NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 21-5096

COMMONWEALTH OF VIRGINIA, STATE OF ILLINOIS, and STATE OF NEVADA,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee,

STATE OF ALABAMA, *et al.*,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF CONSTITUTIONAL LAW SCHOLARS CATHARINE A. MACKINNON, PAUL BREST, REBECCA BROWN, KIMBERLE CRENSHAW, MARTHA FIELD, LAWRENCE LESSIG, DEBORAH JONES MERRITT, MARTHA MINOW, JESSICA NEUWIRTH, MARGARET JANE RADIN, DOROTHY ROBERTS, DIANE ROSENFELD, JANE S. SCHACTER, GEOFFREY R. STONE, GERALD TORRES, AND LAURENCE H. TRIBE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CERTIFICATE OF COUNSEL

A. Parties And *Amici Curiae*

To counsel's knowledge, except for the *amici curiae* listed below, all parties and intervenors appearing before the district court and in this Court are listed in the Certificate as to Parties, Rulings, and Related Cases filed by the Commonwealth of Virginia, State of Illinois, and State of Nevada as Appellants on June 7, 2021. The *amici* represented in this brief are as follows: Constitutional Law Scholars Catharine A. MacKinnon, Paul Brest, Rebecca Brown, Kimberle Crenshaw, Martha Field, Lawrence Lessig, Deborah Jones Merritt, Martha Minow, Jessica Neuwirth, Margaret Jane Radin, Dorothy Roberts, Diane Rosenfeld, Jane S. Schacter, Geoffrey R. Stone, Gerald Torres, and Laurence H. Tribe.

B. Ruling Under Review

References to the rulings at issue appear in the Certificate as to Parties, Rulings, and Related Cases filed by the Commonwealth of Virginia, State of Illinois, and State of Nevada as Appellants on June 7, 2021.

C. Related Cases

Related cases appear in the Certificate as to Parties, Rulings, and Related Cases filed by the Commonwealth of Virginia, State of Illinois, and State of Nevada as Appellants on June 7, 2021.

D. Statement Regarding Separate Briefing

Under D.C. Circuit Rule 29(d), *amici* Constitutional Law Scholars state that they are aware of other planned *amicus* briefs in support of reversal. The filing of a separate brief is nonetheless necessary because none of the other *amicus* briefs will set forth *amici*'s unique scholarly perspective. This case involves questions of first impression as to the interpretation of the text, structure, and history of Article V. *Amici* Constitutional Law Scholars offer perspectives from their academic research that are distinct from and independent of the interests of other *amici* in this case as well as distinct from other scholarly amici who approach the Constitution with different frameworks and perspectives As a result, this brief offers the Court an additional perspective on the proper interpretation of Article V that is not duplicative of other *amicus* briefs in support of Plaintiffs-Appellants and of reversal.

E. Rule 29(a)(4)(E) Statement

Under Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution to fund the brief's preparation or submission.

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INTEREST OF *AMICI CURIAE*

Amici curiae are distinguished scholars of constitutional law and the law of equality. Collectively, they have authored many books and articles relevant to the issues in this case. Because this case involves questions of first impression in the interpretation of the text, structure, and history of Article V, *amici* write to offer the Court the assistance of their scholarly perspectives on this issue. Amici's titles and scholarly affiliations are listed below for purposes of identification only:

Catharine A. MacKinnon is the Elizabeth A. Long Professor of Law at Michigan Law School at the University of Michigan and the long-term James Barr Ames Visiting Professor of Law at Harvard Law School.

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Laurence H. Tribe is the Carl M. Loeb University Professor and Professor of Constitutional Law Emeritus at Harvard Law School.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court held that the ratification of the Equal Rights Amendment ("ERA") by three-fourths of the States came too late because the plaintiff States ratified after expiration of a deadline Congress had set and extended. But that is not so, and nothing in the text and structure of Article V or any prior decision requires that conclusion. To the contrary, the textual requirements of ratification have been met, and this Court should reverse the decision below and hold that the congressional deadline does not preclude the Archivist's publication and certification of the ERA as the Twenty-Eighth Amendment to the U.S. Constitution.

