**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,
*Intervenor-Defendants*.

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

**INTERVENORS' STATEMENT OF MATERIAL FACTS**

Per LCvR 7(h)(1), Intervenors contend that there is no genuine dispute over the following material facts:

1. On March 22, 1972, Congress passed a joint resolution "[p]roposing an amendment to the Constitution of the United States relative to equal rights for men and women." H.R.J. Res. 208, 92d Cong., 1st Sess., 86 Stat. 1523 (1972).

2. The 1972 amendment is more commonly known as the Equal Rights Amendment, or ERA.

3. The joint resolution proposing the ERA stated:

> 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. 1523.

4. The "within seven years" language was added to the ERA because "several influential Members of both Houses objected to its absence." H.R. Rep. 95-1405, at 4 (1978).

5. Excluding the Twenty-Seventh Amendment, no constitutional amendment has been ratified more than four years after its proposal. Huckabee, *Ratification of Amendments to the U.S. Constitution* 1, CRS Report 97-922 (Sept. 30, 1997), bit.ly/3g81Jin (Huckabee).

6. Excluding the Twenty-Seventh Amendment, the average time between the proposal and ratification of successful constitutional amendments has been one year, eight months, and seven days. Huckabee 1.

7. Starting with the Eighteenth Amendment, every congressional proposal for a new constitutional amendment (except the Nineteenth Amendment and the proposed Child Labor Amendment) has included a seven-year ratification deadline. Huckabee 1-2.

8. The seven-year ratification deadlines for the Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments appeared in the proposing resolutions but not the text of the proposed amendments themselves. Huckabee 2.

9. Thirty States referenced the ERA's seven-year ratification deadline in their ratification documents. *Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 95th Cong. 739-40 (1978).

10. Seven years from March 22, 1972 is March 22, 1979.

11. Three-fourths of the States (38 States) did not ratify the ERA before March 22, 1979.

12. By March 22, 1979, thirty States had enacted measures to ratify the ERA and had not enacted measures to rescind their prior ratifications: 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. *Equal Rights Amendment – Proposed March 22, 1972, List of State Ratification Actions*, Nat'l Archives (Mar. 24, 2020), bit.ly/3f31rcf (*Archivist's List*).

13. By March 22, 1979, five States had enacted measures to rescind their prior ratifications of the ERA: Idaho, Kentucky, Nebraska, South Dakota, and Tennessee. *Id.*

14. By March 22, 1979, fifteen States had not enacted measures to ratify the ERA: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia. *Id.*

15. In October 1978, Congress enacted a joint resolution, stating that the ERA "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 not later than June 30, 1982." H.R.J. Res. 638, 95th Cong., 2d Sess., 92 Stat. 3799 (1978).

16. The 1978 resolution was approved by simple majorities of the House and Senate; it did not obtain two-thirds support in either House. *Roll Call Votes*, H.J.Res.638, 95th Cong. (1977-1978), Congress.gov, bit.ly/2Z5SObD.

17. In December 1981, a federal district court declared that "Congress' attempted extension of the time for the ratification of the [ERA] was null and void." *Idaho v. Freeman*, 529 F. Supp. 1107, 1155 (D. Idaho 1981).

18. The U.S. Supreme Court agreed to review the district court's judgment in *Freeman*. *See Nat'l Org. for Women, Inc. v. Idaho*, 455 U.S. 918 (1982).

19. On June 30, 1982, the Supreme Court had not yet issued a decision in the *Freeman* litigation.

20. Between March 22, 1979 and June 30, 1982, no additional States ratified the ERA.

21. On July 9, 1982, the government submitted a memorandum suggesting mootness in the *Freeman* litigation, urging the Supreme Court to order the case dismissed because "the extended period

for ratifying the [Equal Rights] Amendment expired" and so "the Amendment has failed of adoption." Memo. for the Admin. of Gen. Servs. Suggesting Mootness 3, *Nat'l Org. for Women, Inc. v. Idaho*, Nos. 81-1281, 81-1283, 81-1312, 81-1313 (U.S. July 1982).

22. Other parties objected to the suggestion of mootness, stressing that a mootness ruling "would effectively decide the 'antecedent' issue of whether Congress has plenary power and control over the amending process under Article V and thereby determine many of the other issues and policies presented by this case." Response of Idaho and Arizona, et al., in Opposition to the Administrator's Suggestion of Mootness 2, *Nat'l Org. for Women, Inc. v. Idaho*, Nos. 81-1281, 81-1283, 81-1312, 81-1313 (U.S. Aug. 1982)).

23. "Upon consideration of the memorandum for the Administrator of General Services suggesting mootness, filed July 9, 1982, and the responses thereto," the Supreme Court "vacated" the district court's judgment and "remanded to that Court with instructions to dismiss the complaints as moot." *Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)).

24. Reporting on the Supreme Court's decision, a story by United Press International stated that "[t]he Supreme Court today closed the coffin lid on the 10-year-old Equal Rights Amendment, declaring it legally dead." *Supreme Court Closes Lid on 10-Year-Old ERA Issues*, The Press-Tribune (Oct. 4, 1982), *available at* newspapers.com/image/475336066.

25. When it became clear that the ERA would not be ratified by June 30, 1982, "[l]eaders of the fight … officially conceded defeat." Hunter, *Leaders Concede Loss on Equal Rights*, N.Y. Times (June 25, 1982), nyti.ms/2ZhIKuM; *see also* McCormack, *June 30, 1982: The Day the ERA Dies*, UPI (June 30, 1982), https://bit.ly/3eXnBg5 (quoting the president of the National Organization of Women stating that "the death of the ERA is a tragedy").

