime statute, which currently excludes females from its protection.

69. The mission of the Yellow Roses is impaired by the refusal of government officials to begin the process of examining and repairing sex discriminatory laws, regulations, and policies because they cannot effectively advocate on behalf of the ERA so long as the ERA is perceived by government officials as not validly enacted based on the Archivist's refusal to record it.

THE INDIVIDUAL PLAINTIFF

70. Plaintiff Katherine Weitbrecht is a resident of and a college sophomore in Norfolk County, Massachusetts.

71. Ms. Weitbrecht personally suffered a violent act because she is female when she was strangled in Massachusetts by a man who mocked her for wearing a rape whistle on campus late at night. The man had a history of making discriminatory and derogatory comments about females.

72. Ms. Weitbrecht reported the strangulation incident to law enforcement, but no hate crime charges could be filed because, as a female, she is not protected under the Massachusetts hate crime statute, Mass. G.L.c.265, § 39. Had she suffered the exact same crime based on a different protected class category, such as ethnicity or religion, a hate crime charge could have been filed.

73. Although Ms. Weitbrecht was strangled, the offender was charged only with a single misdemeanor count of assault and battery. The offender's case was continued without a finding; he suffered no serious consequences.

74. Because of her experience, Ms. Weitbrecht is now reluctant to report any sex-based criminal activity she may endure. As a college student, Ms. Weitbrecht faces a disproportionately high risk of harm because she is female. Ms. Weitbrecht fears that reporting crimes committed against her because she is female will lead to inadequate charges and unjust treatment by law enforcement and the legal system.

75. Ms. Weitbrecht's rights and well-being are threatened and violated by her lack of full Constitutional equality because she is not equally protected by the United States Constitution, or Massachusetts law.

76. When the ERA becomes law, Massachusetts officials will be required to repair the hate crime

statute to ensure the equal protection of Ms. Weitbrecht and all females.

77. Ms. Weitbrecht has been subjected to a needless increased risk of violence because she is female, and not currently equally protected by law. She has a protectable legal interest in ensuring that government officials regard the ERA as a validly enacted amendment to the United States Constitution, and begin the process of examining and repairing sex discriminatory laws, regulations and policies, including the Massachusetts hate crime statute, which currently excludes females from its protection.

COUNT I
(ARTICLE V OF THE U.S. CONSTITUTION)

78. Plaintiffs repeat and reallege each of the prior allegations in this complaint.

79. Congress cannot limit the amount of time that States have to ratify a constitutional amendment because Article V of the United States Constitution nowhere grants Congress the power to impose deadlines. Under Article V, an amendment becomes valid when three-fourths of the states ratify it.

80. When Congress proposed the ERA in 1972, it imposed a seven-year ratification deadline on the states by enacting a separate deadline provision. In 1978, Congress enacted another statute, extending the deadline to 1982. As Congress had no authority to impose an extra-textual ratification deadline on the states, the ERA ratification deadline is null and void and without any legal effect.

81. If Congress has authority to impose ratification deadlines on the States, it must do so in a constitutional

manner. By enacting the ERA deadline as an extra-textual provision, separate from the text of the ERA itself, Congress violated Article V and the ERA deadline is null and void and without any legal effect.

82. The Archivist has recorded thirty-seven states' ratifications, including from Nevada in 2017 and Illinois in 2018, which occurred after the expiration of the ERA deadline. The Archivist refused to record Virginia's ratification in 2020.

83. The Archivist's recordings of 37 ERA ratifications to date were legal and are consistent with the clear text of Article V. The Archivist's refusal to record Virginia's ratification, and refusal to record ratification of the ERA itself, is illegal and not consistent with the clear text of Article V.

COUNT II
(TENTH AMENDMENT TO THE U.S. CONSTITUTION)

84. Plaintiffs repeat and reallege each of the prior allegations in this complaint.

85. Congress cannot limit the amount of time that States have to ratify a constitutional amendment because the Tenth Amendment to the United States Constitution provides that all rights not specifically granted to the federal government are reserved to the States, and the United States Constitution nowhere grants to Congress the power to impose extra-textual statutory deadlines on the States. Under the Tenth Amendment, and in light of Article V which states that an amendment becomes valid when three-fourths of the states ratify, the States have authority to ratify, or not, unrestrained by the federal government.

86. When Congress proposed the ERA in 1972, it imposed a seven-year ratification deadline on the states by enacting a separate provision that was not part of the ERA itself. In 1978, Congress enacted another law, extending the deadline to 1982. The extra-textual ERA deadline encroached unconstitutionally on the States' Article V right to ratify. Thus, the ERA deadline is null and void and without any legal effect.

87. If Congress has authority to impose ratification deadlines on the States, it must do so in a constitutional manner. By enacting the ERA deadline as an extra-textual provision, separate from the text of the ERA itself, Congress violated Article V and the ERA deadline is null and void and without any legal effect.

88. The Archivist has recorded thirty-seven states' ratifications, including from Nevada in 2017 and Illinois in 2018. The Archivist refused to record Virginia's ratification in 2020, and refused to record the ERA itself as a duly ratified amendment to the U.S. Constitution.

89. The Archivist's recordings of 37 ERA ratifications thus far were legal and consistent with the clear text of Article V and the Tenth Amendment.

COUNT III
(ARTICLE V OF THE U.S. CONSTITUTION)

90. Plaintiffs repeat and reallege each of the prior allegations in this complaint.

91. A State cannot rescind its ratification of a constitutional amendment. Any attempt to do so is null and void.

92. Five States—Nebraska, Idaho, Tennessee, Kentucky, and South Dakota—have voted to rescind their prior ratifications of the ERA. These efforts have no legal effect and are null and void.

93. The Archivist correctly refused to record any rescissions of prior ratifications because That would not be consistent with the plain language of Article V, or Supreme Court precedent.

94. The Archivist's actions to date are constitutional and consistent with the clear text of Article V.

COUNT IV
(ALL WRITS ACT)

95. Plaintiffs repeat and reallege each of the prior allegations in this complaint.

96. The Archivist is mandated to perform the ministerial task of recording state ratifications of, and ratified amendments to, the U.S. Constitution.

97. The Archivist is mandated to record Virginia's ratification of the ERA.

98. The Archivist currently faces legal action in federal court in Alabama to prevent him from recording Virginia's ratification, require him to remove prior ratifications by other states, and prevent him from recording the ERA as a duly ratified amendment to the U.S. Constitution.

99. Plaintiffs have no plain, speedy, and adequate remedy at law, other than the remedies requested by this action.

100. Failure to record the ERA as a duly ratified amendment threatens to cause harm, and will continue to cause harm to Plaintiffs' rights, and the rights of

similarly situated others, and is unlawful, unreasonable and exceptional.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in favor of Plaintiffs and against Defendant and provide the following relief:

i. A declaratory judgment that the ERA is the duly ratified twenty-eighth Amendment to the U.S. Constitution;

ii. A declaratory judgment that the extra-textual ERA ratification deadline is a constitutional nullity;

iii. A declaratory judgment that Nebraska, Idaho, Tennessee, Kentucky, and South Dakota did not and may not validly rescind their prior ratifications of the ERA because such rescissions are not permitted under the Constitution;

iv. A writ requiring the Archivist to record all states' decisions to ratify the ERA, irrespective of the deadline;

v. A writ prohibiting the Archivist from removing previously recorded ratifications of the ERA;

vi. A writ requiring the Archivist to record Virginia's ratification of the ERA;

vii. A permanent injunction precluding the Archivist from removing previously recorded ratifications, or from recording rescissions from Nebraska, Idaho, Tennessee, Kentucky, and South Dakota;

viii. A preliminary injunction granting the above relief during the pendency of this action;

ix. Plaintiffs' reasonable costs and expenses of this action, including attorneys' fees; and

x. All other relief to which Plaintiffs might be entitled.

Respectfully submitted,

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Dated: February 29, 2020

PARTIALLY OPPOSED* MOTION TO INTERVENE AND SUPPORTING STATEMENT OF POINTS AND AUTHORITIES (FEBRUARY 19, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA, ILLINOIS, and NEVADA,

Plaintiffs,

v.

DAVID S. FERRIERO, in his official capacity as Archivist of the United States,

Defendant.

ALABAMA, LOUISIANA, NEBRASKA, SOUTH DAKOTA, and TENNESSEE,

[Proposed] Intervenor-Defendants.

Case No. 1:20-cv-242-RC

Plaintiffs, three States who claim they ratified the Equal Rights Amendment decades after the deadline

* Per LCvR 7(m), counsel for Movants, Plaintiffs, and the Archivist discussed this motion in good faith to determine everyone's position. Plaintiffs oppose intervention. The Archivist takes no position on intervention as of right and consents to permissive intervention.

expired, brought this suit to force the Archivist to add the ERA to the Constitution. Movants, two States who rejected the ERA and three States who timely rescinded their ratifications, seek to intervene in this suit for equal and opposite reasons. If Plaintiffs prevail and the ERA is added to the Constitution, then Movants will be forced to spend substantial resources defending their duly enacted laws from this new line of constitutional attack. Many of those laws, from prohibitions on the public funding of abortion to support for women-only prisons and shelters, risk invalidation. For the Movants who rescinded their ratifications, moreover, Plaintiffs' suit would force the Archivist to wrongly count them among the ratifying States and to illegally convert their rescinded ratification papers into live legal documents. Because Movants have weighty interests at stake and satisfy all the requirements for intervention, this Court should let them intervene as defendants.

BACKGROUND

I. The Rejection of the Original ERA

In 1972, Congress enacted a joint resolution proposing the ERA as the next amendment to the Constitution. H.J. Res. 208. The operative provision of the ERA would have stated that le] quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." *Id.* Like the proposing resolutions for the Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments, the proposing resolution for the ERA gave the States a deadline of "seven years" to ratify the amendment. *Id.*

When the seven-year deadline arrived in 1979, only 30 States had ratified the ERA: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Five States had ratified the ERA but rescinded their ratifications: Idaho, Kentucky, Nebraska, South Dakota, and Tennessee. *See, e.g.*, 126 Cong. Rec. 4,861-62 (Mar. 13, 1979) (reporting South Dakota's resolution "withdraw[ing] its ratification" of the ERA and rendering its earlier ratification "null and void" if the ERA was not ratified by the original 1979 deadline). And 15 States had rejected the ERA: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. The ERA fell short of the 38 States (three-fourths of 50) needed for ratification. *See* U.S. Const., Art. V.

Congress thus passed a measure purporting to "extend" the ratification deadline four more years. H.J. Res. 638 (1978). Unlike the original ERA and its seven-year deadline—which were enacted by a two-thirds vote of Congress, as required by Article V of the Constitution—the extension bill was passed by bare majorities. The only court to consider its legality held that the extension was unconstitutional. *See Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981).

The Supreme Court agreed to review that decision but, before it could, the extended deadline expired in 1982. No additional States had ratified the ERA

between the original deadline and the extended deadline. So the Supreme Court dismissed the case as moot. *See Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809, 809 (1982). Congress, the Executive Branch, the States, and the American public all understood that the ERA was dead. *See, e.g., Supreme Court Declares ERA Issues Legally Dead*, Post-Dispatch (Oct. 4, 1982). As Justice Ginsburg put it, the ERA cannot be ratified unless it's "put back in the political hopper" and its proponents "start[] over again, collecting the necessary number of States." *Justice Ginsburg to Address New Georgetown Law Students*, Georgetown Law (Sept. 12, 2019), bit.ly/3bbokcd (remarks begin at 1:03:35).

II. The Three-State Strategy

In recent years, activists have devised a plan to revive the expired ERA. Dubbed the "three state strategy," these activists argue that the ERA can become law if only three more States ratify it. Three more States, the logic goes, would bring the total number of ratifiers to 38 (ignoring the rescissions in Idaho, Kentucky, Nebraska, South Dakota, and Tennessee)—supposedly crossing the three-fourths threshold specified in Article V. Plaintiffs are all adherents to this plan: Nevada purported to ratify the ERA in 2017, Illinois followed suit in 2018, and Virginia became the third and final State in January 2020.

Plaintiffs' three-state strategy relies on at least three legal assumptions. All are demonstrably false.

First, Plaintiffs assume that the seven-year deadline Congress included in the ERA is unenforceable. *See* Compl. (Doc. 1) 13-14. But the Constitution gives Congress authority over the "mode of ratification,"

U.S. Const., Art. V, including the "period for ratification." *Dillon v. Gloss*, 256 U.S. 368, 376 (1921). When "the congressional resolution proposing" the Eighteenth Amendment declared that the amendment "should be inoperative unless ratified within seven years," the Supreme Court upheld this deadline, "entertain[ing] no doubt" about "the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification." *Id.* at 370, 375-76. While Plaintiffs note that the ERA's deadline was not included in the text of the proposed amendment itself, that was also true of the deadlines imposed on the Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments. Under Plaintiffs' logic, the Congresses that proposed those amendments all violated the Constitution (and no one said anything about it).

Second, even if Congress had not imposed a deadline in the ERA, Plaintiffs assume that the Constitution itself does not limit the time available for ratification. *See* Compl. 14-15. It does. The Supreme Court has drawn the "fair . . . implication from article V" that "the ratification" of a constitutional amendment "must be within some reasonable time after the proposal." *Dillon*, 256 U.S. at 375. Article V treats "proposal and ratification" not "as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time." *Id.* at 374-75. Only "sufficiently contemporaneous" ratification ensures that the grave seriousness of amending the Constitution "reflect[s] the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do." *Id.* at 375. While Plaintiffs note that

the Twenty-Seventh Amendment was ratified in 1992 (200 years after it was proposed), the legitimacy of that ratification is hotly contested, and an isolated episode from the 1990s says little about the original meaning of Article V. *See Printz v. United States*, 521 U.S. 898, 918 (1997).

Third, Plaintiffs assume that Idaho, Kentucky, Nebraska, South Dakota, and Tennessee did not validly rescind their ratifications; if they did, then Plaintiffs are still 5 States short of the 38 States they need for ratification. *See* Compl. 15-16. Yet the Constitution gives States the power to determine "when" they have "ratified" an amendment. U.S. Const., Art. V; *accord Freeman*, 529 F. Supp. at 1134; *Dyer v. Blair*, 390 F. Supp. 1291, 1307 (N.D. Ill. 1975) (Stevens, J.). If States cannot rescind their ratifications before the ratification period has expired, constitutional amendments could "be ratified by a technicality . . . and not because there is really a considered consensus supporting [them]." *Freeman*, 529 F. Supp. at 1149. As Justice Ginsburg recently explained, "a number of States have withdrawn their ratification [of the ERA]," so "if you count a latecomer [like Virginia] on the plus side, how can you disregard States that said, We've changed our mind'?" *Searching for Equality: The 19th Amendment and Beyond*, Georgetown Law (Feb. 10, 2020), bit.ly/2tUgeUw (remarks begin at 43:55).