As *amici* explain, they believe that the U.S. Constitution, the oldest written constitution in the world, should include an explicit guarantee of sex equality, and they support reversal because (i) this case presents a justiciable legal question, (ii) the congressional deadline here does not operate to bar recognition of the ERA as validly part of the Constitution under Article V, (iii) Article V contains no implied requirement that ratification occur within a particular time period, and (iv) Article V contains no implied basis to enforce purported state rescissions of prior ratifications.[1]

[1] *Amici* express no views on whether (i) the plaintiff States have standing, (ii) the Archivist has a statutory duty to publish and certify, or (iii) a writ of mandamus is the appropriate relief.

In reversing, however, this Court need not go so far as to hold that Congress acted unconstitutionally or somehow *ultra vires* in setting forth the seven-year deadline and three-year extension in the first place. All it need hold is that those deadlines cannot be enforced to bar an otherwise valid ratification. Congress is free to specify a desired time period for ratification and to extend or lift that deadline, so long as the deadline is not incorporated in the text of the amendment that is sent to the States. But such non-textual deadlines are best understood as advisory or hortatory rather than binding on the States or judicially enforceable. If the requisite number of States ratify within such time period, the amendment is valid. But if they do not, it does not follow that the amendment is dead.

This qualification is important because proposed joint resolutions to remove the prior ERA ratification deadline are pending in both chambers of Congress.[2] And if both Houses agree on either resolution, that would provide an alternative path to removing any doubt that the ERA is valid for all intents and purposes and part of the Constitution. Nothing in *amici*'s arguments here should be construed to question Congress's power to follow this alternative path to recognizing the ERA as a valid part of our Constitution.

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[2] *See* S.J. Res. 1, 117th Cong. (2021) (sponsored and co-sponsored by Senators Cardin (D-MD), Murkowski (R-AK), Collins (R-ME), Casey (D-PA), and King (I-ME)) *and* H.R.J. Res. 17, 117th Cong. (2021) (sponsored by Representatives Speier (D-CA) and Reed (R-NY), among others, and passed in the House by majority vote on March 17, 2021).

ARGUMENT

I. THE U.S. CONSTITUTION SHOULD INCLUDE AN EXPLICIT GUARANTEE OF EQUALITY ON THE BASIS OF SEX

Until now, the U.S. Constitution, the world's oldest written constitution, has been the only major written constitution in the world that includes a bill of rights but lacks a provision explicitly declaring the equality of the sexes. The ERA, as proposed by Congress in 1972 and now ratified by three-quarters of the States, provides in section 1 that "[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," and in section 2 that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." It thus aligns the United States with other industrialized democracies whose constitutions have long provided for equality on the basis of sex.

For example, since 1946, the Constitution of France has provided: "The law guarantees to the woman, in all spheres, rights equal to those of the man." Fr. Const. (Preamble to 1946 Constitution) ¶ 3. The German Constitution provides: "Men and women have equal rights," and "Nobody shall be prejudiced or favored because of their sex." Ger. Const. ch. I, art. 3. The Constitution of India has stated since 1949: "The State shall not discriminate against any citizen on grounds only of . . . sex." India Const. Art. 15, § 1. Among newer constitutions, Canada's states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law . . . without discrimination based on . . . sex." Can.

Const. pt. I § 15(1). And South Africa's provides that neither the state nor any person may "unfairly discriminate directly or indirectly against anyone on . . . grounds[] including . . . gender, sex, pregnancy, [or] marital status." S. Afr. Const. ch. 2, § 9.[3] Moreover, every new constitution adopted or amended since 2000 has constitutionalized sex equality.[4]

The ERA is the result of extraordinary bipartisan cooperation. First authored by Alice Paul and Crystal Eastman after ratification of the Nineteenth Amendment in 1920, it was introduced in Congress in 1923.[5] In the 1960s and 70s, Republican Congresswomen Florence Dwyer (NJ), Charlotte Reid (IL), Margaret Heckler (MA), and Catherine Dean May (WA) worked across the aisle with Democratic Congresswomen Martha Griffiths (MI), Bella Abzug (NY), Patsy Mink (HI), Shirley

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[3] *See* Catharine A. MacKinnon, *Gender in Constitutions*, *in* OXFORD HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW 7-10 (Michel Rosenfeld and András Sajó, eds., Oxford Univ. Press, 2012); Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 Cal. L. Rev. 735, 735 (2002).

