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Education. Empowerment. Equality.

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WHY THE EQUAL RIGHTS AMENDMENT REMAINS LEGALLY VIABLE AND RESCISSIONS ARE INVALID

THE EQUAL RIGHTS AMENDMENT

Section 1: Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3: This amendment shall take effect two years after the date of ratification.

The Equal Rights Amendment to the U.S. Constitution, first proposed by Alice Paul in 1923, was passed by the Senate and the House of Representatives on March 22, 1972, by the required two-thirds majority and was sent to the states for ratification. An original seven-year deadline in the proposing clause was later extended by Congress to June 30, 1982. At that date, only 35 of the necessary 38 of the states had ratified the ERA. It has not yet become part of the Constitution.

The ERA is still legally viable and properly before the states.

In the 1990s, supporters began to advocate for passage of ERA ratification bills in the 15 so-called “unratified” states (Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia). Between 1995 and 2019, ERA ratification bills were introduced in one or more legislative sessions in 14 of these states (all except Alabama).

Political activity in the unratified states is the result of a “three-state strategy” for ERA ratification, which was developed after the 27th (“Madison”) Amendment was added to the Constitution in 1992, more than 203 years after its 1789 passage by Congress. Acceptance of that uniquely long ratification period as sufficiently contemporaneous has led to legal analysis contending that the ERA’s existing 35 state ratifications remain legally viable and it is still properly before the states for consideration. The time limit on ERA ratification is open to change, as Congress demonstrated in extending the original deadline, and precedent with the 14th, 15th, and 19th Amendments shows that rescissions or other legislative retractions of ratifications have never been accepted as valid.

This untrodden constitutional ground is explored by Allison Held *et al.* in “The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States,” *William & Mary Journal of Women and the Law*, Spring 1997. The Library of Congress’s Congressional Research Service discussed this analysis in their 1996, 2014, and 2017 reports on the status of

ERA ratification and concluded that acceptance of the Madison Amendment does have implications for the legal viability of the ERA's three-state strategy.

On March 22, 2017, 45 years to the day after Congress sent the amendment to the states for ratification, Nevada became the 36th state to ratify the ERA. On May 30, 2018, Illinois became the 37th state to ratify. In 2019, legislatures in several other unratified states may provide the 38th approval necessary to put the ERA into the Constitution.

No previous efforts to withdraw a state ratification by rescission or other means have ever been accepted as valid.

Five states – Idaho, Kentucky, Nebraska, Tennessee, and South Dakota – have attempted to withdraw their approval of the Equal Rights Amendment after first ratifying it. However, based on precedent, case law, and statutory language, a state's vote to rescind or otherwise withdraw its ratification of a constitutional amendment has never been accepted as valid.

During the ratification process for the 14th Amendment, New Jersey and Ohio voted to rescind their ratifications after first voting yes, but they were both included in the published list of states approving the amendment in 1868. New York retracted its ratification of the 15th Amendment before the last necessary state ratified in 1870, but it was listed as one of the ratifying states.

In *Leser v. Garnett* (1922), the Supreme Court upheld the constitutionality of the 19th Amendment with language supporting the claim that a state's ratification of a federal amendment ends its ability to further participate in that amendment's ratification process:

“The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed amendment was ratified by the Legislatures of 36 states, and that it “has become valid to all intents and purposes as a part of the Constitution of the United States.” As the Legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.”

In *The Story of the Constitution* (1937), the United States Constitution Sesquicentennial Commission explained that:

“...an amendment was in effect on the day when the legislature of the last necessary State ratified. Such ratification is entirely apart from State regulations respecting the passage of laws or resolutions.... Approval or veto of such ratification by the Governor is of no account either as respects the date or the legality of the sanction. The rule that ratification once made may not be withdrawn has been applied in all cases; though a legislature that has rejected may later approve, and this change has been made in the consideration of several amendments.”

A 1981 court decision (*Idaho v. Freeman*) in the U.S. District Court of the District of Idaho is sometimes inaccurately cited as support for the claim that the ERA time extension was invalid and rescission votes are permissible. This decision was appealed to the Supreme Court, which

did not hear arguments on the appeal before the June 30, 1982 ratification deadline passed. As the Congressional Quarterly's 1982 *CQ Almanac* explained:

“Not only did the justices dismiss the cases as moot, they also vacated the lower court decision [*Idaho v. Freeman*], wiping it off the law books and rendering it useless as a precedent, a partial victory for those challenging it.”

In an October 25, 2012 letter to Congresswoman Carolyn Maloney (NY), longtime lead sponsor of the traditional ERA ratification bill in the House of Representatives, Archivist of the United States David Ferriero wrote:

“[The National Archives and Records Administration's] website page “The Constitutional Amendment Process” (www.archives.gov/federal-register/constitution) ... 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 [the U.S. Archivist's] 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.”

Bills in Congress support implementation of the three-state strategy for ERA ratification.

Since 1994, bills have been introduced in each session of Congress to support the premise that ERA ratification will be accomplished when an additional three states beyond the original 35 ratify it.

In the 116th Congress (2019-2020),) companion bills *S.J. Res. 6*, co-sponsored by Senators Benjamin Cardin (D-MD) and Lisa Murkowski (R-AK), and *H.J. Res. 53*, sponsored by Representative Jackie Speier (CA), aim to maintain the legal viability of the 35 state ratifications achieved before the 1982 deadline. They resolve

That notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment [the ERA] proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the Constitution whenever ratified by the legislatures of three-fourths of the several States.

For further information, see www.equalrightsamendment.org and www.eracoalition.org.