III. Litigation Over the Three-State Strategy

Correctly anticipating that Virginia would soon complete the three-state strategy, three of the Movants (Alabama, Louisiana, and South Dakota) sued the Archivist last December. *See Alabama v. Ferriero*, No. 7:19-cv-02032-LSC (N.D. Ala.). Their complaint sought,

among other relief, a declaration that the ERA has expired, a declaration that the rescinding States have not ratified the ERA, and an injunction requiring the Archivist to return South Dakota's ratification documents.

Three weeks after Movants sued, the Justice Department's Office of Legal Counsel issued a formal opinion on the three-state strategy. *See Ratification of the Equal Rights Amendment*, O.L.C. Op.___ (Jan. 6, 2020), bit.ly/2UqCYWZ. OLC's opinion agrees with one, but not all, of the legal claims that Movants raised in their complaint. OLC agrees that the original ERA proposed in 1972 can never be ratified because the seven-year deadline has expired. *See id.* at 12-36. Yet OLC did not opine on whether the ERA has expired because, apart from the deadline imposed by Congress, the Constitution imposes its own deadline on ratification. *See id.* at 18 n.17. OLC's existing opinions reach the opposite conclusion. *See id.* (citing *Congressional Pay Amendment*, 16 Op. O.L.C. 85, 92-93 (1992)). OLC also did not opine on whether the rescissions by Idaho, Kentucky, Nebraska, South Dakota, and Tennessee are valid and enforceable. *See id.* at 36-37. Again, OLC's existing opinions reach the opposite conclusion. *See id.* at 37 (citing Memo. for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Asst. Att'y Gen., OLC, Re: *Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment* 28-49 (Oct. 31, 1977); *Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment*, 1 Op. O.L.C. 13, 15 (1977)).

Despite these continued disagreements, the Archivist now agrees with Movants that the original

ERA can never be ratified. Compl. 13; *see Press Statement on the Equal Rights Amendment*, NARA (Jan. 8, 2020), bit.ly/39ejGIi ("[The Archivist] defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order."). Thus, although Movants do not concede that their lawsuit against the Archivist is moot, it is now clear that the parties in that case are not adversarial on one important legal question surrounding the viability of the ERA. Movants expect their case against the Archivist to reach a mutually agreeable resolution soon.

Meanwhile, the parties in this case are adversarial on the legal questions surrounding the ERA. If Plaintiffs obtain their requested relief, this Court's judgment will cause Movants the exact same injuries that prompted them to sue the Archivist in the first place. And because the Justice Department's existing opinions reject two of Movants' defenses—*i.e.*, their claim that the Constitution itself imposes time limits on ratification and their claim that States can rescind prior ratifications—Movants have no reason to believe the Justice Department will advance these defenses or otherwise protect Movants' interests. Movants thus filed this motion to intervene.

ARGUMENT

I. Movants are Entitled to Intervene as of Right

This Court "must grant a timely motion to intervene that seeks to protect an interest that might be impaired by the action and that is not adequately represented by the parties." *Roane v. Leonhart*, 741

F.3d 147, 151 (D.C. Cir. 2014). Specifically, under Rule 24(a)(2), this Court grants intervention as of right if:

1. The motion is timely;
2. Movants have "a legally protected interest" in this action;
3. This action "threaten[s] to impair that interest"; and
4. No existing party is "an adequate representative of [Movants'] interests."

Karsner v. Lothian, 532 F.3d 876, 885 (D.C. Cir. 2008). Any movant "who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003).

"[T]he D.C. Circuit has taken a liberal approach to intervention." *Wilderness S oc. v. Babbitt*, 104 F. Supp. 2d 10, 18 (D.D.C. 2000); *see Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967) (emphasizing "the need for a liberal application [of Rule 24(a)] in favor of permitting intervention"). Under any standard, liberal or otherwise, Movants satisfy each requirement of Rule 24(a).

A. This Motion Is Timely

Movants filed a "timely motion" to intervene. Fed. R. Civ. P. 24(a). Movants filed this motion as quickly as they could—three weeks after the complaint was filed, before the Archivist even entered an appearance, and months before the Archivist's answer is due. *E.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (motion timely filed "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer"); *Connecticut v.*

DOI, 344 F. Supp. 3d 279, 304 (D.D.C. 2018) (Contreras, J.) (motion timely filed "within a month of when Plaintiffs filed the complaint, and before Federal Defendants entered an appearance"); *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3 (D.D.C. 2017) (Contreras, J.) (motion timely filed "approximately sixteen weeks after the initial complaint was filed"). Regardless how many days it's been, courts "'do not require timeliness for its own sake'" but only to prevent harm to the court or the parties. *100Reporters LLC v. DOJ*, 307 F.R.D. 269, 274-75 (D.D.C. 2014) (Contreras, J.). Since "no substantive progress has occurred in this action," Movants' intervention could not "unduly disrupt the litigation or pose an unfair detriment to the existing parties." *Id.* at 275. This motion is timely.

B. Movants Have a Protected Interest in This Action

Movants also have a "legally protected interest in [this] action." *Karsner*, 532 F.3d at 885 (citing Fed. R. Civ. P. 24(a)(2)). This "interest" test is a "liberal" one. *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 105 F.R.D. 106, 109-10 (D.D.C. 1985). It is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse*, 385 F.2d at 700. The test is satisfied here.

Movants' interests in this action are, at a minimum, equal to Plaintiffs'. If Plaintiffs have standing to ensure their "yes" votes are counted and the ERA is added to the Constitution, then Movants have standing to ensure their "no" votes are counted and the ERA is not added to the Constitution. Every "State has an interest in securing observance of the terms under

which it participates in the federal system." *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 607-08 (1982). Key among those terms are the "orderly" rules that Article V establishes for amending the Constitution. *Hawke v. Smith*, 253 U.S. 221, 226 (1920); *accord Freeman*, 529 F. Supp. at 1128 ("Within article V each of the participants are assigned certain powers which appear to be carefully balanced and approximately equally distributed."). "It is not the function of" Plaintiffs, the Archivist, or anyone else "to alter the method which [Article V of] the Constitution has fixed." *Hawke*, 253 U.S. at 227. Yet this suit asks the Court to do just that—*i.e.*, to allow Plaintiffs to alter our fundamental charter without securing the timely, supermajority consent that Article V requires. If Plaintiffs' suit is successful, Movants will suffer "a continuing injury." *Freeman*, 529 F. Supp. at 1123.

The Movants who rescinded their ratifications of the ERA (Nebraska, South Dakota, and Tennessee) have an additional interest at stake. The Archivist still has possession of their ratification documents; those documents were never returned after Movants' rescinded their initial ratifications. According to the Archivist, he maintains these documents solely for historical purposes. He claims that his official records do not list Idaho, Kentucky, Nebraska, South Dakota, or Tennessee as having validly ratified the ERA. *See, e.g., Equal Rights Amendment – Proposed March 22, 1972, List of State Ratification Actions*, Nat'l Archives, *available at*, bit.ly/31BdR5d (noting these States' "Purported Rescission[s]"). But if Plaintiffs prevail in this case, then the Archivist will be ordered to convert Movants' archival ratifications into live legal documents, to wrongfully treat those documents as votes

for ratification, and to falsely list Movants as having ratified the ERA. These injuries, which resemble common-law property and tort claims, independently support Movants' intervention. *See Freeman*, 529 F. Supp. at 1114 (granting intervention to state defendants who sought "a return of Washington's certificate of ratification"); *id.* at 1123 (finding a "conflict of the type proper for the courts to resolve" because "the defendant has refused to remove Idaho's name from the official lists of those who are considered as having ratified").

All Movants have still more interests at stake in this action—interests that are even stronger than Plaintiffs'. If the ERA stays out of the Constitution, Plaintiffs could always voluntarily comply with what they believe it dictates. But if the ERA is added to the Constitution, Movants cannot avoid the risk that their duly enacted laws will be challenged as unconstitutional. *See Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("[States] clearly ha[ve] a legitimate interest in the continued enforceability of [their] own statutes."); *Alaska v. DOT*, 868 F.2d 441, 443 (D.C. Cir. 1989) ("States have an interest, as sovereigns, in exercising 'the power to create and enforce a legal code.'"). For example:

- Movants have laws that prohibit the expenditure of public funds on abortion. *E.g.*, Ala. Admin. Code r. 560-X-6-.09; Ala. Medicaid-Provider Billing Manual §§ 5.8, 28.6.7 (Oct. 2019); La. Stat. Ann. §§ 22:1014, 40:1061.6; Neb. Rev. Stat. § 44-1615.01; 471 Neb. Admin. Code § 10-005.09; S.D. Codified Laws §§ 28-6-4.5, 58-17-147; Tenn. Code Ann. § 9-4-5116. Litigants will argue that these laws violate the ERA, as they successfully argued under several state ERAs.

E.g., *NM Right to Choose/ NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981).

- Movants maintain regulations that protect women's health, *e.g.*, Ala. Admin. Code r. 420-5-1-.01; La. Stat. Ann. §§ 40:2175.3-.4; S.D. Codified Laws 34-23A-5, and that impose other reasonable regulations of abortion, *e.g.*, Ala. Code § 26-23A-4; La. Stat. Ann. §§ 40:1061.9-10, 16-17; La. Admin. Code tit. 48, § 4405; Neb. Rev. Stat. §§ 28-3,106, 28-327; S.D. Codified Laws §§ 34-23A-3-5; Tenn. Code Ann. § 39-15-202. Litigants will argue that the ERA is "properly interpreted" to "negate" these "hundreds of laws" because abortion restrictions are a form of "sex discrimination," Nat'l Org. for Women, *Is the Equal Rights Amendment Relevant in the 21st Century?*, bit.ly/2UvXN3p—an argument they successfully made under New Mexico's ERA, *see NM. Right to Choose/ NARAL*, 975 P.2d 841.

- Movants fund and operate programs, such as school athletics, that are reserved exclusively for women. Activists will argue that these programs violate the ERA, which they claim requires stricter scrutiny than the "intermediate scrutiny" currently given to sex-based laws. *See* Compl. 4; *e.g.*, *Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d 284, 296 (Mass. 1979) (holding that a state rule barring "boys from playing on girls' interscholastic teams" violates the Massachusetts ERA).

Movants do not concede that any of their laws would violate the ERA. But if a litigant convinces at least one judge to enjoin Movants' laws under a federal ERA—as many judges have done under state ERAs—Movants and their citizens will suffer serious injuries. Even if Movants can quickly stay any such decisions and ultimately defend all their laws, the ERA will force them to spend massive time and money doing so. *See United States v. Windsor*, 570 U.S. 744, 761 (2013). And as soon as the ERA is added to the Constitution, it will cast a pall of uncertainty over hundreds of Movants' laws and "impos[e] substantial pressure on them to change their laws." *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015). Movants thus have many weighty interests at stake in this case.

C. This Action Threatens to Impair Movants' Interests

Movants are "so situated that disposing of [this] action may as a practical matter impair or impede [their] ability to protect [their] interest." Fed. R. Civ. P. 24(a)(2). This language in Rule 24 is "obviously designed to liberalize the right to intervene in federal actions." *Nuesse*, 385 F.2d at 701. When applying it, "courts in this circuit look to the practical consequences that the applicant may suffer if intervention is denied." *100Reporters*, 307 F.R.D. at 278. The practical consequences for Movants are immense.

If Plaintiffs' action succeeds, then the ERA will be added to the Constitution. *See* Compl. 17. That addition will irreparably harm Movants in all the ways mentioned above: They will be forced to spend substantial resources defending their laws from constitutional attack, many of their laws risk invalidation,

and the rescinding States' ratification documents will be unlawfully given effect and their rescissions ignored. Movants cannot sit back and wait until after the ERA is added to the Constitution and litigants begin using it to challenge their laws. Movants will be barred from challenging the validity of the ratification process at that time, litigants will claim, because the Archivist's "certification of the adoption of the [ERA will be] conclusive." *United States v. Stahl*, 792 F.2d 1438, 1439-40 (9th Cir. 1986). While Movants would resist that argument, litigating in such a defensive posture would certainly present "a sterner challenge than [Movants] would face as intervenors here." *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969). Nothing more is required for intervention.

But no matter what happens in future cases interpreting the ERA, Movants "do not need to establish that their interests will be impaired," "only that the disposition of the action 'may' impair or impede their ability to protect their interests." *Brumfield v. Dodd*, 749 F.3d 339, 344-45 (5th Cir. 2014). It would be "a questionable rule that would require prospective intervenors to wait on the sidelines. . . . The very purpose of intervention is to allow interested parties to air their views so that a court may consider them before making potentially adverse decisions." *Id.*

It is also no answer to say that Movants could "fil[e] a separate suit" of their own against the Archivist. *Kaufman v. Societe Internationale Pour Participations Industrielles Et Commerciales, S.A.*, 343 U.S. 156, 161 (1952). "[T]he opportunity to raise the same issue in another forum" in "the hope of sparking a conflict between circuits, and possibly even Supreme Court resolution," is "no bar to intervention of right";

such a rule would encourage the very "fragmented approach to adjudication that [Rule 24] seek[s] to avoid." *Nuesse*, 385 F.2d at 702; *accord Kaufman*, 343 U.S. at 161 (approving intervention to avoid "a multiplicity of separate actions"); *NRDC v. Costle*, 561 F.2d 904, 911 (D.C. Cir. 1977) (approving intervention because the movants' "involvement may lessen the need for future litigation to protect their interests").

Nor is there any guarantee that, in a separate dispute between Movants and the Archivist, the court would even reach the critical constitutional issues at stake here, given the parties' lack of adversity on the viability of the ERA. *See Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) ("In our adversary system, . . . we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and . . . we normally decide only questions presented by the parties."). Even if the parties someday become adversarial again, Movants are still entitled to intervene here because the "persuasive weight" of an adverse decision from this Court "would make it more difficult for [Movants] to succeed on similar claims . . . in a separate lawsuit of [their] own.'" *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015); *accord U.S. House of Representatives v. Price*, 2017 WL 3271445, at *1 (D.C. Cir. Aug. 1, 2017); *Roane*, 741 F.3d at 151. The "best" course then—and the one that Rule 24 "implements"—is to give "all parties with a real stake in a controversy . . . an opportunity to be heard" in this suit. *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972).

D. The Existing Parties Do Not Adequately Represent Movants' Interests

Finally, no existing party is "an adequate representative of [Movants'] interests." *Karsner*, 532 F.3d at 885 (citing Fed. R. Civ. P. 24(a)(2)). This inadequate-representation requirement is "not onerous" and "should be treated as minimal." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); *100Reporters*, 307 F.R.D. at 279. It is satisfied when "the applicant shows that representation of his interest 'may be' inadequate"; "[t]he applicant need . . . not [show] that representation will in fact be inadequate." *100Reporters*, 307 F.R.D. at 279; *Dimond*, 792 F.2d at 192; *see Am. Tel.*, 642 F.2d at 1293 ("[Intervention is] ordinarily . . . allowed . . . unless it is clear that the party will provide adequate representation for the absentee."). Representation is inadequate when the existing parties have "a 'different' interest" from the movant, even if they have "'a shared general agreement,'" "'tactical similarity [in their] legal contentions,'" or "general alignment" on the correct outcome. *Fund for Animals*, 322 F.3d at 737; *Crossroads*, 788 F.3d at 321.