[4] *See, e.g.*, Lux. Const. art. 11(2) (amending 1868 constitution in 2006 to provide that "[w]omen and men are equal in rights and duties"); Nepal Const. pt. 3 ¶ 18 (forbidding discrimination on the basis of sex, marital status, or pregnancy); Colom. Const. art. 43 (guaranteeing that "[w]omen and men have equal rights and opportunities"); Zim. Const. ch. 4 pt. 2 ¶ 56(2) (guaranteeing women the right to equal treatment); JODY HEYMANN ET AL., ADVANCING EQUALITY: HOW CONSTITUTIONAL RIGHTS CAN MAKE A DIFFERENCE WORLDWIDE, 49-55 (2020).

[5] *See* JULIE C. SUK, WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT, 28 (2020) ("Suk"); 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, 115-16 (1997) ("Held").

Chisholm (NY), Louise Day Hicks (MA), and Edith Green (OR) to advocate for the ERA, with Congresswomen Chisholm and Mink—the first women of color to serve in Congress—articulating the intersectional inequalities of race and sex experienced by women of color that the ERA would redress.[6]

The ratification process was similarly bipartisan. For instance, Indiana's ratification in 1977 was a result of a bipartisan coalition, Hoosiers for the Equal Rights Amendment; ten of the 30 states that ratified the ERA within the first year of its proposal had legislatures controlled by Republican lawmakers; in another five, Republicans controlled or were tied for control in one house; and plaintiffs Illinois and Virginia voted to ratify the ERA on bipartisan votes.[7]

Nothing in the Constitution requires that Congress and the States must go through this arduous and hard-fought proposal and ratification process ***twice***. Even where there is a strong consensus, getting an amendment proposed and ratified is a complex and difficult process that requires time, bargaining, and collective mobilization. For the reasons below, the ERA need not start over again from scratch.

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[6] Suk at 66-108.

[7] *See Hoosiers for The Equal Rights Amendment (HERA), 1973-1976*, Indiana Historical Society (June 3, 1993), https://indianahistory.org/wp-content/uploads/hoosiers-for-the-equal-rights-amendment-hera-1973.pdf; Alex Cohen & John F. Kowal, *Is the GOP Warming Up to the Equal Rights Amendment?*, Brennan Ctr. for J. (Mar. 19, 2019), https://www.brennancenter.org/our-work/analysis-opinion/gop-warming-equal-rights-amendment.

II. THE ERA HAS BEEN RATIFIED UNDER ARTICLE V NOTWITHSTANDING THE CONGRESSIONAL DEADLINE

A. This Case Presents A Justiciable Legal Question

Contrary to the Archivist's assertion below [8] and the opinion of other distinguished constitutional scholars with whom *amici* respectfully disagree,[9] the question whether the Archivist must certify and publish the ERA is not a political question committed to the exclusive and unreviewable discretion of Congress. While the Plaintiff States (Virginia, Illinois, and Nevada) and the Intervenor States (Alabama, Louisiana, Nebraska, South Dakota, and Tennessee) do not agree on much, they agree that this case presents a justiciable legal question.[10] And rightly so, as the district court correctly ruled. *See Commonwealth of Virginia v. Ferriero*, 525 F. Supp. 3d 36, 49-54 (D.D.C. 2021) ("*Ferriero*").

First, *Coleman v. Miller*, 307 U.S. 433 (1939), did ***not*** hold that all timing questions with respect to the ratification of constitutional amendments are

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[8] Memorandum in Support of Defendant's Motion to Dismiss Plaintiffs' Complaint, Dkt. No. 29-1 at 12-15. All docket numbers cited herein refer to the docket below in *Commonwealth of Virginia et al v. Ferreiro*, No. 1:20-cv-00242-RC (D.D.C.).

