

**REPORT TO BOARD OF DIRECTORS,
NATIONAL ORGANIZATION FOR WOMEN**

On

COMMONWEALTH OF VIRGINIA V. FERRIERO

June 4, 2020

As you are certainly aware, the Commonwealth of Virginia recently became the thirty-eighth state to ratify the Equal Rights Amendment to the Constitution of the United States since the amendment was submitted to the states for ratification in 1972. Article V of the Constitution provides that a proposed amendment is ratified, and therefore becomes a part of our Nation's fundamental governing law, when approved by three quarters of the states. The Equal Rights Amendment would amend the Constitution to say 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." Although the ERA has now been ratified by three-quarters of the states, a question remains about the ERA's effectiveness.

When Congress first considered the ERA in 1972, the Joint Resolution by which the Amendment was submitted to the states for ratification included language that purported to impose a time limit for ratification of seven years. Significantly, language concerning the ratification period was not part of the amendment itself; rather, it was set out in the "Resolved" portion of the Joint Resolution. In 1982, Congress, also by means of a Joint Resolution, extended the ratification period for an additional seven years. Only thirty-five states had ratified the ERA by the expiration of the extended period. Prior to that time, several states (Idaho, Kentucky, Nebraska, Tennessee, and South Dakota) purported to rescind their prior ratifications.

The Attorneys General of the last three ratifying states (Virginia, Illinois, and Nevada) have filed a lawsuit in the United States District Court for the District of Columbia to mandate the Archivist of the United States (the sole administration official charged with monitoring the ratification process) to accept the ratifications of all thirty eight states as valid and certify the Equal Rights Amendment as being the twenty eighth Amendment to Constitution. The Plaintiff Attorneys General will argue, on behalf of their states that a time limit contained in joint resolution of Congress could not possibly be effective to stop an amendment from becoming valid because Article V of the Constitution states that an amendment "shall be valid . . . when ratified by the legislatures of three fourths of the several States." Article V contains no requirement for ratification within a certain time period. Neither does it recognize the authority of a state to act further with respect to a proposed amendment, such as attempting revocation, once the amendment has been ratified by it.

The Archivist (represented by the Department of Justice) has moved to dismiss the suit on several grounds, including the time limit itself included in the 1972 Joint Resolution. There will be several amicus briefs filed in opposition to that motion.

NOW is actively working with the ERA Coalition on an amicus brief to be filed on behalf of several diverse organizations (including NOW) that fight for women's rights. The brief is being authored by Linda Coberly, the Chicago Managing Partner of the nationally prominent Winston

Strawn LLP law firm. Our amicus submission will be what is sometimes known as a “Brandeis” brief, which provides history and context more than legal citations. It will focus on the history of the fight for constitutional equality, as well as the inequality that persists today—in terms of employment, violence, and many other things. It also will demonstrate that there exists a National consensus for the need of an ERA that is even stronger than when the amendment was initially proposed. Amici briefs filed by other organizations and groups will focus on the more traditional legal arguments.

The states’ response to the motion to dismiss—and the amicus briefs— are to be filed by June 29.

Please note that there is no inconsistency between this litigation against the time limit and the strategy of removing the time limit legislatively. Whether the time limit is really effective or not, Congress can nevertheless vote at any time to change or remove it. The House of Representatives passed a bill earlier this year to remove the time limit altogether. There is a similar bill pending before the Senate, with bipartisan sponsorship.

Toni Van Pelt, President