Plaintiffs clearly do not represent Movants' interests, and the Archivist does not adequately represent them either. Most obviously, the Archivist will not raise two of Movants' defenses—that the ERA has expired by force of the Constitution, and that five States (including three Movants) have validly rescinded their ERA ratifications. The Archivist "defers to DOJ" in this case, *Press Release, supra*, and the Justice Department's existing opinions expressly reject these two defenses. Thus, Movants will make "real and legitimate additional or contrary arguments" to the Archivist, which "is sufficient to demonstrate that the

representation may be inadequate." *Brumfield*, 749 F.3d at 346. At the very least, Movants will "serve as a vigorous and helpful supplement" to the Archivist, will "make a more vigorous presentation" than the Archivist, and "can reasonably be expected to contribute to the informed resolutions of these questions." *Costle*, 561 F.2d at 912-13; *accord 100Reporters*, 307 F.R.D. at 286 ("Though the Court agrees that the DOJ can represent capably many of the interests asserted by the [movant], the Court also has found that . . . the strength of the DOJ's position will be enhanced by the assistance of the [Movant]").

More broadly, the D.C. Circuit "look[s] skeptically on [federal] government entities serving as adequate advocates for private parties," *Crossroads*, 788 F.3d at 321—much less for separate *sovereigns* like Movants. *Fund for Animals*, 322 F.3d at 736. As a federal official, the Archivist has no interest in the validity of Movants' laws or what happens to their ratification documents. *Id.* at 736-37; *see also Nuesse*, 385 F.2d at 703 (explaining that the federal government does not adequately represent States because, unlike them, it usually tries to maximize federal power). In fact, the Archivist has no formal position on the wisdom of the ERA, disclaims any independent power to decide legal questions about its ratification, and describes his role in the ratification process as merely "ministerial." *Press Release, supra.* Because his only interest is following the procedures imposed on him by federal law, the Archivist "merely seeks to defend the present suit and would accept a procedural victory." *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016). Movants, by contrast, want a definitive ruling that rejects the three-state

strategy on the merits and binds future Archivists. *See, e.g., Crossroads*, 788 F.3d at 321 (finding the federal government an inadequate representative of the movant's interests because the government planned to raise a procedural standing argument).

Finally, the "burden is on those opposing intervention to show the adequacy of the existing representation." *Smuck*, 408 F.2d at 181 (cleaned up). Because the government "has taken no position on the motion to intervene" as of right, its "'silence on any intent to defend [Movants] special interests is deafening.'" *Utah Ass'n of Cos. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001); *accord U.S. House*, 2017 WL 3271445, at *2. Further, the positions and personnel of the Executive Branch can change over the course of a single case, so it is "not realistic to assume" that the Archivist will forever defend Movants' position in this litigation. *Utah Ass'n*, 255 F.3d at 1256. Movants "should not need to rely on a doubtful friend to represent [their] interests, when [they] can represent [themselves]" as intervenor-defendants. *Crossroads*, 788 F.3d at 321.

II. Alternatively, Movants are Entitled to Permissive Intervention

Even if Movants were not entitled to intervention as of right under Rule 24(a), this Court should grant them permissive intervention under Rule 24(b). Exercising broad judicial discretion, courts grant permissive intervention when the movant makes a "timely motion" and has "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). Courts also consider

"whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* "While permissive intervention may be denied in order to avoid the likelihood of undue delay," it should not be denied based on the natural burdens that always come with adding parties—the likely delay must be "undue." *Nuesse*, 385 F.2d at 704 & n.13. Courts in this Circuit are particularly "hospitable" to "governmental application[s]" for permissive intervention, like this one. *Id.* at 705.

The requirements of Rule 24(b) are all met here. As explained, Movants filed a timely motion. And Movants will raise defenses that share many common questions with the parties' claims and defenses—including whether Congress can impose deadlines on constitutional amendments, *see* Compl. 13-14; whether the Constitution imposes deadlines on constitutional amendments, *see* Compl. 14-15; and whether States can rescind their ratifications of constitutional amendments, *see* Compl. 15-16. These "similarities between the issues presented by [the proposed intervenor-defendant] and those raised by the DOJ" and Plaintiffs warrant permissive intervention. *100Reporters*, 307 F.R.D. at 286.

Movants' intervention will not unduly delay this litigation. Movants swiftly moved to intervene while the case was "at . . . a nascent stage," *id.*, and their participation will add no delay beyond the norm for multiparty litigation. This is particularly true because Movants will voice their collective views in one consolidated brief (and one consolidated oral argument), and they will focus their briefs and arguments on their own unique defenses, rather than duplicating defenses and arguments that the Archivist raises himself.

Although Movants will make two "additional and different legal arguments," Plaintiffs will not be prejudiced because they "will have a full opportunity, in their . . . brief[s], to counter any such legal arguments." *United States v. Philip Morris USA Inc.*, 2005 WL 1830815, at *5 (D.D.C. July 22, 2005). And this case will likely be resolved at the motion-to-dismiss stage anyway, requiring only one round of briefing. Nor would any prejudice be undue "[i]n a case of this magnitude," which implicates the very contents of our founding document. *Id.* at *6.

"The proper approach" to permissive intervention, this Court has explained, "is to allow all interested parties to present their arguments in a single case at the same time." *100Reporters*, 307 F.R.D. at 286. Movants are interested parties, they have important interests to represent, their unique arguments are essential to the accurate resolution of this case, and this Court will benefit from their involvement. Movants should be granted leave to intervene.

CONCLUSION

The Court should grant this motion and allow Movants to intervene as defendants.

Respectfully submitted,

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Dated: February 19, 2020

NARA PRESS STATEMENT ON THE EQUAL RIGHTS AMENDMENT (JANUARY 8, 2020)

Washington, DC

At the request of the National Archives and Records Administration (NARA), the Department of Justice (DOJ) has issued an opinion on the Ratification of the Equal Rights Amendment (ERA) and the statutory role of the Archivist of the United States.

Under 1 U.S.C. § 106b, the Archivist performs a ministerial role with respect to certifying the ratification of amendments to the U.S. Constitution, as follows:

> 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, 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.

In its January 6, 2020, opinion, the Office of Legal Counsel (OLC) has 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 Opinion, at p.2.) Accordingly, the OLC opinion goes on to state that "the ERA's

adoption could not be certified under 1 U.S.C. § 106b." (OLC Opinion, at p.37.)

These issues are currently presented in two federal lawsuits against the Archivist of the United States, one filed in the U.S. District Court for the Northern District of Alabama by the states of Alabama, Louisiana, and South Dakota and the other filed in the U.S. District Court for the District of Massachusetts by Equal Means Equal, The Yellow Roses, and Katherine Weitbrecht.

NARA defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order.

MEMORANDUM OPINION FOR THE GENERAL COUNSEL NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (JANUARY 6, 2020)

RATIFICATION OF THE EQUAL RIGHTS AMENDMENT

Congress has constitutional authority to impose a deadline for ratifying a proposed constitutional amendment. It exercised this authority when proposing the Equal Rights Amendment and, because three-fourths of the state legislatures did not ratify before the deadline that Congress imposed, the Equal Rights Amendment has failed of adoption and is no longer pending before the States. Accordingly, even if one or more state legislatures were to ratify the proposed amendment, it would not become part of the Constitution, and the Archivist could not certify its adoption under 1 U.S.C. § 106b.

Congress may not revive a proposed amendment after a deadline for its ratification has expired. Should Congress wish to propose the amendment anew, it may do so through the same procedures required to propose an amendment in the first instance, consistent with Article V of the Constitution.

You have asked for our views concerning the legal status of the Equal Rights Amendment ("ERA"). Consistent with Article V of the Constitution, two-thirds of both Houses passed a joint resolution proposing the ERA, which would become part of the Constitution when ratified by three-fourths of the States. *See* 86 Stat. 1523 (1972) ("ERA Resolution").

Consistent with the last seven amendments adopted before 1972, Congress conditioned ratification on a deadline, requiring that the necessary number of States (thirty-eight) approve the amendment within seven years. *See id.* As that deadline approached, only thirty-five States had ratified the ERA, and several had sought to rescind their initial approvals. Congress took the unprecedented step of voting, with a simple majority in each House, to extend the deadline by three years, until June 30, 1982. *See* 92 Stat. 3799 (1978). That new deadline came and went, however, without additional ratifications. The ERA thus failed to secure the necessary ratifications within either of Congress's deadlines.

Nearly four decades later, ERA supporters have renewed their push to ratify the amendment. Some have urged Congress to restart the ratification process by proposing it anew. *See, e.g.*, Remarks of Justice Ruth Bader Ginsburg, Georgetown University Law Center (Sept. 12, 2019) ("[T]he 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.").[1] Others, however, have urged the outstanding States to ratify the long-expired ERA Resolution, arguing that the

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[1] https://www.facebook.com/georgetownlaw/videos/justice-ginsburg-to-address-new-georgetown-law-students/2325195750861807 (remarks starting at 1:03:35); *see also* Marcia Coyle, *Partisan Divisions Are 'Not Serving Our Country Well,' Justice Ginsburg Says*, Nat'l L.J., Sept. 12, 2019 (quoting Justice Ginsburg's remarks on the ERA), https://www.law.com/nationallawjournal/2019/09/12/partisan-divisions-are-not-serving-our-country-well-justice-ginsburg-says/.

congressional deadline was invalid or could be retroactively nullified by Congress. In 2017, Nevada voted to ratify the ERA, *see* S.J. Res. 2, 79th Leg. (Nev. 2017), and in 2018, Illinois did the same, *see* S.J. Res. Const. Amend. 0004, 100th Gen. Assemb. (Ill. 2018). If the ratification period remains open, and if the efforts by five States to rescind their earlier ratifications are disregarded, then thirty-seven States could be credited with having voted to ratify the ERA. After falling just short of ratifying the ERA during its 2019 session, the Virginia legislature is expected to vote again early this year.

Congress has charged the Archivist of the United States with the responsibility to publish a new constitutional amendment upon receiving the formal instruments of ratification from the necessary number of States. Whenever the National Archives and Records Administration ("NARA") receives "official notice" that an amendment to the Constitution "has been adopted," the Archivist "shall forthwith cause the amendment to be published" along with a certificate identifying the States that ratified the amendment and declaring "that the [amendment] has become valid, to all intents and purposes, as a part of the Constitution of the United States." 1 U.S.C. § 106b. In view of this responsibility, NARA has received inquiries from Members of Congress and from several States asking about the status of the ERA. Accordingly, you have asked for our views on the legal status of the proposed amendment.[2]

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[2] *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Gary M. Stern, General Counsel, National Archives and Records Administration (Dec. 12, 2018).

We conclude 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. The Supreme Court has upheld Congress's authority to impose a deadline for ratifying a proposed constitutional amendment. *See Dillon v. Gloss*, 256 U.S. 368, 375-76 (1921) ("Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt."). Although Congress fixed the ratification deadline in the proposing clause of the ERA Resolution, rather than in the proposed amendment's text, that choice followed established practice. After incorporating ratification deadlines in the text of four amendments, *see* U.S. Const. amends. XVIII, XX-XXII, Congress placed deadlines in the resolutions proposing each of the next four amendments. Both Houses of Congress, by the requisite two-thirds majorities, adopted the terms of the ERA Resolution, including the ratification deadline, and the state legislatures were well aware of that deadline when they considered the resolution. We therefore do not believe that the location of the deadline alters its effectiveness.

The more difficult question concerns whether Congress, having initially specified that state legislatures must ratify the proposed amendment within seven years, may modify that deadline. In 1977, this Office advised that Congress could extend the ERA's deadline before it had expired. *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) ("*Constitutionality of ERA Extension*").[3] We recognized that "respectable arguments can be made on both sides of this question," *id.* at 7, but we viewed Congress's authority to fix the deadline in the first instance as including a power to modify it even after the States had begun to vote on ratification, *see id.* at 20-21. We acknowledged, however, that there would be a "strong argument" that Congress's authority to extend a pending deadline would not include "reviving a proposed amendment" after the deadline had expired. *Id.* at 5-6.

Although we disagree with the 1977 opinion's conclusion that Congress may extend a ratification deadline on an amendment pending before the States, we agree in any event that Congress may not revive a proposed amendment after the deadline has expired. The Constitution authorizes Congress to propose amendments for ratification, but it does not contemplate any continuing role for Congress during the ratification period. *See* U.S. Const. art. V. Even if Congress could validly extend the ERA's ratification deadline before its expiration, that deadline expired decades ago. Should the people of the United States wish to adopt the ERA as part of the Constitution, then the appropriate path is for Congress (or a convention sought by the state legislatures) to propose that amendment once more, in a manner consistent with Article V of the Constitution.

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[3] The 1977 opinion is not published in the *Opinions of the Office of Legal Counsel*, but it was reprinted in connection with Assistant Attorney General Harmon's November 1, 1977 congressional testimony. *See 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 (1978).

I.

Congress proposed the ERA to the States after five decades of deliberation over whether such an amendment was necessary to secure equal rights for women or might instead cut back on existing protections. The first ERA proposal was introduced in 1923. It would have provided that "[m]en and women shall have equal rights throughout the United States and every place subject to its jurisdiction" and that Congress could "enforce this article by appropriate legislation." S.J. Res. 21, 68th Cong. (1923); *see also* H.R.J. Res. 75, 68th Cong. (1923). The measure faced opposition from traditionalists and some leaders of the women's movement, including many who feared that the amendment would invalidate labor laws that protected women. *See* Mary Frances Berry, *Why ERA Failed: Politics, Women's Rights, and the Amending Process of the Constitution* 56-60 (1986). The proposal did not advance in 1923, but it was re-introduced repeatedly over the next fifty years, and it was the subject of multiple committee hearings.[4] The amendment appears to have first reached the Senate floor in July 1946, where it fell short of the required two-thirds majority by a vote of 38 to 35. *See* 92 Cong. Rec. 9404-05 (1946). The Senate would go on to approve the

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[4] *See, e.g.*, H.R.J. Res. 42, 79th Cong. (1945); S.J. Res. 8, 77th Cong. (1941); S.J. Res. 65, 75th Cong. (1937); H.R.J. Res. 1, 75th Cong. (1937); S.J. Res. 1, 73d Cong. (1933); H.R.J. Res. 55, 71st Cong. (1929); S.J. Res. 64, 70th Cong. (1928); S.J. Res. 11, 69th Cong. (1925); *Equal Rights for Men and Women: Hearings on S.J. Res. 65 Before a Subcomm. of the S. Comm. on the Judiciary*, 75th Cong. (1938); *Equal Rights Amendment: Hearing on S.J. Res. 64 Before a Subcomm. of the S. Comm. on the Judiciary*, 70th Cong. (1929).

proposal by the required supermajority on two occasions, in 1950 and 1953. *See* 99 Cong. Rec. 8974 (1953); 96 Cong. Rec. 872-73 (1950). On both occasions, however, the House did not act on the measure.