[9] Brief of *Amici Curiae* Constitutional Law Professors in Support of Neither Party, Dkt. No. 48-1 at 6-10.

[10] Plaintiff States' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, Dkt. No. 37 at 11-16; Intervenors' Motion for Summary Judgment and Supporting Memorandum of Points and Authorities, Dkt. No. 74 at 27-30.

nonjusticiable political questions. The political-question language in *Coleman* was arguably *dicta* and in any event was narrowly framed so as to be inapposite here. The four justices who would have treated *all* Article V questions as nonjusticiable, *see id.* at 458-59 (Black, J., concurring), did not command a majority. The district court thus correctly distinguished *Coleman* as inapplicable here. *Ferreiro*, 525 F. Supp. 3d at 50-51.

To recap, the plaintiff state legislators in *Coleman* opposed the Child Labor Amendment. *Coleman*, 307 U.S. at 435-36. The Kansas legislature voted to reject the amendment in 1924 but voted 13 years later to ratify, with the Lieutenant Governor casting the tie-breaking vote in the state senate. *Id.* The plaintiffs challenged the ratification, contending that the Lieutenant Governor's tie-break was not legislative action, that the prior rejection was final and conclusive, and that the 13 years that had elapsed since the amendment's proposal was an unreasonably long ratification period under Article V. *Id.* at 436. The Kansas Supreme Court rejected the challenge and held the ratification valid. *Id.* at 437.

A fractured U.S. Supreme Court affirmed, with a three-judge plurality setting forth the opinion of the Court. On the lieutenant-governor objection, the opinion reached no ruling. As to the prior-rejection question, the opinion deemed it a "political question" but also appeared to decide it on the merits, noting that "Article V, speaking solely of ratification, contains no provision as to rejection" and thus

provided no basis to deny the ratification on this ground. *Id.* at 450. Whether the nonjusticiability of prior state rejections is holding or *dicta*, it is irrelevant here, where no prior state rejection is at issue. As to the issue of what constitutes a reasonable time period for ratification, *Coleman* deemed it nonjusticiable, but only in the ***absence*** of any congressional ratification deadline. *Id.* at 452-54. The Court conceded, as it had to under *Dillon v. Gloss*, 256 U.S. 368, 375-76 (1921), that where, as here, the question is what force a congressional deadline may have, that question is a justiciable legal one.

Second, as the district court again correctly observed, the Supreme Court and lower courts have repeatedly treated questions about the Article V ratification process as justiciable legal questions. *See Ferreiro*, 525 F. Supp. 3d at 50 (collecting authorities).[11]

Third, this case satisfies all the other justiciability factors set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962), for the reasons well explained by the district court. *See Ferreiro*, 525 F. Supp. 3d at 51-54. Indeed, this case presents a classic justiciable question about the boundaries between state and federal authority of a kind that courts have routinely adjudicated since the Rehnquist Court. *See, e.g.*,

[11] *See also* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 403-05 (1983) ("Dellinger"); Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 Tex. L. Rev. 919, 943-45 (1979).

United States v. Morrison, 529 U.S. 598 (2000) (limits of congressional authority to regulate commerce and enforce civil rights); *Printz v. United States*, 521 U.S. 898 (1997) (limits of federal power to commandeer the States); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (limits of federal power to abrogate state sovereign immunity). If anything, the question here—whether the Archivist must publish the ERA in light of state ratification by 38 States—is ***more*** clearly susceptible to judicial resolution because it turns on interpreting the plain text of Article V, and not on applying vaguer implied structural postulates of federalism.

