Statement by Russ Feingold, President of the American Constitution Society
Before the Senate Judiciary Committee
"The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution"
February 28, 2023

Thank you, Chairman Durbin, Ranking Member Graham, and Members of the Committee for the opportunity to submit this comment about the Equal Rights Amendment. I am submitting this statement on behalf of the American Constitution Society, a 501(c)(3) non-profit, non-partisan organization.

The Equal Rights Amendment (ERA) has met all constitutional requirements for ratification and should be considered the 28th Amendment to the Constitution. As women face mounting threats to their reproductive and bodily autonomy, recognizing – and enforcing – the ERA is more important than ever.

Article V of the U.S. Constitution lays out two methods by which the Constitution can be amended. Every amendment to the Constitution has utilized the same method. Two-thirds of each chamber of Congress proposed an amendment to the Constitution and that amendment was subsequently ratified by the legislatures of three-fourths of the states. The ERA has satisfied each of these steps.

On March 22, 1972, the 92nd Congress passed House Joint Resolution 208, proposing the ERA and sending it to state legislatures for ratification. By a vote of 354-24 in the House and 84-8 in the Senate, each chamber comfortably surpassed the required two-thirds threshold.

On January 27, 2020, Virginia became the 38th state to ratify the ERA. As a result of Virginia's ratification, the ERA achieved the three-fourths of states threshold and thereby satisfied all requirements prescribed in Article V to become the 28th Amendment to the Constitution.

Opponents to the ERA claim it is "dead" and point to "a seven-year deadline for ratification" as proof. This deadline, however, only shows up in one place in H. J. Res. 208 – the preamble. While some may claim that the deadline is binding nonetheless, the U.S. Supreme Court has never said as much.

The U.S. Supreme Court has only once examined Congress's power to include a deadline within a proposed amendment and whether such a deadline is binding on the states. In *Dillon v. Gloss*, the Court held that it is not unconstitutional for Congress to require that a constitutional amendment be ratified within a specified period of time.

The problem for those arguing that the ERA is dead, however, is that the seven-year time limit fixed by Congress in the resolution at issue in *Dillon* was included within the text of the proposed amendment itself – not the preamble. This distinguishes the situation in *Dillon* from

that of the ERA, wherein the deadline only shows up in the preamble, not the actual text of the amendment.

The Supreme Court has not addressed the constitutionality of a deadline found in prefatory text and later extended before expiration. While some folks claim that the ERA formally died after its extended deadline of June 30, 1982 passed, there is no legally binding source that claims the same. There is a valid argument that neither the original deadline, included only in the preamble, nor the deadline extension are binding on the states.

Separate from the issue of a deadline, there is a claim that some states have rescinded their ratification. The problem with this claim is, again, there is no legally binding source that says states may rescind their ratification of a constitutional amendment. The Constitution does not specify this, nor has the Supreme Court ever said as much. Moreover, previous efforts by different states to rescind their ratification of the 14th, 15th, and 19th amendments have not blocked those amendments' enforcement or placement in our Constitution.

On the other hand, Congress has had multiple opportunities to address the issue and has consistently rejected the validity of recissions. And while Article V does not give weight to Congressional action in this regard, the precedent is worth noting, particularly in the absence of clear judicial precedent on the matter.

Lastly, critics of the ERA like to point to comments made by Justice Ruth Bader Ginsburg, who suggested that the ratification process should “start over.” As Julie Suk expertly explained, however, Justice Ginsburg made these comments in the abstract, not based on a lawsuit before her with all the facts and legal arguments. Justice Ginsburg devoted significant advocacy and scholarship in support of the ERA over the course of her career. One isolated public comment is not grounds for any legal conclusion regarding the status of the ERA.

It is encouraging to see Congress call attention to the ERA, including with this hearing and particularly as we confront more proposals and laws by state legislatures striving to erode or eliminate fundamental freedoms. Now more than ever, we must do everything we can to ensure publication of the ERA as the 28th amendment.

The founders did not consider the Constitution written in stone and, in fact, predicted that it would be readily amended. This is why they included Article V, to provide a means by which to amend the Constitution and keep it relevant as the country evolved. The ERA is critical to addressing a founding failure of our Constitution - its silence on gender equality. Thirty-eight states have acknowledged this founding failure and ratified the ERA in accordance with the procedure provided in Article V. It is part of the Constitution and should be treated as such.