After languishing for decades, the ERA gained momentum during the 91st Congress. *See* H.R.J. Res. 264, 91st Cong. (1969). In 1970, Representative Martha Griffiths obtained the necessary signatures for a discharge petition to move the resolution out of the House Judiciary Committee, and the House approved the resolution by an overwhelming margin. *See* 116 Cong. Rec. 28004, 28036-37 (1970). The Senate, however, did not take a final vote on the resolution. *See* S. Rep. No. 92-689, at 4-5 (1972). Notably, in the debates over the ERA, opponents had seized on the absence of a ratification deadline. *See, e.g.*, 116 Cong. Rec. 28012 (1970) (remarks of Rep. Celler); *see also* 116 Cong. Rec. 36302 (1970) (remarks of Sen. Ervin) (proposing to amend the earlier resolution to include a seven-year deadline for ratification).

In the 92nd Congress, the resolution finally met with bicameral success. The House adopted the ERA Resolution by the requisite two-thirds majority on October 12, 1971. 117 Cong. Rec. 35815 (1971). The Senate did the same on March 22, 1972. 118 Cong. Rec. 9598 (1972).

The ERA Resolution reads in its entirety:

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.

"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."

86 Stat. at 1523.

The proposing clause of the ERA Resolution contains a ratification deadline, which required that "the legislatures of three-fourths of the several States" ratify the amendment "within seven years from the date of its submission by the Congress," resulting in a

deadline of March 22, 1979. *Id.* In 1971, Representative Griffiths, the ERA's lead sponsor, defended the inclusion of the deadline, describing it as "customary," as intended to meet "one of the objections" previously raised against the resolution, and as a "perfectly proper" way to ensure that the resolution "should not be hanging over our head forever." 117 Cong. Rec. at 35814-15. The report of the Senate Judiciary Committee similarly explained: "This is the traditional form of a joint resolution proposing a constitutional amendment for ratification by the States. The seven year time limitation assures that ratification reflects the contemporaneous views of the people." S. Rep. No. 92-689, at 20; *see also* Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 Tex. L. Rev. 919, 921 (1979) (stating that ERA supporters "thought the stipulation innocuous, a 'customary' statute of limitations, not a matter of substance worth opposing" (footnote omitted)). Congress therefore made the deliberate choice to subject the proposed amendment to a seven-year ratification deadline.

After Congress adopted the ERA Resolution, the Acting Administrator of the General Services Administration transmitted certified copies of the full text of the resolution to the States with a request that each governor submit the proposed amendment "to the legislature of your state for such action as it may take." *Constitutionality of ERA Extension* at 3; *see, e.g.*, Letter for George C. Wallace, Governor, State of Alabama, from Rod Kreger, Acting Administrator, General Services Administration (Mar. 24, 1972).[5]

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[5] As we have previously recognized, "Section 106b and its antecedents have long been understood as imposing a ministerial, 'record-keeping' duty upon the executive branch." *Congressional*

Twenty-two States ratified the ERA by the end of 1972.[6] The political winds shifted, however, and only thirteen more States ratified within the next five years.[7] During those years, four States voted to

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Pay Amendment, 16 Op. O.L.C. 85, 98 (1992). From 1791 to 1951, the Secretary of State reported on the ratification of new amendments, a practice that Congress formally endorsed in 1818. *See* Act of Apr. 20, 1818, ch. 80, § 2, 3 Stat. 439. The Administrator of General Services held the duty from 1951 to 1984. *See* Pub. L. No. 82-248, ch. 655, sec. 2(b), § 106b, 65 Stat. 710, 710 (1951). In 1984, the role was transferred to the Archivist. *See* Pub. L. No. 98-497, § 107(d), 98 Stat. 2280, 2291 (1984).

6 The States were Hawaii, New Hampshire, Delaware, Iowa, Idaho, Kansas, Nebraska, Texas, Tennessee, Alaska, Rhode Island, New Jersey, Colorado, West Virginia, Wisconsin, New York, Michigan, Maryland, Massachusetts, Kentucky, Pennsylvania, and California. S. Con. Res. 39, 6th Leg. (Haw. 1972); H.R. Con. Res. 1, 1972 Sess. Gen. Ct. (N.H. 1972); S. Con. Res. 47, 126th Gen. Assemb. (Del. 1972); S.J. Res. 1008, 64th Gen. Assemb. (Iowa 1972); S.J. Res. 133, 41st Leg. (Idaho 1972); H.R. Con. Res. 1155, 1972 Sess. Leg. (Kan. 1972); Legis. Res. 86, 82d Leg. (Neb. 1972); S. Con. Res. 1, 62d Leg. (Tex. 1972); H.R.J. Res. 371, 87th Gen. Assemb. (Tenn. 1972); H.R.J. Res. 125, 7th Leg. (Alaska 1972); S. Res. 3482, 1972 Jan. Sess. Gen. Assemb. (R.I. 1972); S. Con. Res. 74, 195th Leg. (N.J. 1972); H.R. Con. Res. 1017, 48th Gen. Assemb. (Colo. 1972); S.J. Res. 3, 60th Leg. (W. Va. 1972); Enrolled J. Res. 52, 1972 Spec. Sess. Gen. Assemb. (Wis. 1972); S. Con. Res. 9748, 179th Leg. (N.Y. 1972); S.J. Res. GG, 76th Leg. (Mich. 1972); H.R.J. Res. LLL, 76th Leg. (Mich. 1972); Res. 35, 1972 Sess. Gen. Assemb. (Md. 1972); Res. Ratifying the Proposed Amend. to the Const. of the U.S. Prohibiting Discrimination on Account of Sex, 167th Gen. Ct. (Mass. 1972); H.R.J. Res. 2, 1972 1st Extra. Sess. Gen. Assemb. (Ky. 1972); J. Res. 2, 1972 Sess. Gen. Assemb. (Pa. 1972); S.J. Res. 20, 1972 Sess. Leg. (Cal. 1972).

7 Eight States ratified the ERA in 1973: Wyoming, South Dakota, Oregon, Minnesota, New Mexico, Vermont, Connecticut, and Washington. H.R.J. Res. 2, 42d Leg. (Wyo. 1973); S.J. Res. 1, 48th Leg. (S.D. 1973); S.J. Res. 4, 57th Legis. Assemb. (Or.

rescind their earlier ratifications.[8] A fifth State, South Dakota, later adopted a resolution providing that its prior ratification would be withdrawn if the requisite number of the States failed to ratify the ERA within the seven-year period. S.J. Res. 2, 54th Leg. (S.D. 1979).

As the seven-year deadline approached, Congress considered resolutions that would take the historically unprecedented step of extending the ratification deadline. *See* H.R.J. Res. 638, 95th Cong., 1st Sess. (1977); H.R.J. Res. 638, 95th Cong., 2d Sess. (1978). Congress had never before sought to adjust the terms or conditions of a constitutional amendment pending before the States. A subcommittee of the House Judiciary Committee conducted hearings over six days during which government officials, legal scholars, and political activists expressed differing views over whether Congress could validly extend the ratification deadline, whether it could adopt such a resolution by only a

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1973); H.R. Res. 1, 68th Leg. (Minn. 1973); H.R.J. Res. 2, 31st Leg. (N.M. 1973); H.R.J. Res. 8, 1973 Sess. Gen. Assemb. (Vt. 1973); H.R.J. Res. 1, 1973 Jan. Sess. Gen. Assemb. (Conn. 1973); H.R.J. Res. 10, 43d Leg. (Wash. 1973). Three ratified in 1974: Maine, Montana, and Ohio. J. Res. to Ratify the Equal Rights Amend. to the Federal Const., 106th Leg., 1st Spec. Sess. (Me. 1974); H.R.J. Res. 4, 43d Leg. (Mont. 1974); H.R.J. Res. 11, 110th Gen. Assemb. (Ohio 1974). North Dakota ratified the ERA in 1975. S. Con. Res. 4007, 44th Legis. Assemb. (N.D. 1975). Indiana did so in 1977. H.R.J. Res. 2, 100th Gen. Assemb. (Ind. 1977).

[8] Kentucky voted to rescind its ratification in 1972. H.R.J. Res. 20, 1978 Sess. Gen. Assemb. (Ky. 1978). Nebraska did the same in 1973, Legis. Res. 9, 83d Leg. (Neb. 1973); Tennessee in 1974, S.J. Res. 29, 88th Gen. Assemb. (Tenn. 1974); and Idaho in 1977, H. Con. Res. 10, 44th Leg. (Idaho 1977).

simple majority vote, and whether States could validly rescind their earlier ratifications. *See 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. (1978) ("*House Extension Hearings*"). The witnesses included future Justice Ruth Bader Ginsburg, who was then a professor at Columbia Law School, and John Harmon, who was the Assistant Attorney General for this Office. A subcommittee of the Senate Judiciary Committee also conducted hearings. *See Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong. (1979) ("*Senate Extension Hearings*").

In connection with these hearings, Assistant Attorney General Harmon released an opinion, which he had provided to the Counsel to the President, concluding that the proposed extension of the ERA would likely be constitutional. *See Constitutionality of ERA Extension* at 1. The opinion advised that "respectable arguments can be made on both sides of this question," since Article V "can be viewed as envisioning a process whereby Congress proposes an amendment and is divested of any power once the amendment is submitted to the States for ratification." *Id.* at 7. Nevertheless, the opinion ultimately concluded that Congress's authority to "establish a 'reasonable' time in which ratification may occur," *id.*, may be subject to modification by a later Congress at least where the deadline has not yet expired, *see id.* at 5-8, 16-17. The opinion reasoned that the ERA's deadline was not in the proposed amendment's actual text and therefore concerned only a "'subsidiary matter[] of

detail'" that Congress could revise by a simple majority vote of both Houses. *Id.* at 22-23 (quoting *Dillon*, 256 U.S. at 376).

In 1978, the House and Senate, acting by simple majorities, adopted a resolution extending the deadline for the ERA's ratification. 92 Stat. at 3799.[9] The ERA's supporters had initially sought to extend the ratification deadline by an additional seven years, but a compromise extended the deadline by just over three years, to June 30, 1982. *See* H.R. Rep. No. 95-1405, at 1 (1978). Although this Office had advised that the President need not sign a resolution concerning a constitutional amendment, *see Constitutionality of ERA Extension* at 25, President Carter chose to sign the extension resolution to demonstrate his support. *See* Equal Rights Amendment, Remarks on Signing H.J. Res. 638 (Oct. 20, 1978), 2 *Pub. Papers of Pres. Jimmy Carter* 1800 (1978) (acknowledging that "the Constitution does not require the President to sign a resolution concerning an amendment to the Constitution").

Several States and state legislators challenged the validity of the resolution extending the ratification deadline, and a federal district court held that Congress had exceeded its authority in passing the extension resolution. *See Idaho v. Freeman*, 529 F. Supp. 1107, 1150-54 (D. Idaho 1981), *vacated as moot*, 459 U.S. 809 (1982). According to the district court, "[o]nce the proposal has been formulated and sent to the states, the time period could not be changed any more than the entity designated to ratify could be changed from

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[9] The votes in the House and Senate were 233-189 and 60-36. 124 Cong. Rec. 26264, 34314 (1978).

the state legislature to a state convention or vice versa." *Id.* at 1153. The Supreme Court allowed briefing on appeals from the district court, granted certiorari before judgment in the court of appeals, and stayed the district court's judgment. *See Nat'l Org. for Women, Inc. v. Idaho*, 455 U.S. 918 (1982). But before the Court was able to address the validity of Congress's deadline extension on the merits, the extended deadline expired without ratifications by any additional States. The Court then vacated the district court's judgment and remanded the cases with instructions to dismiss the complaints as moot. *See Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982).

After the expiration of the 1982 deadline, many of the ERA's supporters acknowledged that the ratification effort had failed and would have to begin anew. *See* Berry, *Why ERA Failed* at 81 ("In the aftermath of ERA's defeat, proponents began to assess the reasons for failure."); *see also* Adam Clymer, *Time Runs Out for Proposed Rights Amendment*, N.Y. Times, July 1, 1982, at A12 ("The drive to ratify the proposed Federal equal rights amendment . . . failed tonight in the states, still three legislatures short of the 38 that would have made it the 27th Amendment to the Constitution."); Marjorie Hunter, *Leaders Concede Loss on Equal Rights*, N.Y. Times, June 25, 1982, at A1 ("Leaders of the fight for an equal rights amendment officially conceded defeat today."). The ERA's supporters in Congress offered new resolutions to reintroduce the ERA, which, if approved by two-thirds majorities, would have restarted the ratification process. *See* 128 Cong. Rec. 16106 (1982) (statement of Rep. Schroeder) (announcing that she, along with "200 Members of the House and 51 Members of the

Senate," had "reintroduced the equal rights amendment," and analogizing the new proposal to "the phoenix rising from the ashes"); *id.* at 16108-09 (statement of Rep. Rodino) (acknowledging that the previously proposed ERA "failed of ratification as of June 30," arguing that "what we need to do is to really go forward once again," and introducing a resolution to "begin the battle anew"); *see also* Berry, *Why ERA Failed* at 82 ("The supporters of ERA in Congress . . . did not give up the effort either. They announced on July 14, that they had fifty-one cosponsors in the Senate and 201 in the House to reintroduce ERA.").

In January 1983, Joint Resolution 1 was introduced in the House, proposing the ERA for ratification by state legislatures with a new seven-year deadline. *See* H.R.J. Res. 1, 98th Cong. (1983). The House voted on the resolution, but it fell short of the necessary two-thirds majority. *See* 129 Cong. Rec. 32668, 32684-85 (1983). In the following decades, similar resolutions were regularly introduced. *See, e.g.*, H.R.J. Res. 1, 101st Cong. (1989); S.J. Res. 1, 101st Cong. (1989); S.J. Res. 40, 103d Cong. (1993); H.R.J. Res. 41, 106th Cong. (1999); S.J. Res. 7, 109th Cong. (2005); H.R.J. Res. 69, 112th Cong. (2011); S.J. Res. 6, 115th Cong. (2017). None, however, was adopted. In the current Congress, similar resolutions were introduced in the House on January 29, 2019, *see* H.R.J. Res. 35, 116th Cong., and in the Senate on March 27, 2019, *see* S.J. Res. 15, 116th Cong. Two-thirds passage of either of those resolutions in both chambers of Congress would restart the ratification process by re-proposing the ERA to the States.

Separately, ERA supporters in recent years have sought to revive the expired ERA Resolution from

1972, contending either that the original deadline was legally invalid or that Congress may retroactively nullify the deadline decades after the original proposal's expiration. *See* Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 Wm. & Mary J. Women & L. 113 (1997).[10] In the current Congress, several proposed resolutions would purport to void the deadline in the ERA Resolution. *See* S.J. Res. 6, 116th Cong. (2019); H.R.J. Res. 79, 116th Cong. (2019); H.R.J. Res. 38, 116th Cong. (2019). The House Judiciary Committee voted on November 13, 2019 to report one of those resolutions favorably. *See* H.R.J. Res. 79, 116th Cong. (2019) (as amended).[11]

In seeking to revive the ERA, supporters have urged several States to ratify the ERA as proposed in the ERA Resolution. *See, e.g.*, Kristina Peterson, *Equal Rights Amendment Could Soon Be Back in Congress*, Wall St. J., July 3, 2019, https://www.wsj.