Finally, nothing in *amici*'s argument that the question here is justiciable precludes a possible finding that ***other*** amendment ratification questions are political questions that should be left to the exclusive and unreviewable discretion of Congress. For example, the Office of Legal Counsel opined in 1977 that Congress may lift or extend a ratification deadline by majority vote of both Houses.[12] If Congress were to act on currently pending resolutions that would lift the prior ERA ratification deadlines (*see supra* at 4 n.2), there might be strong arguments that courts should not be able to review challenges to such a measure on prudential separation-of-powers grounds, lest such adjudication inhibit Congress's freedom to overrule the

[12] *See* Memo to Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Att'y Gen., Off. L. Counsel, *Re: Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment* (Oct. 31, 1977).

judiciary's own decisions through the amendment process (as it did by proposing the Fourteenth, Sixteenth, Nineteenth, and Twenty-Fourth Amendments).[13] Finding justiciability here does not foreclose that possibility.

B. The Congressional Deadline Does Not Bar The Archivist From Publishing And Certifying The ERA

While the district court was right on justiciability, it was wrong on the merits. The district court erred in determining that the congressional deadline bars the Archivist from publishing and certifying the ERA. The text, structure and history of Article V refute that conclusion.

1. The Text Of Article V Provides That An Amendment Is Validly Part Of The Constitution When Ratified

Article V provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress….

U.S. Const. Art. V. The language of Article V contemplates exclusively the two steps of proposal and ratification; it does not provide for a third step by which

[13] *See* Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 444 (1983) (urging caution about judicial review in the amendment context where it might ultimately involve the Supreme Court in "pass[ing] on the legitimacy of actions taken to correct perceived flaws in its own jurisprudence").

Congress or an executive branch officer may effectively veto an amendment. The language of Article V is also mandatory: an amendment to the Constitution "***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" (emphasis added). Nor does the text of Article V envision a role for an executive branch officer to assert his discretion regarding the validity of the amendment. The text requires no additional action by Congress or by anyone else after ratification by the final State.

Moreover, the text of Article V is silent on any time period for ratification or congressional authority to set one. Of course, the Framers knew how to impose deadlines or otherwise allow for time limits when they wished to. *See, e.g.*, U.S. Const. Art. I, Sec. 7 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law…"); Art. I, Sec. 2 (census every ten tears); Art. I, Sec. 3 (senatorial term limit of six years); Art. I, Sec. 8 (military budget term of two years); Art. I, Sec 8. (copyright term will be set); Art. II, Sec. 1 (presidential term of four years). But the Framers made no mention of time limits or return deadlines in Article V.

In rejecting this plain textual reading of Article V, the district court misplaced reliance on *Dillon*, 256 U.S. 368, which it characterized as holding broadly that Congress can attach a deadline to a proposed amendment that is binding on the States, *Ferriero*, 525 F. Supp. at 52-53. But *Dillon* is inapposite, because it found such

power only where the time limit was set forth in the ***text*** of the proposed amendment that was itself sent to the States for ratification. *Dillon*, 256 U.S. at 375-76. Here, in sharp contrast, the deadline is set forth in a ***preamble***, and this difference is far from immaterial. The States have the opportunity to vote on any deadline in the text of an amendment when they decide whether to ratify or reject. They thus bind themselves to the deadline constraint upon their ratification vote. They vote to ratify only on condition their sister States do so in adequate numbers by the deadline. But the States never vote on or bind themselves to a deadline set forth in the proposing language of a congressional preamble, as distinct from the text of the amendment.

Nothing else in the text of Article V suggests the primacy of Congress over the States in making an amendment a valid part of the Constitution. In particular, any notion that there is a necessary "'third step'—promulgation by Congress—has no foundation in the text of the Constitution" and has been widely discredited.[14]

[14] Dellinger at 398; *see* Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 Const. Comment. 101, 105 (1994) (finding "there is, of course, no textual warrant whatsoever for the 'promulgatory' function of Congress" in Article V) ("Levinson"); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677, 723 (1993) ("Plenary congressional power over the amendment process simply cannot be squared with the text of Article V or with basic principles of limited constitutional government.").