26. ERA proponents announced on July 14, 1982 that they would be reintroducing the ERA in Congress. *See* Rosellini, *U.S. Equal Rights Measure Is Re-introduced in Congress*, N.Y. Times (July 15, 2020), nyti.ms/2BwlVMg.

27. ERA proponents assumed they had to "reintroduce [the ERA] fresh and begin from square 1 … go[ing] through the different legislatures all over again." 128 Cong. Rec. 14,925 (1982) (Rep. Schroeder); *see id.* at 14,913 (Rep. Frank: "Should the Congress approve the reintroduced ERA, we will have 7 years to win ratification."); *id.* at 15,558 (Sen. Packwood: "Yesterday, the ratification deadline for the equal rights amendment expired. It is unfortunate, indeed tragic, that the deadline passed with us still three States short of the 38 needed to put the equal rights amendment into our Constitution."); *id.* at 14,913-14 (Rep. Ferraro: "July 14 marks the day of the beginning of a new battle for equal rights."); *accord id.* at 15,559-60 (Sen. Tsongas); *id.* at 15,149 (Rep. Lehman); *id.* at 15,195 (Rep. Kastenmeier); *id.* at 15,560 (Sen. Cranston); *id.* at 15,570 (Sen. Kennedy); *id.* at 15,586 (Sen. Biden).

28. Other than the 1972 proposal, Congress never again proposed the ERA to the States.

29. In 1986, in response to a question about the status of the ERA, prominent ERA supporter Gloria Steinem stated, "Because it was not ratified in the nine years allotted to it, it now has to start the process over again and … be passed by the House and the Senate and go through … all the States' ratification process…. [P]robably something like eight or ten years…." The Oprah Winfrey Show (Jan. 14, 1986), *available at* youtube.com/watch?v=E0Ii-AYUtcg.

30. "[F]ollowing the 1992 ratification of the … 27th Amendment to the Constitution," however, "[t]he three-state strategy for ERA ratification was developed." *Two Modes of Ratification*, Alice Paul Inst., bit.ly/2ZIGCg1.

31. The three-state strategy argued that the ERA proposed by Congress in 1972 could still be added to the Constitution if three more States ratified it.

32. On March 22, 2017, the Nevada legislature enacted Senate Joint Resolution 2, titled "Ratifying the proposed amendment to the Constitution of the United States providing that equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

33. Nevada enacted Senate Joint Resolution 2 forty-five years after Congress proposed the ERA to the States.

34. On May 30, 2018, the Illinois legislature enacted Senate Joint Resolution Constitutional Amendment No. 4, stating that "the proposed amendment to the Constitution set forth in [H.R.J. Res. 208] is ratified."

35. Illinois enacted Joint Resolution Constitutional Amendment No. 4 more than forty-six years after Congress proposed the ERA to the States.

36. On January 27, 2020, the Virginia legislature enacted House Joint Resolution 1, titled "Ratifying the Equal Rights Amendment to the Constitution of the United States."

37. Virginia enacted House Resolution 1 nearly forty-eight years after Congress proposed the ERA to the States.

38. From 1972 to 2017, the population of the United States grew by more than 100 million people. *See Population, Total – United States*, World Bank, bit.ly/2VtaAmO.

39. More than half of the Americans alive in 2017 were not alive in 1972. *See Median Age of the Resident Population of the United States from 1960 to 2018*, Statista (June 2019), bit.ly/2CJLEAQ.

40. In anticipation of Virginia's purported ratification, Alabama, Louisiana, and South Dakota sued the Archivist in the U.S. District Court for the Northern District of Alabama on December 16, 2019. *See Alabama v. Ferriero*, Doc. 1, No. 7:19-cv-2032-LSC (N.D. Ala. Dec. 16, 2019).

41. Days later, the Archivist "requested guidance from the Department of Justice's Office of Legal Counsel on legal issues regarding ratification of the ERA." *Statement on Equal Rights Amendment Debate*, Nat'l Archives (Dec. 19, 2019), bit.ly/3iwxu6t.

42. On January 6, 2020, the Office of Legal Counsel published a formal opinion titled "Ratification of the Equal Rights Amendment," concluding (among other things) that the ERA could not be ratified because its congressional deadline had expired. *Ratification of the Equal Rights Amendment*, 44 Op. OLC ___ (Jan. 6, 2020).

43. On January 8, 2020, the Archivist released a statement that he "defers to DOJ on this issue and will abide by the OLC opinion." *NARA Press Statement on the Equal Rights Amendment*, Nat'l Archives (Jan. 8, 2020), bit.ly/3e8w7ry.

44. Alabama, Louisiana, South Dakota, and the Archivist entered a joint stipulation with the federal district court in Alabama, where the States agreed to dismiss their case without prejudice and the Archivist agreed that, "[i]n the event that the Department of Justice ever concludes that the 1972 ERA Resolution is still pending and that the Archivist therefore has authority to certify the ERA's adoption under 1 U.S.C. § 106b, the Archivist will make no certification concerning ratification of the ERA until at least 45 days following the announcement of the Department of Justice's conclusion, absent a court order compelling him to do so sooner." *Alabama v. Ferriero*, Doc. 23, No. 7:19-cv-2032-LSC (N.D. Ala. Feb. 27, 2020).

45. On March 24, 2020, the Archivist published an updated list of the States' ratification actions on the ERA, representing that the ratifications of Illinois, Nevada, and Virginia are invalid because they "occurred after Congress's deadline expired." *Archivist's List* (citing *Ratification of the Equal Rights Amendment*, 44 Op. OLC ___ (Jan. 6, 2020)).

Dated: July 6, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I filed this statement with the Court via ECF, which will electronically notify all counsel of record.

Dated: July 6, 2020 *_/s/ Cameron T. Norris_*