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[10] *See also* Maggie Astor, *The Equal Rights Amendment May Pass Now. It's Only Been 96 Years*, N.Y. Times, Nov. 6, 2019 ("'It's been extended by Congress, so if you can extend it, you can certainly strike it,' said Representative Jackie Speier of California, the lead sponsor of a bipartisan House resolution to repeal the deadline."), https://www.nytimes.com/2019/11/06/us/politics/virginia-ratify-equal-rights-amendment.html; Dana Canedy, *Advocates of Equal Rights Amendment Resume Their Fight*, N.Y. Times, May 4, 2003, § 1, at 41 ("Supporters contend they can challenge the deadline if they can now find three more states to vote in favor of the amendment.").

[11] *See also* Press Release, H. Comm. on the Judiciary, *House Judiciary Committee Passes Resolution Removing Ratification Deadline for the ERA* (Nov. 13, 2019), https://judiciary.house.gov/news/press-releases/house-judiciary-committee-passes-resolution-removing-ratification-deadline-era.

com/articles/equal-rights-amendment-could-soon-be-back-in-congress-11562155202. In March 2017, Nevada's legislature approved it. S.J. Res. 2, 79th Leg. (Nev. 2017). In May 2018, the Illinois legislature did the same. S.J. Res. Const. Amend. 0004, 100th Gen. Assemb. (Ill. 2018). The Virginia legislature narrowly failed to approve the amendment in 2019, but ERA supporters will try again this year.[12] If the ratification votes from 1972 to 1977 remain valid, and the five rescissions of those ratifications are disregarded, then thirty-seven of the States may be viewed as having approved the ERA Resolution. In that case, the approval by Virginia, or by another state legislature, would require a determination as to whether the ERA Resolution remains pending, notwithstanding the congressional deadline. The passage of House Joint Resolution 79, or a similar resolution, would likewise require a determination as to whether Congress may revive the ERA Resolution by retroactively removing the earlier deadline. Accordingly, you have requested our opinion on these matters.

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12 *See* Jenna Portnoy, *ERA Bill Dies for Good in GOP-Controlled Virginia House of Delegates*, Wash. Post, Feb. 21, 2019, https://www.washingtonpost.com/local/virginia-politics/virginia-house-kills-era-ratification-bill/2019/02/21/82920204-3560-11e9-854a-7a14d7fec96a_story.html (noting the narrow failure); Rachel Frazin, *Virginia Targets Historic Push on Equal Rights Amendment for Women*, The Hill, Dec. 1, 2019, https://thehill.com/homenews/state-watch/472295-virginia-targets-historic-push-on-equal-rights-amendment-for-women (noting that joint resolutions to ratify the ERA have been prefiled in both houses for consideration in the upcoming session).

II.

Congress required that the ERA Resolution be ratified within a fixed period, and whether the effective deadline was in 1979 or 1982, that time has come and gone. The ERA Resolution thus has expired unless the deadline was somehow invalid in the first place. Yet in *Dillon*, the Supreme Court squarely upheld Congress's authority to set a ratification deadline, 256 U.S. at 374-76, and that conclusion is consistent not only with Article V of the Constitution, but with the history of the seven amendments proposed and ratified since *Dillon*. For the last four of those amendments, Congress placed the deadline in the proposing clause—the clause containing the procedural rules for ratification that, like the amendment itself, has always been adopted by two-thirds of both Houses of Congress. As Chief Justice Hughes suggested in his controlling opinion in *Coleman v. Miller*, 307 U.S. 433 (1939), a ratification deadline may be included "either in the proposed amendment or in the resolution of submission," *id.* at 452, and there is no reason in law or historical practice to draw any other conclusion. Because Congress lawfully conditioned the States' ratification of the ERA upon a deadline, and because the deadline expired, the proposed amendment has necessarily failed.

A.

The Founders established a process for amending the Constitution that requires substantial agreement within the Nation to alter its fundamental law. As James Madison explained in *The Federalist*, the Founders chose to ensure a broad consensus in favor of any amendment to "guard[] . . . against that extreme

facility which would render the Constitution too mutable," while at the same time avoiding "that extreme difficulty which might perpetuate its discovered faults." *The Federalist* No. 43, at 296 (James Madison) (Jacob E. Cooke ed., 1961); *see also id.* No. 85, at 592 (Alexander Hamilton) ("[W]henever . . . ten [of thirteen] states[] were united in the desire of a particular amendment, that amendment must infallibly take place." (footnote omitted)). The Constitution requires supermajorities in Congress (or of state legislatures) to propose an amendment. U.S. Const. art. V. It then raises the bar for ratification even higher by requiring three-fourths of the States—acting either through their legislatures or through ratifying conventions—to approve the amendment. *See id.*

The infrequency with which the Constitution has been amended attests not just to the genius of the original design but also to the difficulty inherent in securing the broad consensus required by Article V. In connection with promises made during the state ratifying conventions for the original Constitution, the First Congress in 1789 proposed twelve amendments to the States. *See* 1 Stat. 97 (1789); *see also, e.g.*, David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, at 110-115 (1997). By 1791, three-fourths of the States had approved ten of those twelve articles—the Bill of Rights. *See* U.S. Const. amends. I-X; *see also* 1 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 339-40 (2d ed. 1836). In the nearly 230 years since then, the States have ratified only seventeen additional amendments. *See* U.S. Const. amends. XI-XXVII.

Article V of the Constitution sets forth the procedures for proposing and ratifying constitutional amendments:

> 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.

Id. art. V.

The process for proposing amendments is one of only two instances where the Constitution requires both Houses of Congress to act by a supermajority.[13]

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[13] The Constitution alternatively provides that a supermajority (two-thirds) of the state legislatures may petition Congress to convene a convention for proposing amendments. U.S. Const. art. V. The Founders believed that this process would likely be unnecessary unless Congress had become corrupted. *See, e.g.*, 1 *The Records of the Federal Convention of 1787*, at 202-03 (Max Farrand ed., 1911); 1 *Blackstone's Commentaries* 371 (St. George

The other is when Congress seeks to override the President's veto of a bill or other form of joint resolution. *See id.* art. I, § 7, cls. 2-3.[14] The Founders thus established a high bar by requiring that two-thirds of both Houses agree upon the terms of any amendment to be proposed to the States and that three-fourths of the States ratify the amendment on those terms.

The Constitution further grants Congress the authority to specify "one or the other Mode of Ratification" in the States, either by the legislatures thereof or by state conventions chosen for that purpose. *Id.* art. V. In adopting the Constitution, the people "deliberately made the grant of power to Congress in respect to the choice of the mode of ratification of amendments." *United States v. Sprague*, 282 U.S. 716, 733 (1931); *see also* 4 Elliot, *Debates in the Several State Conventions* at 177 (statement of James Iredell) ("Any amendments which either Congress shall propose, or which shall be proposed by such general convention, are afterwards to be submitted to the legislatures of the different states, or conventions called for that purpose, as Congress shall think

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Tucker ed., 1803) (observing that the convention process "will probably never be resorted to, unless the federal government should betray symptoms of corruption," and describing the convention process as a "radical and effectual remedy"). As a historical matter, the state legislatures have never successfully petitioned for such a convention, and every amendment proposed to the States to date has come from Congress in the first instance.

[14] The Constitution requires a two-thirds majority in the Senate to convict a civil officer in an impeachment trial, U.S. Const. art. I, § 3, cl. 6, and to give advice and consent to ratification of a treaty, *id.* art. II, § 2, cl. 2. It requires two-thirds of either House to concur in the expulsion of one of its Members. *Id.* art. I, § 5, cl. 2.

proper[.]"). Congress therefore exercises discretion in determining not just the substance of the amendment, but which of the two modes of ratification is to be used. *See Sprague*, 282 U.S. at 732 (recognizing that "the choice of mode rests solely in the discretion of Congress").

In making such determinations, Congress has specified the mode of ratification in the proposing clause included within every resolution proposing a constitutional amendment. For every successful amendment, both Houses of Congress approved the proposing clause at the same time as the text of the proposed amendment, and they did so by a two-thirds vote. Congress included such a clause in the very first set of amendments proposed to the States, ten of which were ratified in 1791 as the Bill of Rights (and one of which was ratified in 1992 as the Twenty-Seventh Amendment). The resolution recited that Congress was proposing twelve articles "to the legislatures of the several states, as amendments to the constitution of the United States, all or any of which articles, when ratified by three fourths of the said legislatures, to be valid to all intents and purposes, as part of the said Constitution." 1 Stat. at 97 (emphasis added). In every subsequent amendment proposed to the States, Congress has included a proposing clause reciting the intended mode of ratification.[15]

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[15] *See* 1 Stat. 402 (1794) (Eleventh Amendment); 2 Stat. 306 (1803) (Twelfth Amendment); 2 Stat. 613 (1810) (proposed Titles of Nobility Amendment); 12 Stat. 251 (1861) (proposed Article the Thirteenth); 13 Stat. 567 (1865) (Thirteenth Amendment); 14 Stat. 358 (1866) (Fourteenth Amendment); 15 Stat. 346 (1869) (Fifteenth Amendment); 36 Stat. 184 (1909) (Sixteenth Amendment); 37 Stat. 646 (1912) (Seventeenth Amendment); 40 Stat.

The proposing clause for the Bill of Rights not only specified the mode of ratification but also contained a procedural instruction authorizing the state legislatures either to ratify "all" twelve proposed articles or to ratify "any of "them individually. 1 Stat. at 97. This proposing clause was debated by the House and the Senate and considered of a piece with the substantive proposed amendments. *See* 4 *Documentary History of the First Federal Congress of the United States of America* 35-45 (Charlene Bangs Bickford & Helen E. Veit eds., 1986). Although the early resolutions proposing amendments did not include deadlines for ratification, seven-year deadlines were included in the texts of what became the Eighteenth, Twentieth, Twenty-First, and Twenty-Second Amendments. *See* U.S. Const. amends. XVIII, § 3; XX, § 6; XXI, § 3; XXII, § 2. When proposing the Twenty-Third Amendment in 1960, Congress included a similar seven-year deadline in the proposing clause, *see* 74 Stat. 1057 (1960), and every subsequent proposed amendment has also included, in its proposing clause, a requirement that the amendment be ratified within seven years. *See* 76 Stat. 1259 (1962) (Twenty-Fourth Amendment); 79 Stat. 1327 (1965) (Twenty-Fifth Amendment); 85 Stat. 825 (1971) (Twenty-Sixth Amendment); 86 Stat. at 1523

1050 (1917) (Eighteenth Amendment); 41 Stat. 362 (1919) (Nineteenth Amendment); 43 Stat. 670 (1924) (proposed Child Labor Amendment); 47 Stat. 745 (1932) (Twentieth Amendment); 48 Stat. 1749 (1933) (Twenty-First Amendment); 61 Stat. 959 (1947) (Twenty-Second Amendment); 74 Stat. 1057 (1960) (Twenty-Third Amendment); 76 Stat. 1259 (1962) (Twenty-Fourth Amendment); 79 Stat. 1327 (1965) (Twenty-Fifth Amendment); 85 Stat. 825 (1971) (Twenty-Sixth Amendment); 86 Stat. 1523 (1972) (proposed ERA); 92 Stat. 3795 (1978) (proposed D.C. Congressional Representation Amendment).

(proposed ERA); 92 Stat. 3795 (1978) (proposed D.C. Congressional Representation Amendment). Each of these deadlines was adopted as part of the same resolution that proposed each amendment by the required two-thirds majorities of both Houses of Congress.

B.

Article V does not expressly address how long the States have to ratify a proposed amendment. The "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." *Dillon*, 256 U.S. at 371. The text does direct that "[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution[.]" U.S. Const. art. V (emphases added). This language authorizes Congress to propose amendments for ratification when two-thirds majorities in each chamber deem it necessary, thereby implying that Congress may propose amendments for the period that the requisite majorities deem necessary. *See Dillon*, 256 U.S. at 375 ("[I]t is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently."). Article V thus requires Congress to make a judgment concerning the needs of the moment and, from that, the Supreme Court has inferred the power to set a deadline by which the States must ratify, or reject, Congress's judgment. *See id.* at 375-76.

The Court reached this conclusion in *Dillon*, which upheld Congress's authority to impose a deadline for ratifying the Eighteenth Amendment, which

established Prohibition. *See* U.S. Const. amend. XVIII, §§ 1-2. In section 3 of the Amendment, Congress conditioned its effectiveness upon the requirement that it be ratified within seven years. *See id.* § 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."). The Senate had previously considered proposing ratification deadlines for the Fourteenth and Fifteenth Amendments. *See* Cong. Globe, 40th Cong., 3d Sess. 912-13, 1309-14 (1869); Cong. Globe, 39th Cong., 1st Sess. 2771 (1866). But the Eighteenth Amendment was the first amendment to include one.

In *Dillon*, a prisoner detained in violation of the National Prohibition Act (which was enacted pursuant to federal power authorized by the Eighteenth Amendment) argued that the presence of the deadline invalidated the amendment because "Congress has no constitutional power to limit the time of deliberation or otherwise attempt to control what the legislatures of the States shall do in their deliberation." Br. for Appellant at 4, *Dillon v. Gloss*, 256 U.S. 368 (1921) (No. 251). In rejecting this claim, the Court observed that "some" of the first seventeen amendments had been ratified "within a single year after their proposal and all within four years." *Dillon*, 256 U.S. at 372. Four other proposed amendments, however, had failed to obtain the necessary votes from the States and "lain dormant for many years," leaving it an "open question" whether they "could be resurrected." *Id.* at 372-73. To avoid such future uncertainty, the Court explained, Congress fixed a seven-year deadline for the ratification

of the Prohibition amendment. *Id.* at 373; *see also* 55 Cong. Rec. 5557 (1917) (remarks of Sen. Ashurst) (expressing support for a provision "limiting the time in the case of this amendment or any other amendment to 10, 12, 14, 16, 18, or even 20 years, so that we will not hand down to posterity a conglomerate mass of amendments floating around in a cloudy, nebulous, hazy way").