2. The Structure Of Article V Confirms States' Co-Equal Role In The Amendment Process

The structure of Article V likewise disfavors any preclusive effect for ratification deadlines other than those embedded in the text of proposed amendments. Unlike provisions that grant certain powers to the States only subject to ultimate congressional veto, *see, e.g.*, Art. I, Sec. 4 (Time, Place, and Manner of Elections Clause); Art. I, Sec. 10 (import and export duties), Article V expressly contemplates a ***co-equal*** role for Congress and the States, assigning them each separate tasks in the amendment process. As James Madison noted in the Federalist Papers, the amendment power is neither "wholly national, nor wholly federal." THE FEDERALIST No. 39 (Madison).

Thus a congressionally proposed amendment becomes "valid, for all intents and purposes" when three fourths of the States ratify, and the States may themselves propose an amendment by the alternative mechanism of requesting a call for a constitutional conventions. Both these aspects of Article V were meant to assure Anti-federalists opposed to the Constitution that they "may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority." THE FEDERALIST No. 85 (Alexander Hamilton).[15]

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[15] *See* Danaya C. Wright, "*Great Variety Of Relevant Conditions, Political, Social And Economic": The Constitutionality Of Congressional Deadlines On Amendment Proposals Under Article V*, 28 Wm. & Mary Bill Rts. J. 45, 60 (2019) ("Wright, *Great Variety*").

3. Congressional History And Practice Do Not Warrant Enforcing A Non-Textual Ratification Deadline

The district court acknowledged that Article V confers no deadline-setting power on Congress and that the force of a deadline that appears in the preamble to rather than the text of a proposed amendment is a "question of first impression." *Ferriero*, 525 F. Supp. at 57. In answering that question, however, it misplaced reliance on the recent history of Congress's use of such a device, *id*. at 57-59.

First, there is no basis to assume that Congress contemplated the constitutional implications of shifting from textual to preambular ratification deadlines beginning with the Twenty-Third Amendment as proposed in 1960. The evidence suggests Congress wanted to avoid "cluttering up" the Constitution.[16] But there is no evidence this practice was designed to bind the States in the same manner as a deadline the States themselves could vote upon. When Congress inserted a time limit into the proposing language of the ERA, some members recognized that it did so "cavalierly."[17]

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[16] *See Equal Rights Amendment Extension Hearings, 1977-78: Hearings on H.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong. 35, 1st. & 2d Sess. (1977-78) (remarks of Rep. Butler); *id*. at 104 (statement of Erwin N. Griswold); *see also* 124 Cong. Rec. 34,284-90 (1978) (remarks of Sen. Garn).

[17] 124 Cong. Rec. S16936 (Oct. 3, 1978) (remarks of Sen. Bayh).

Second, the history sheds no light on the ***enforceability*** of preambular ratification time limits. Until now, neither Congress nor any State nor any other party has sought to enforce a such a deadline by contesting subsequent ratifications. All other amendments with proposing-language time limits (the Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments) were ratified by three-quarters of the States prior to their deadlines. When Congress proposed the D.C. Representation Amendment in 1978, it abandoned the practice of proposing-language time limits and returned to textual time limits.[18] And when the thirty-eighth State ratified the Twenty-Seventh Amendment (congressional pay raise) fully 203 years after the First Congress proposed it, the Archivist certified it effective as of that day and Congress simply "concurred" in that act two days later without any hearings.[19] There is thus no basis in the past five decades of amendment history to suppose that a congressional deadline is enforceable so as to deny recognition to the actions of subsequently ratifying States.

For all the above reasons, *amici* respectfully submit that the district court erred on the merits of the congressional deadline question.

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[18] Wright, *Great Variety* at 68-69.

[19] The Twenty-Seventh Amendment was ratified by Michigan, on May 7, 1992, and on May 18, 1992, Archivist Don Wilson certified the Amendment. 138 Cong. Rec. 11,656 (May 19, 1992); 57 Fed. Reg. 21,187 (May 19, 1992).