In upholding Congress's authority to impose deadlines, the Court recognized that Article V does not expressly address the timing of ratification. *See Dillon*, 256 U.S. at 371. It nevertheless read the text to imply a degree of contemporaneity between an amendment's proposal and its ratification, which "are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time." *Id.* at 374-75. The Court inferred that the approval of three-fourths of the States needs to be "sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period." *Id.* at 375. Thus, "'an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today,'" and "'if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.'" *Id.* at 375 (quoting, with alterations, John Alexander Jameson, *A Treatise on Constitutional Conventions* § 585, at 634 (4th ed. 1887)).[16] The Court therefore concluded that "the fair

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16 The *Dillon* Court necessarily rejected Jameson's contention that, although Article V gives Congress the powers to propose an amendment and to express the mode of ratification, it does not grant Congress the power "to prescribe conditions as to the time

inference or implication from article V is that the ratification must be within some reasonable time after the proposal." *Dillon*, 256 U.S. at 375.[17]

Having viewed Article V as implicitly including a requirement of contemporaneity, *Dillon* rejected the argument that Congress lacks the power to set the reasonable time for ratification. *See id.* at 375-76. The Court reasoned that, "[a]s a rule[,] the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and article V is no exception to the rule." *Id.* at 376 (footnote omitted). Therefore, "[w]hether 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[.]" *Id.* The Court concluded that Congress has the authority to impose a deadline upon the ratification process, reasoning that such a power is "an incident of its power to designate the mode of ratification" under Article V. *Id.*

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within which amendments are to be ratified, and hence to do so would be to transcend the power given." Jameson, *A Treatise on Constitutional Conventions* § 585, at 634.

[17] In *Congressional Pay Amendment,* this Office concluded that "*Dillon* is not authoritative on the issue whether Article V requires contemporaneous ratification" in the absence of any congressional deadline, because the Eighteenth Amendment contained a deadline. 16 Op. O.L.C. at 92-93. Finding no time limit in Article V, we concluded that the Twenty-Seventh Amendment, which was proposed without a deadline in 1789, had been adopted in 1992. *See id.* at 97, 105. Because the ERA Resolution contained a deadline (which has expired), we do not need to consider in this opinion the 1992 opinion's reading of *Dillon*.

C.

Unlike with the Eighteenth Amendment, Congress placed the ratification deadline for the ERA Resolution in the proposing clause, rather than in the text of the proposed amendment. But that judgment was entirely consistent with the four preceding amendments, and with *Dillon*'s recognition that a deadline is related to the mode of ratification, which has always been included in the proposing clause. In placing the ERA's deadline in the proposing clause, Congress followed a practice that started with the Twenty-Third Amendment. *See* 74 Stat. at 1057 (resolving "that the following article is hereby proposed . . . which shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by Congress"). Congress took the same course in the proposing clauses of the Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments. *See* 76 Stat. at 1259; 79 Stat. at 1327; 85 Stat. at 825. There is no reason for deadlines declared in proposing clauses to be any less binding on the ratification process than those included in the text of proposed amendments.

In *Dillon*, the Supreme Court held that Congress's decision to fix "a definite period for ratification" is "a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification" under Article V. 256 U.S. at 376. In the first resolution proposing constitutional amendments, Congress identified the mode of ratification in the resolution's proposing clause, separate from the text of the proposed amendments themselves. *See supra* pp. 14-15. Congress has specified the mode of ratification in the proposing clause of every resolution proposing

a constitutional amendment since then. *See supra* note 15. Each time, two-thirds of both Houses of Congress approved these measures. Insofar as Congress and the States have relied upon proposing clauses to specify the mode of ratification since 1789, we think it clear that Congress may exercise its integrally related authority to set a deadline in precisely the same manner. Chief Justice Hughes suggested as much when he observed that the Child Labor Amendment did not include a ratification deadline "either in the proposed amendment or in the resolution of submission." *Coleman*, 307 U.S. at 452.

As we recognized in 1977, "[t]he history of congressional use of a seven-year limitation demonstrates that Congress moved from inclusion of the limit in the text of proposed amendments to including it within the proposing clauses . . . without ever indicating any intent to change the substance of their actions." *Constitutionality of ERA Extension* at 15. After the Court's 1921 decision in *Dillon* confirmed the validity of the Eighteenth Amendment's ratification deadline, Congress included a seven-year deadline in the Twentieth, Twenty-First, and Twenty-Second Amendments. *See* U.S. Const. amend. XX, § 6 ("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."); *id.* amend. XXI, § 3 ("This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."); *id.* amend. XXII, § 2 ("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 to the States by the Congress."). By including such a provision in the amendment itself, Congress ensured that approvals secured after the seven-year deadline would be ineffective. Even if three-fourths of the States later ratified the amendment—and it therefore became "valid to all Intents and Purposes, as Part of [the] Constitution," *id.* art. V—the amendment, by its own terms, would be legally inert.

Members of Congress recognized, however, that these textual deadlines came at a cost. With each amendment, the Nation's highest law became increasingly cluttered with extraneous sections imposing conditions on ratification that had no prospective effect. Once three-fourths of the States ratified amendments within the prescribed deadlines, the deadlines, having already fulfilled their purpose, were nonetheless added to the constitutional text. To avoid exacerbating that problem, Congress adopted an alternative way of setting a ratification deadline when it proposed the Twenty-Third Amendment. Rather than including the deadline in the amendment's text, Congress put it in the proposing clause specifying the mode of ratification. *See* 74 Stat. at 1057. As Senator Kefauver had explained:

> The general idea was that it was better not to make the 7-year provision a part of the proposed constitutional amendment itself. It was felt that that would clutter up the Constitution. . . . We wanted to put the 7-year limitation in the preamble. So the intention

> of the preamble is that it must be ratified within 7 years in order to be effective.

101 Cong. Rec. 6628 (1955); *see also Appointment of Representatives: Hearing on S.J. Res. 8 Before a Subcomm. of the S. Comm. on the Judiciary*, 84th Cong. 34 (1955) (letter from Prof. Noel Dowling) ("The 7-year limitation is put in the resolution rather than in the text of the amendment. There is no doubt about the power of Congress to put it there; and it will be equally effective. The usual way, to be sure, has been to write the limitation into the amendment; but we hope such an unnecessary cluttering up of the Constitution can be ended.").[18]

Congress thereafter adopted the Twenty-Third Amendment resolution, including the seven-year deadline, by a two-thirds majority of both Houses. 106 Cong. Rec. 12571, 12858 (1960); *see* 74 Stat. at 1057. The States promptly ratified the amendment within

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[18] In connection with the Twentieth Amendment, Representative Emanuel Celler had proposed placing the seven-year deadline in the proposing clause, but that approach drew objections. 75 Cong. Rec. 3856-57 (1932). Representative Lamar Jeffers protested that, "[i]f the gentleman wants his amendment in the Constitution, it should go in a new section, or section 6. As he has now offered it, it would be of no avail, as he is offering it as a part of the proposal clause and not as a part of the proposed constitutional amendment." *Id.* at 3856; *see also id.* (statement of Rep. Ramseyer) ("The eighteenth amendment carried that 7-year provision as section 3, and it was that provision that the Supreme Court held to be valid. . . . I think we should play safe, inasmuch as the Supreme Court has held the provision valid."); *see also Constitutionality of ERA Extension* at 10-11 (discussing this history). We have not identified the expression of any similar concern with respect to the Twenty-Third or any subsequent Amendment, and, as discussed below, we believe this concern is misplaced.

ten months. *See* Certification of Amendment to Constitution of the United States Granting Representation in the Electoral College to the District of Columbia, 26 Fed. Reg. 2808 (Apr. 3, 1961). And Congress repeated the very same course by including deadlines in the proposing clauses for the Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments. *See* 76 Stat. at 1259; 79 Stat. at 1327; 85 Stat. at 825.[19] In 1977, we observed that Congress appears to have adopted this approach without any discussion about potentially placing the deadlines elsewhere. *See Constitutionality of ERA Extension* at 14-15. And we have found no indication that Members of Congress (or any court) seriously questioned the binding nature of a deadline stated in a resolution's proposing clause rather than the text of its proposed amendment.

In the case of the ERA Resolution, Congress again included a ratification deadline in the proposing clause. Members suggested that, by this time, it had become the customary way of setting a deadline. *See, e.g.*, S. Rep. No. 92-689, at 20 (1972) (describing the deadline as part of the "traditional form of a joint resolution proposing a constitutional amendment for ratification by the States" and stating that it "has been included in every amendment added to the Constitution in the last 50 years"). The deadline was

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[19] In proposing the Twenty-Third and Twenty-Fourth Amendments, Congress provided that the amendment would be valid "only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission" (emphasis added). Starting with the Twenty-Fifth Amendment, Congress replaced "only if" with "when." As we recognized in 1977, this change did not alter the meaning of the resolution or the binding nature of the deadline. *See Constitutionality of ERA Extension* at 15.

widely understood to be a necessary part of the legislative compromise that resulted in the resolution's passage. Prominent ERA opponents had faulted an earlier version of the resolution for the absence of a deadline. *See, e.g.*, 116 Cong. Rec. at 28012 (remarks of Rep. Celler, Chairman of the House Judiciary Committee) (decrying the fact that, without a deadline, "[t]his amendment could roam around State legislatures for 50 years" and arguing that the "customar[y]" seven-year deadline should be added); *id.* at 36302 (remarks of Sen. Ervin) (proposing a seven-year deadline and noting that "we still have floating around some unratified amendments that were submitted at the time of the original submission of the Bill of Rights"). And ERA supporters confirmed that, while they expected prompt ratification, the seven-year deadline would impose a binding time limit. *See* 117 Cong. Rec. at 35814-15 (remarks of Rep. Griffiths) (recognizing that the deadline will ensure that the resolution "should not be hanging over our head forever"); 118 Cong. Rec. at 9552 (remarks of Sen. Hartke) (recognizing that if the ERA is not "ratified within 7 years," then "we must begin the entire process once again"). In proposing the ERA to the States with a deadline, Members of Congress thus recognized that the deadline was a binding condition upon its ratification.

Apart from the seven-year deadline in the proposing clause, the ERA Resolution included a separate timing requirement—a delay on effectiveness for two years after ratification—in section 3 of the text of the proposed amendment. But this distinction did not make the seven-year deadline any less mandatory than the two-year delay. Unlike with ratification

deadlines, Congress has never placed an amendment's delayed effective date in a proposing clause. Nor is it clear that it could effectively do so, because Article V declares that a proposed amendment "shall be valid to all Intents and Purposes, as Part of [the] Constitution, when ratified." U.S. Const. art. V (emphasis added). Including the two-year delay in the amendment itself could be necessary to amend the effect that Article V would otherwise have on the amendment's effective date.

After Congress proposed the ERA Resolution, state legislatures considered whether to ratify it subject to all of the conditions imposed by Congress, including the seven-year deadline. Of the thirty-five state legislatures that ratified between 1972 and 1977, twenty-five expressly voted upon a state measure that included the text of the ERA Resolution in its entirety (and hence the deadline). *See Senate Extension Hearings* at 739-54, 756-61. Five others did not expressly vote on the entire text of the ERA Resolution, but the seven-year deadline was otherwise repeated in the measures that they approved. *See id.* at 739-40, 742-43, 746-47, 752-54, 758. And South Dakota's legislature expressly provided that its ratification would be formally withdrawn if the ERA were not adopted within the seven-year deadline. S.J. Res. 2, 54th Leg. (S.D. 1979). Accordingly, the States that ratified the ERA Resolution plainly did so with the knowledge of the timing condition and with the understanding that the seven-year deadline was part and parcel of the amendment proposal.

Although some ERA supporters have recently questioned the enforceability of the deadline, no one involved with the ERA around the time of its proposal

seems to have done so. As the original ratification period neared its end, Congress weighed extending the deadline precisely to avoid the failure of the amendment. For instance, Representative Elizabeth Holtzman, the primary sponsor of the extension resolution, testified that "[t]he cosponsors of [the] resolution have every hope that the equal rights amendment will be ratified before March 22, 1979, but do believe there might be need for an insurance policy to assure that the deadline will not arbitrarily end all debate on the ERA." House Extension Hearings at 4 (emphasis added). And while this Office advised that Congress could extend the deadline, we nonetheless recognized that the proposed amendment would otherwise expire. *See Constitutionality of ERA Extension* at 15.

Even more telling, the Supreme Court necessarily recognized the enforceability of the deadline by finding that the legal controversy over the ERA extension became moot when the extended deadline lapsed. After the district court in *Idaho v. Freeman* held that Congress could not extend the deadline, the federal government and others sought review in the Supreme Court. *See, e.g.*, Pet. of Adm'r of Gen. Servs. for Writ of Cert. Before J., *Carmen v. Idaho*, No. 81-1313 (U.S. Jan. 22, 1982); Pet. for Writ of Cert. Before J., *Nat'l Org. for Women, Inc. v. Idaho*, No. 81-1283 (U.S. Jan. 8, 1982). Although the Court accepted review, the June 1982 deadline expired before it could hear argument. At that point, the Acting Solicitor General urged the Court to dismiss the case as moot because "the Amendment has failed of adoption no matter what the resolution of the legal issues presented." Mem. for Adm'r of Gen. Servs. Suggesting Mootness at 3, *Nat'l Org. for Women, Inc. v. Idaho*, Nos. 81-1282 et al.

(U.S. July 9, 1982). Other parties objected to that conclusion on prudential grounds, but none argued that the deadline was unenforceable.[20] The Supreme Court remanded with instructions "to dismiss the complaints as moot." *Nat'l Org. for Women*, 459 U.S. at 809. In so doing, the Court necessarily adopted the view that Congress had validly imposed a ratification deadline that had expired. *See* Response of Nat'l Org. for Women, Inc., et al., to Mem. for Adm'r of Gen. Servs. Suggesting Mootness at 3, *Nat'l Org. for Women, Inc. v. Idaho*, Nos. 81-1282 et al. (July 23, 1982) ("Even an unexplained ruling that this case is moot would necessarily signal implicit acceptance of [the Acting Solicitor General's] position, particularly in light of this Court's stay of January 25.").

All of this history confirms that the deadline in the proposing clause of the ERA Resolution was a valid and binding exercise of Congress's authority to set a deadline on ratification. Congress in 1972 required the ERA to be ratified by a certain date as an incident to its authority to set the mode of ratification. *See Dillon*, 256 U.S. at 376. Two-thirds of both Houses

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[20] *See, e.g.*, Response of Nat'l Org. for Women, Inc., et al., to Mem. for Adm'r of Gen. Servs. Suggesting Mootness at 3-5, *Nat'l Org. for Women, Inc. v. Idaho*, Nos. 81-1282 et al. (U.S. July 23, 1982) (arguing that notwithstanding the expiration of the deadline, the Court should address whether the validity of the extension presented a political question); Response of Washington Appellees and Respondents to Mem. for Adm'r of Gen. Servs. Suggesting Mootness at 4, *Nat'l Org. for Women, Inc. v. Idaho*, Nos. 81-1282 et al. (U.S. Aug. 10, 1982) ("One might think that a scheme to secure ratification past the expiration of the second deadline is patently ludicrous. However, it also seemed ludicrous prior to 1978 to suggest an extension of time for the ratification of a constitutional amendment by a simple majority vote.").

of Congress approved the amendment with that accompanying condition, and the state legislatures that ratified did so as well. Under the text and structure of Article V, and consistent with the Court's opinion in *Dillon*, that condition was legally effective. Because the deadline lapsed without ratifications from the requisite thirty-eight States, the ERA Resolution is no longer pending before the States, and ratification by additional state legislatures would not result in the ERA's adoption.

III.