C. Article V Contains No Implied Contemporaneity Requirement

While the district court did not reach the issue, *Ferriero*, 525 F. Supp. at 61, the Intervening States have urged that Article V contains an implied requirement that Congress propose and the States ratify an amendment within a reasonably contemporaneous time period, and thus that—independent of the congressional deadline—the Illinois, Nevada, and Virginia ratifications came too late.[20] That argument is incorrect, and provides no alternative ground for affirmance here. *Amici* respectfully disagree with recent scholarship arguing that Article V imposes an implied reasonable time limit,[21] and submit that the better view is that "no speedy ratification rule may be extracted from Article V's text, structure or history."[22]

First, the well-accepted ratification of the Twenty-Seventh Amendment 203 years after it was first proposed by the First Congress belies any such notion. Congress proposed this amendment to limit congressional pay raises initially as the Second Amendment in 1789, but only six States ratified it before 1800. When (after a long hiatus and revival) Michigan became the thirty-eighth State to ratify in 1992, neither Congress, the Archivist, the Department of Justice, nor the courts took any

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[20] Intervenors' Motion, Dkt. No. 74 at 16-23.

[21] *See, e.g.*, Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 Harv. L. Rev. 1220 (2019).

[22] Laurence H. Tribe, *The 27th Amendment Joins the Constitution*, Wall St. J., May 13, 1992, at A15 ("Congress has no power to subject a validly-ratified amendment to "a veto for tardiness.").

action to suggest that the new Twenty-Seventh Amendment was not validly part of the Constitution.[23]

To the contrary, the Office of Legal Counsel opined that there is no implied Article V requirement of contemporaneous ratification,[24] concluding that "Article V contains no time limit not stated in its text," that "the Twenty-Seventh Amendment—although well aged, is not stale," and that any contemporaneity requirement would "introduce[] so much uncertainty as to make the ratification process unworkable."[25] Congress did not hold a single hearing to consider whether the ratification came too late before voting almost unanimously to "concur" in the Archivist's certification.[26] Nor has the judicial branch ever questioned the validity of the Twenty-Seventh Amendment. *See, e.g.*, *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994); *Schaffer v. Clinton*, 240 F.3d 878 (10th Cir. 2001). This history fatally undermines the *dicta* in *Dillon* that ratifications must occur within a

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[23] *See* Held at 124; Levinson at 104-08.

[24] Memo. to C. Boyden Gray, Counsel to the President, from Timothy E. Flanigan, Assistant Att'y Gen., Off. L. Counsel, *Re: Congressional Pay Amendment* (Nov. 2, 1992).

[25] *Id.* at 97, 95.

[26] *See Unfinished Constitutional Business*, N.Y. Times, May 24, 1992, https://www.nytimes.com/1992/05/24/opinion/topics-of-the-times-unfinished-constitutional-business.html ("Congress has rushed to bless the 27th Amendment.").

reasonable time period and that it would be "quite untenable" for one of the remaining 1789 amendments to still be pending. *See Dillon*, 256 U.S. at 375.

Second, the notion that proposed amendments must undergo speedy ratification conflicts with the nature of our Constitution, which is "intended to endure for ages to come," *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819), and not to encapsulate fleeting political preferences better suited to legislation that can be easily repealed. On this view, there is nothing wrong with deepening a consensus over time before finalizing an amendment. Of course, some originalists might object that it is harder to discern the "original" public meaning of a constitutional provision when the ratification window is many years long.[27] But a long ratification period should not trouble either textualists, common-law constitutionalists, or new originalists who admit that constitutional meaning is not rigidly bound by the political, economic, or social conditions at the time of enactment.

Moreover, it would be incongruous to require that the Peoples of the several States must act contemporaneously with Congress and each other to amend the Constitution when judges are permitted to interpret the Constitution and its

[27] *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation Of Legal Texts* 81 (2012) ("The Constitution is a written instrument. As such its meaning does not alter. That which it meant *when adopted* it means now.") (emphasis added) (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905)).

amendments decades and centuries after the relevant text was written. The Court is unconstrained by interpretive notions of contemporaneity when it interprets "persons, houses, papers, [or] effects" under the Fourth Amendment, ratified in 1791, to include cell phone location data, *see Carpenter v. United States*, 138 S. Ct. 2206, 2213-14 (2018), or the Fourteenth Amendment, ratified in 1868, to protect the right of same-sex couples to marry, *see Obergefell v. Hodges*, 576 U.S. 644 (2015). It is difficult to see why ratification requires a different constraint.