Although the ERA Resolution expired decades ago, there remains the question whether Congress may revive the ERA ratification process. As noted above, the House Judiciary Committee has favorably reported a joint resolution "[r]emoving the deadline for the ratification of the equal rights amendment," which would purport to make the ERA "valid to all intents and purposes as part of the United States Constitution whenever ratified by the legislatures of three-fourths of the several States." H.R.J. Res. 79, 116th Cong. (as ordered to be reported by H. Comm. on the Judiciary, Nov. 13, 2019); *see also supra* note 11 and accompanying text. We therefore must consider whether this pending resolution, if adopted by both Houses of Congress, would reopen the ratification of the ERA Resolution.

Congress, of course, could restart the amendment process by re-proposing the ERA to the States. We do not believe, however, that Congress in 2020 may change the terms upon which the 1972 Congress proposed the ERA for the States' consideration. Article V does not expressly or implicitly grant Congress such authority. To the contrary, the text contemplates no

role for Congress in the ratification process after it proposes an amendment. Moreover, such a congressional power finds no support in Supreme Court precedent. While the controlling opinion in *Coleman* suggested that Congress—and not the Court—may judge what constitutes "a reasonable limit of time for ratification," the opinion concerned only those instances "when the limit has not been fixed in advance." 307 U.S. at 454 (opinion of Hughes, C.J.). By its own terms, that opinion does not extend to the circumstances of the ERA, where Congress fixed a deadline before the proposal went to the States and that period has now expired.

A.

Those who believe that the ERA Resolution may be revived argue that Congress's authority under Article V would allow simple majorities in each House to eliminate the earlier ratification deadline and thereby extend the ratification process. *See* 165 Cong. Rec. H8741 (daily ed. Nov. 8, 2019) (statement of Rep. Speier) (identifying Article V as the constitutional authority for House Joint Resolution 79). Relying upon Congress's prior action to extend the ERA deadline, they argue that, since the deadline rests in the proposing clause rather than the amendment's text, it is open to congressional revision at any time, including decades after its expiration. *See, e.g.*, Held, 3 Wm & M. J. Women & L. at 128-29; Astor, *supra* note 10 ("'It's been extended by Congress, so if you can extend it, you can certainly strike it,' said Representative Jackie Speier of California, the lead sponsor of a bipartisan House resolution to repeal the deadline."). They contend not only that this approach would permit the States to ratify the ERA Resolution long

after the deadline, but that the thirty-five ratifications from the 1970s, as well as the two from the 2010s, would count towards the thirty-eight necessary to complete ratification.[21] Despite Congress's having proposed the ERA Resolution to the States with an express deadline, and the state legislatures' having voted upon it with that understanding, this contingent of ERA supporters believes that a concurrent resolution of Congress could void that earlier widespread understanding.

We do not believe that Article V permits that approach. Congress's authority to fix a "definite period for ratification" is "an incident of its power to designate the mode of ratification." *Dillon*, 256 U.S. at 376. Congress may fix such a deadline for a proposed amendment "so that all may know what it is and speculation on what is a reasonable time may be avoided." *Id.* Congress would hardly be setting a "definite period for ratification" if a later Congress could simply revise that judgment, either by reducing, extending, or eliminating the deadline that had been part of the proposal transmitted to the States. While Congress need not set any ratification deadline, once it has done so, "that determination of a time period becomes an integral part of the proposed mode of ratification." *Idaho v. Freeman*, 529 F. Supp. at 1152-53. "Once the proposal has been formulated and sent to the states, the time period could not be changed any

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[21] Notably, these proponents further argue that States may not rescind their earlier ratifications, which means that a resolution would amend the terms of the proposal upon which the state legislatures voted between 1972 and 1977 and purportedly lock them into their earlier votes upon different terms, without any input from, or opportunity for reconsideration by, those legislatures. *See, e.g.*, Held, 3 Wm & M. J. Women & L. at 131-34.

more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa." *Id.* at 1153.

When Congress "propose[s]" an amendment, it also selects the "Mode of Ratification." U.S. Const. art. V. The power to "propose" authorizes Congress to set the terms upon which the amendment will be considered by others, namely the States. *See* 2 Noah Webster, *American Dictionary of the English Language* s.v. PROPOSE (1828) (defining the transitive verb propose: "To offer for consideration, discussion, acceptance or adoption; as, to propose a bill or resolve to a legislative body[.]"); 2 Samuel Johnson, *A Dictionary of the English Language* s.v. To PROPOSE (6th ed. 1785) ("To offer to the consideration."). Once Congress has "propose[d]" an amendment and selected the mode of ratification as "may be proposed by the Congress," the States then determine whether the proposal will be ratified. U.S. Const. art. V. As we recognized in our 1992 opinion concerning the Twenty-Seventh Amendment, "[n]othing in Article V suggests that Congress has any further role. Indeed, the language of Article V strongly suggests the opposite[.]" *Congressional Pay Amendment*, 16 Op. O.L.C. 85, 102 (1992).[22] The power

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22 *See also* 56 Cong. Rec. 446 (1917) (statement of Rep. Lenroot) ("Article V expressly provides that once this proposed amendment has gone from the halls of Congress and rests with the States, when ratified by the States it becomes a part of the Constitution."); Walter Dellinger, *Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 398 (1983) (The Constitution "requires no additional action by Congress or by anyone else after ratification by the final state."); Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 Tex. L. Rev. 875, 899 (1980)

to propose is thus a prospective power, and does not entail any authority to modify the terms of a proposed amendment once it has been offered for the consideration of the States.

Consistent with the Constitution's federal structure, Congress and the state legislatures are "separate legislative bodies representing separate sovereignties and agencies of the people." Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677, 689 (1993). Congress has the responsibility to propose the text of an amendment and the terms under which the States may ratify it, but once it has done so, Congress may not directly regulate the States in the performance of their distinct constitutional responsibilities. *Cf. Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) (recognizing that the Founders made a "decision to withhold from Congress the power to issue orders directly to the States"). If anything, Article V operates in precisely the opposite direction by authorizing the state legislatures themselves to require Congress to call a constitutional convention to propose new amendments.[23] Article V

(arguing that Article V requires only "proposal by Congress" and "ratification by the states," not "final 'acceptance' by Congress").

[23] As noted above, *see supra* note 13, the Founders expressed concern that the national government might block necessary amendments, and they therefore included in Article V a mechanism to ensure that the States could amend the Constitution even over the objection of Congress by allowing two-thirds of the state legislatures to direct Congress to convene a convention to propose such new constitutional amendments. *See Federalist* No. 85, at 593 (Alexander Hamilton) ("By the fifth article of the plan the congress will be obliged, 'on the application of the legislatures

goes on to confirm that Congress lacks any continuing authority over ratification by providing that the States' ratification of what Congress proposed is self-executing. Upon the approval of "three fourths" of the state legislatures or of state ratifying conventions, the amendment "shall be valid to all Intents and Purposes, as Part of th[e] Constitution." U.S. Const. art. V. In other words, the amendment becomes immediately effective, and Article V contemplates no additional role for Congress in modifying the proposal or in accepting or approving ratifications by the States.

For these reasons, constitutional commentators have long recognized that "Congress may not withdraw an amendment once it has been proposed." *Constitutionality of ERA Extension* at 18 n.22; *see also* Lester Bernhardt Orfield, *The Amending of the Federal Constitution* 51-52 (1942) ("The practice has been to regard such a withdrawal as ineffectual. The theory apparently is that each affirmative step in the passage of an amendment is irrevocable."); Charles K. Burdick, *The Law of the American Constitution* 39 (1922) ("It seems safe to assert that Congress, having once submitted a proposed constitutional amendment to the States, cannot thereafter withdraw it from their consideration[.]"); Jameson, *A Treatise on Constitutional Conventions* § 585 at 634 ("[T]he Federal Constitution, from which Congress alone derives its power to submit amendments to the States, does not provide for recalling them upon any event or condition; and . . . the power to recall cannot be considered as involved in that to submit, as necessary to its complete execution. It therefore cannot exist."). Similarly, we

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of two thirds of the states . . . to call a convention for proposing amendments.'").

believe that Article V does not authorize Congress to adjust the terms of an amendment previously proposed to the States, whether it seeks to alter the mode of ratification or the deadline for ratification.

Recognizing congressional authority to modify the terms of a proposed constitutional amendment would present numerous questions that lack answers in the text of the Constitution or the history of past amendments. Could Congress modify a substantive provision within a pending amendment, or is its modification power limited to procedural terms? Could a later Congress hostile to a pending amendment shorten the deadline or declare it expired (and if so, how would such a power differ from a power to withdraw the pending amendment)? Must Congress adopt such changes by the same two-thirds vote of both Houses by which an amendment is proposed, or would a simple majority vote of each House suffice? And must the President sign the joint resolution modifying a proposal, or would the modification become immediately effective without presentment? *Compare* U.S. Const. art. I, § 7, cls. 2-3, *with Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 n.*, 382 (1798). In concluding that Congress could extend the ERA's deadline, our 1977 opinion hazarded answers to all of these questions, while recognizing the absence of any authoritative guidance from the Constitution, caselaw, or historical practice. *See Constitutionality of ERA Extension* at 16-26. We think that the better inference to draw from the Constitution's silence is that there is no modification authority in the first place. If Congress wants to remove a ratification deadline from a proposed amendment, then it must propose an entirely new constitutional amendment, giving the States a new

opportunity to consider that proposal. Article V does not provide for any other supervisory mechanism by which Congress can adjust those terms.

B.

Although the text of Article V does not contemplate any further role for Congress after it has proposed a constitutional amendment, the Supreme Court suggested one exception in *Coleman*, where a majority of justices concluded that, when a proposed amendment contains no deadline, then Congress, not the courts, should have the responsibility for deciding whether the States had ratified the amendment within a reasonable time. In *Coleman*, members of the Kansas legislature had challenged the State's 1937 ratification of the Child Labor Amendment based, in part, on the ground that it was untimely because Congress had proposed the amendment in 1924. *See* 307 U.S. at 436. In addressing that question, the Court fractured on whether *Dillon*'s requirement that an amendment be ratified within a "reasonable time" was a matter subject to judicial resolution. There was no majority opinion, but two separate opinions, joined by a total of seven justices, agreed that where a proposed amendment lacked any deadline, what constituted a "reasonable time" for ratification was a nonjusticiable political question.

Chief Justice Hughes's controlling opinion, which was joined by Justices Stone and Reed and styled as the "Opinion of the Court," concluded that the political branches, and not the Court, should decide whether an amendment had been ratified within a "reasonable time." *See Coleman*, 307 U.S. at 454 (opinion of Hughes, C.J.). In so ruling, he reasoned that "the question of a

reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic," and these conditions were "appropriate for the consideration of the political departments of the Government." *Id.* at 453-54. The Chief Justice advised that Congress should address that question "when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment." *Id.* at 454 (emphasis added). Justice Black, joined by Justices Roberts, Frankfurter, and Douglas, would have gone further and treated any congressional proclamation that an amendment had been ratified as "final" and "'conclusive upon the courts.'" *Id.* at 457 (Black, J., concurring) (quoting *Leser v. Garnett*, 258 U.S. 130, 137 (1922)).[24]

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[24] Justice Black's separate opinion, which would appear to view every question about the adoption of a constitutional amendment as a political question, is difficult to square with *Dillon* and several other cases where the Supreme Court has addressed the validity of congressional action on constitutional amendments. *See, e.g.*, *National Prohibition Cases*, 253 U.S. 350 (1920) (holding that the requirements of Article V were met in connection with the adoption of the Eighteenth Amendment); *Sprague*, 282 U.S. at 716 (rejecting the claim that Congress was obliged to call a convention to propose the Eighteenth Amendment); *Hollingsworth*, 3 U.S. at 381 n.*, 382 (stating that "[t]he negative of the President applies only to the ordinary cases of legislation," and thus holding that the Eleventh Amendment had been "constitutionally adopted"). As then–Circuit Judge John Paul Stevens recognized, "since a majority of the [*Coleman*] Court refused to accept [Justice Black's] position in that case, and since the Court has on several occasions decided questions arising under article V, even in the face of 'political question' contentions, that argument is not one which a District Court is free to accept." *Dyer v. Blair*, 390 F. Supp. 1291, 1299-1300 & n.20 (N.D. Ill. 1975) (Stevens, J.) (footnote omitted). In contrast with cases

Neither of these *Coleman* opinions identified any textual foundation for any power of Congress to "promulgate" an amendment ratified by three-fourths of the States. The dissenting justices criticized the majority opinions for addressing a point that had not been "raised by the parties or by the United States appearing as amicus curiae." *Id.* at 474 (Butler, J., dissenting). And *Coleman*'s conclusion has been frequently criticized as lacking foundation in the text, caselaw, or historical practice of congressional amendments. *See, e.g.*, *Congressional Pay Amendment*, 16 Op. O.L.C. at 99 ("[C]ongressional promulgation is neither required by Article V nor consistent with constitutional practice."); Dellinger, 97 Harv. L. Rev. at 403 ("[T]he *Coleman* Court largely manufactured the anticipated event of congressional promulgation to which it was deferring."); Rees, 58 Tex. L. Rev. at 887 ("*Coleman* was a very bad decision when handed down, and the Court almost certainly would decide it differently today.") (footnote omitted). Nothing in Article V suggests that Congress has any role in promulgating an amendment after it has been ratified by the requisite number of state legislatures or conventions. To the contrary, *Dillon* held that the ratification of the Eighteenth Amendment was "consummated" on the date that the thirty-sixth State had ratified it, and not

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involving the requirements of Article V, the Court has treated questions about whether a State has ratified an amendment as nonjusticiable. *See Leser*, 258 U.S. at 137 (holding a State official's "duly authenticated" acknowledgement of ratification to be "conclusive upon the courts"); *cf. White v. Hart*, 80 U.S. 646, 649 (1871) (suggesting, in dictum, that the Court could not review Congress's decision to require Georgia to ratify the Fourteenth and Fifteenth Amendments as a condition of regaining representation in Congress after the Civil War).

thirteen days later when the Acting Secretary of State had proclaimed it under the statutory predecessor to 1 U.S.C. § 106b. *See Dillon*, 256 U.S. at 376. The Court in *Dillon* did not suggest that there was any need for Congress to promulgate the amendment, and Congress did not purport to do so.

Chief Justice Hughes's opinion would create a strange situation in which state legislatures voting on an amendment would not know until after the fact—and potentially long after the fact—whether a future Congress would conclude that their ratifications had occurred within a "reasonable time." *See Congressional Pay Amendment*, 16 Op. O.L.C. at 95 ("In order to be able to carry out its function in the ratification process, any state that is contemplating ratification must know whether an amendment is in fact pending before it. That is not a matter of degree; the proposed amendment is either pending or not."). Such a scenario would not only be a constitutional anomaly, it would directly conflict with Article V's command that, "when ratified" by three-fourths of the States, an amendment "shall be valid to all Intents and Purposes, as Part of this Constitution." U.S. Const. art. V (emphasis added).[25]

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[25] In addition, the *Coleman* rule would suggest that Congress could block a constitutional amendment that was proposed, over Congress's objection, by a convention called by the States, simply by declaring that the States had not ratified it within a "reasonable time." And because Congress's decision to block the amendment would be a political question, no court could second-guess that determination. That would vitiate the States' affirmative power under Article V to bypass Congress. *See supra* notes 13 and 23.