Third, if the Court were to reach the question whether the ERA was ratified within a reasonable time period as somehow implied in Article V, it would need to confront the language in *Coleman* deeming that question nonjusticiable. While *Dillon* had stated that amendments ought to be "sufficiently contemporaneous" to "reflect the will of the people in all sections at relatively the same period," 256 U.S. at 375, *Coleman* concluded that "whether the amendment had been adopted within a reasonable time [is] not subject to review by the courts," *Coleman*, 307 U.S. at 454. The opinion of the Court 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, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice." *Id.* at 453. Thus, unlike the justiciable question here of whether a particular congressional deadline precludes recognition of an otherwise valid ratification, analysis of "contemporaneity"

involves a "lack of judicially discoverable and manageable standards," *Baker*, 369 U.S. at 217, that raises prudential political question concerns.

D. Article V Contains No Implied Authority For State Rescissions

While the district court again did not reach the question, *Ferriero*, 525 F. Supp. at 61, the Intervenor States argued below that the purported rescissions by five States of their prior ratifications of the ERA provide an independent basis for the Archivist to decline to publish and certify the amendment—whether or not the Virginia, Illinois, and Nevada ratifications are valid.[28] Again, this argument is incorrect and provides no alternative ground for affirmance.

First, the text of Article V is silent on rescission: it provides for States' ratification of proposed amendments and does not mention rescinding a ratification, much less provide any procedural mechanism for such rescission.[29] This strongly suggests that ratification is a one-way ratchet.

Second, no state rescission has ever been judicially recognized, and Congress has historically rejected legislative efforts to recognize purported state rescissions, including of the Fourteenth, Fifteenth, and Nineteenth Amendments. *See Coleman*,

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[28] Intervenors' Motion, Dkt. No. 74 at 23-26.

[29] *See* Held at 131 ("Article V of the Constitution addresses only the positive terms of ratification of a proposed amendment, thus giving the states the power to ratify proposed amendments, but not the power to reject proposed amendments.").

307 U.S. at 448-49.[30] Even the Attorneys General of States that purported to rescind their ERA ratifications have opined that the rescissions would be legal nullities.[31]

Third, the recognition of rescissions would make the ratification process unworkable as a practical matter, or in other words, "an atrocious way to run a constitution."[32] Rolling attempts to rescind create uncertainty and treat amendments as something less than permanent alterations of our founding document. Nor should courts create a judicially implied right to rescission, as it would give rise to impossible line-drawing and finality problems. Surely a State may not withdraw the ratification of an amendment that already has received the support of three-quarters of the States and been certified and published; such a result would undermine the stability of the Constitution. And any line drawn before the thirty-eighth State ratifies would create inequality among States based on the fortuity of when they ratify.

For these reasons, this Court should reject the rescission argument if reached.

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[30] *See also* Dellinger at 421; Danaya C. Wright, *"An Atrocious Way to Run A Constitution": The Destabilizing Effects of Constitutional Amendment Rescissions*, 59 Duq. L. Rev. 12, 48-51 (2021).

[31] *See* Brenda Feigen Fasteau & Marc Feigen Fasteau, *May a State Legislature Rescind Its Ratification of a Pending Constitutional Amendment*, 1 Harv. Women's L.J. 41 (1978) (quoting the former Attorney General of Intervenor Tennessee concluding that ratification "is irrevocable").

[32] Testimony of William Van Alstyne, *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. at 138 (1977).

CONCLUSION

This Court should reverse the judgment of the district court and recognize the ERA has been validly ratified under Article V as an amendment to the Constitution, expanding our equality and enhancing our democracy.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that this brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirement of Rule 32(a)(6) because it is written in 14-point Times New Roman font, a proportionately spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure Rule 29(a)(5) (referencing Federal Rule of Appellate Procedure Rule 32(a)(7)(B)) because it contains 5,708 words, excluding the parts exempted from length limits by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I certify that, on January 10, 2022, I electronically filed the foregoing brief with the Clerk of the Court by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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