Chief Justice Hughes's analysis relied upon the role that Congress had played in the "special circumstances" surrounding the ratification of the Fourteenth Amendment during Reconstruction. *Coleman*, 307 U.S. at 449-50. There, Secretary of State George Seward had responded to irregularities in the ratifications of Ohio and New Jersey by issuing a conditional certification of the amendment "if the resolutions of the legislatures of Ohio and New Jersey . . . are to be deemed as remaining in full force and effect." Proclamation No. 11, 15 Stat. 706, 707 (1868). The House and Senate responded by adopting a concurrent resolution declaring the Fourteenth Amendment to be part of the Constitution. *See* Proclamation No. 13, 15 Stat. 708, 709-10 (1868). One week later, the Secretary of State issued a second proclamation "in execution of "the States' ratifications and the concurrent resolution certifying the Fourteenth Amendment. *Id.* at 710-11.

Based on that one episode, Chief Justice Hughes concluded that Congress could determine the timeliness of Kansas's ratification if and when Congress exercised its promulgation authority after three-fourths of the States had submitted ratifications. But that vision of Congress's role in the ratification process was "inconsistent with both the text of Article V of the Constitution and with the bulk of past practice." *Congressional Pay Amendment*, 16 Op. O.L.C. at 102. As Professor Walter Dellinger later observed, "[t]he action of the Reconstruction Congress with respect to the fourteenth amendment was literally unprecedented." Dellinger, 97 Harv. L. Rev. at 400. Congress had played no official role in promulgating the first thirteen amendments or any amendment since. Indeed, only two of the other twenty-six amendments have been the subject of any

congressional action at all, and in neither case was Congress's action deemed necessary to promulgate the amendment.[26] Accordingly, the notion of a freestanding authority of Congress to determine the validity of a constitutional amendment after the States have submitted their ratifications finds little support in the text of Article V, historical practice, or other Supreme Court precedent.

Moreover, to the extent that Chief Justice Hughes's *Coleman* opinion (joined by only two other Justices) represents a precedential holding of the Court, *see Marks v. United States*, 430 U.S. 188, 193 (1977), it still would not authorize Congress to revive the long-expired ERA Resolution. *Coleman* addressed whether an amendment, which had been proposed thirteen years earlier, could still be ratified within a "reasonable time," and the Court held that the political branches,

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[26] The Fifteenth Amendment, like the Fourteenth, was plagued with Reconstruction irregularities, and the Senate initially referred to committee a joint resolution declaring the Amendment to be valid and part of the Constitution, but it later passed a simple resolution requesting the views of the Secretary of State. Cong. Globe, 41st Cong., 2d Sess. 1444, 1653 (1870). The Secretary of State thereafter proclaimed the Fifteenth Amendment on March 30, 1870. *See* Proclamation No. 10, 16 Stat. 1131-32 (1870). The House then adopted its own resolution declaring the amendment's validity, Cong. Globe, 41st Cong., 2d Sess. 5441 (1870), but the Senate never took up the measure. With respect to the Twenty-Seventh Amendment, the Archivist certified the ratification in reliance upon the opinion of this Office. *See* Certification of Amendment to the Constitution of the United States Relating to Compensation of Members of Congress, 57 Fed. Reg. 21187 (1992). The House and the Senate later passed separate versions of concurrent resolutions that would have confirmed the amendment's validity. *See* H.R. Con. Res. 320, 102d Cong. (1992); S. Con. Res. 120, 102d Cong. (1992).

not the Court, must decide that question. *See Coleman*, 307 U.S. at 454 (opinion of Hughes, C.J.). Although Chief Justice Hughes contemplated that, where an amendment's proposal lacked a ratification deadline, Congress could determine timeliness after the States had ratified the amendment, he did not suggest that Congress could nullify a deadline it had previously imposed on the States.

To the contrary, the Chief Justice repeatedly emphasized that Congress had not imposed any deadline on the Child Labor Amendment. His opinion stated that "[n]o limitation of time for ratification is provided in the instant case either in the proposed amendment or in the resolution of submission." *Id.* at 452 (emphasis added). The Court assumed that the question of "what is a reasonable time" may be "an open one when the limit has not been fixed in advance" by Congress. *Id.* at 454 (emphasis added). But it concluded that, even if an amendment would lapse after some period, "it does not follow that, whenever Congress has not exercised that power, 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. The opinion thus repeatedly made clear that the Court was addressing the case where Congress did not include a deadline when proposing the amendment. Nothing in *Coleman* supports the view that when Congress proposed an amendment and included a time limit "in the resolution of submission," *id.* at 452, it would later be free to revise that judgment.

C.

Apart from *Coleman* itself, the proponents of reviving the ERA ratification process rely heavily upon Congress's 1978 decision to modify the ERA's original deadline before it expired. The precedent of the ERA extension, however, is a thin reed. The action reflected something that Congress had never done before in our Nation's history, and the only federal court to review the measure held it unconstitutional. *See Idaho v. Freeman*, 529 F. Supp. at 1153. Although this Office at the time issued an opinion recognizing Congress's authority to extend the deadline, we recognized that it was "difficult to conclude with certainty that [the extension resolution] is or is not constitutional," and that "respectable arguments can be made on both sides of this question." *Constitutionality of ERA Extension* at 1, 7. Since then, this Office has adopted a narrower view of *Coleman* than the one reflected in our 1977 opinion, but even if we adhered to all of the reasoning in the 1977 opinion, we do not believe that opinion would support reviving the ERA Resolution nearly forty years after the deadline expired.

In *Constitutionality of ERA Extension*, this Office concluded that, when the ratification deadline was not placed in the text of the proposed constitutional amendment, but only in the proposing clause, that condition on ratification should be treated as equivalent to a statute subject to congressional modification. *See id.* 7-8, 15-16. The Office relied on *Coleman* as recognizing a congressional authority "years after an amendment has been proposed . . . to determine the reasonableness of the intervening time period" and to modify a deadline placed in the proposing clause. *Id.* at 7-8. At the same time, our opinion admitted that

there was an argument that "Art[icle] V itself can be viewed as envisioning a process whereby Congress proposes an amendment and is divested of any power once the amendment is submitted to the States for ratification," and that, "[a]s suggested by the language of the *Coleman* opinion, the question of a time limit is no longer open once a time limit is imposed by the proposing Congress." *Id.* at 7.

This Office later read Article V to further limit Congress's role in proposing amendments. In *Congressional Pay Amendment,* we rejected the proposition that *Coleman* had recognized an exclusive congressional authority to determine when a constitutional amendment had been validly ratified. *See* 16 Op. O.L.C. at 101-02. In a footnote, our 1992 opinion questioned the 1977 opinion's interpretation of *Coleman*, although we suggested that the extension of the ERA ratification deadline might be viewed as the "'reproposal' of a constitutional amendment" (a purely congressional action) rather than "the certification of a ratified amendment" (an action in which Article V gives Congress no role). *Id.* at 102 n.24. At the same time, we opined that, "[t]o the extent that our earlier opinions suggest that Congress alone must make the determination of the adoption of a constitutional amendment, we reject them today." *Id.* For the reasons discussed above, we also take a narrower view of *Coleman* than the one advanced in our 1977 opinion, and we do not believe that the decision supports the authority of Congress to revise a deadline included in an amendment previously proposed to the States.

Yet even under the reasoning of *Constitutionality of ERA Extension*, there was a distinction between congressional action to extend a pending ratification

deadline and action to revive it after the fact. That opinion concluded that, under *Coleman*, Congress might reconsider whether a seven-year deadline was a "reasonable time" for ratification, but the opinion simultaneously suggested that any such authority could not survive the deadline's expiration. As we observed, "[c]ertainly if a time limit had expired before an intervening Congress had taken action to extend that limit, a strong argument could be made that the only constitutional means of reviving a proposed amendment would be to propose the amendment anew by two-thirds vote of each House and thereby begin the ratification process anew." *Constitutionality of ERA Extension* at 5-6. The Acting Solicitor General effectively took the same view in Supreme Court litigation about the extension of the ERA Resolution, defending the extension until the deadline expired, but then acknowledging that the effort to ratify the ERA had come to an end. *See* Mem. for Adm'r of Gen. Servs. Suggesting Mootness at 3-4, *Nat'l Org. for Women* ("[T]he amendment has failed of adoption. . . . Even if all of 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 38 states can be regarded as having ratified the Amendment.").

The proponents of the 1978 ERA extension also relied upon Congress's general authority to extend statutes of limitations. As Justice Ginsburg explained in 1979, "[i]n form and function, the seven-year provision is a statute of limitations. Generally, statutes of limitations may be extended should the legislature determine that its initial estimate was inaccurate." Ginsburg, 57 Tex. L. Rev. at 927 n.43; *see also House*

Extension Hearings at 129 (testimony of Prof. Ruth Bader Ginsburg) ("It is the general rule that extensions [of] statutes of limitation may be directed by the legislature. . . . If the objective was simply to exclude [stale] claims, an extension of the limitation period for a reasonable time is well-accepted and fully comports with constitutional constraints.").[27] It is true that Congress may extend a limitations period, sometimes even after pending claims have expired. *See Chase Secs. Corp. v. Donaldson*, 325 U.S. 304 (1945); *Campbell v. Holt*, 115 U.S. 620 (1885); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) ("[T]he length and indeed even the very existence of a statute of limitations upon a federal cause of action is entirely subject to congressional control."). But Congress changes the terms of a statute of limitations only by enacting a new law, and that change is adopted through the same constitutionally required procedures as the prior one. *See* U.S. Const. art. I, § 7. There is no constitutional shortcut that would permit revisions without adoption by both Houses and presentment to the President. By the same token, we do not believe that Congress may change the terms upon which an amendment has been proposed to the States except by following the same procedures that were required in connection with the earlier proposal, namely proposal by two-thirds majorities and a new round of consideration by the States.

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[27] We again note that, several months ago, Justice Ginsburg publicly stated her view that the ERA "fell three States short of ratification" and the ratification process must begin anew: "I hope someday [the ERA] will be put back in the political hopper, starting over again, collecting the necessary number of States to ratify it." *See supra* note 1 and accompanying text (emphasis added).

Because Congress and the state legislatures are distinct actors in the constitutional amendment process, the 116th Congress may not revise the terms under which two-thirds of both Houses proposed the ERA Resolution and under which thirty-five state legislatures initially ratified it. Such an action by this Congress would seem tantamount to asking the 116th Congress to override a veto that President Carter had returned during the 92nd Congress, a power this Congress plainly does not have. *See Pocket Veto Case*, 279 U.S. 655, 684-85 (1929) ("[I]t was plainly the object of the [relevant] constitutional provision that there should be a timely return of the bill, which . . . should enable Congress to proceed immediately with its reconsideration [.]" (emphasis added)). Because the 1972 ERA Resolution has lapsed, the only constitutional way for Congress to revive the ERA, should it seek to do so, would be for two-thirds of both Houses of Congress to propose the amendment anew for consideration by the States.

IV.

In view of our foregoing conclusions, it is unnecessary for us to consider whether the earlier ratifications of the ERA by five state legislatures were validly rescinded. *See supra* note 8 and accompanying text. The question of a State's authority to rescind its ratification, before an amendment has been ratified by three-fourths of the States, is a significant one that has not been resolved. *See* Ginsburg, 57 Tex. L. Rev. at 920 (describing the doctrine of rescission as "the most debatable issue" concerning the ERA's legal status shortly after the 1978 extension). In *Constitutionality of ERA Extension*, we concluded that the Constitution does not permit rescissions, even if

Congress had changed the ratification deadline after the State had voted upon the amendment. *See id.* at 28-49; *see also Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment*, 1 Op. O.L.C. 13, 15 (1977).

The district court in *Idaho v. Freeman* disagreed, however, reasoning that *Dillon*'s interpretation of Article V requires a contemporaneous consensus of the people of the United States, and therefore implies that a state legislature, as the representative of one portion of the people, remains free to change its position until three-fourths of the States have agreed in common to support ratification. *See* 529 F. Supp. at 1146-50. The Supreme Court did not reach the question before the extended deadline expired. Although we have disagreed in this opinion with some of the conclusions in the 1977 opinion, we believe that the expiration of the ERA Resolution makes it unnecessary for us to revisit this question. Regardless of the continuing validity of the five States' ratifications, three-fourths of the States did not ratify the amendment before the deadline that Congress set for the ERA Resolution, and therefore, the 1972 version of the ERA has failed of adoption.

V.

For the reasons set forth above, we conclude that the ERA Resolution has expired and is no longer pending before the States. Even if one or more state legislatures were to ratify the 1972 proposal, that action would not complete the ratification of the amendment, and the ERA's adoption could not be certified under 1 U.S.C. § 106b. In addition, we conclude that when Congress uses a proposing clause to impose

a deadline on the States' ratification of a proposed constitutional amendment, that deadline is binding and Congress may not revive the proposal after the deadline's expiration. Accordingly, should Congress now "deem [the ERA] necessary," U.S. Const. art. V, the only constitutional path for amendment would be for two-thirds of both Houses (or a convention sought by two-thirds of the state legislatures) to propose the amendment once more and restart the ratification process among the States, consistent with Article V of the Constitution.

Steven A. Engel
Assistant Attorney General
Office of Legal Counsel

LETTER TO THE HONORABLE CAROLYN MALONEY FROM NATIONAL ARCHIVES (OCTOBER 25, 2012)

NATIONAL ARCHIVES
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The Honorable Carolyn Maloney
U.S. House of Representatives
Washington, DC 20515

Dear Ms. Maloney:

Thank you for your letter requesting information about the ratification status of the Equal Rights Amendment (ERA), and the role played by the National Archives and Records Administration (NARA) in certifying amendments to the Constitution.

You asked for a list of the states that ratified the ERA, and a list of states that either rejected the amendment, or rescinded an earlier ratification vote. I have attached a chart showing this information.

You also asked for legal verification of statements on NARA's website page "The Constitutional Amendment Process" (www.archives.gov/federal-register/constitution). This webpage states that a proposed Amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states, indicating that Congressional action is not needed to

certify that the Amendment has been added to the Constitution. It also states that my certification of the legal sufficiency of ratification documents is final and conclusive, and that a later rescission of a state's ratification is not accepted as valid.

These statements are derived from 1 U.S.C. 106b, which says that: "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, 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." Under the authority granted by this statute, once NARA receives at least 38 state ratifications of a proposed Constitutional Amendment, NARA publishes the amendment along with a certification of the ratifications and it becomes part of the Constitution without further action by the Congress. Once the process in 1 U.S.C. 106b is completed the Amendment becomes part of the Constitution and cannot be rescinded. Another Constitutional Amendment would be needed to abolish the new Amendment.

I hope this information answers your question and is of use to you. If you would like more information or would like to discuss this issue further, please do not hesitate to contact me again.

Sincerely,

/s/ David S. Ferriero
Archivist of the United States