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Appeal of D.C. Federal Judge's ERA-Expired Ruling Likely to Extend an Unbroken 40-Year Losing Streak For ERA-Resuscitation Legal Claims

WASHINGTON – Three Democratic attorneys general today appealed a landmark March 5 ruling by federal Judge Rudolph Contreras, who held that the Equal Rights Amendment expired decades ago, and that the ERA in reality has not been “ratified” by 38 states as has been widely reported (*Virginia v. Ferriero*).

Attorneys general Mark Herring (Virginia), Aaron Ford (Nevada), and Kwame Raoul (Illinois) filed notice in the U.S. District Court for the District of Columbia that they appeal Judge Contreras’ ruling to the U.S. Court of Appeals for the District of Columbia.

“The March 5 ruling by Judge Rudolph Contreras, a widely respected judge appointed by President Obama, holding the 1972 ERA expired decades ago, was only the latest in an unbroken, 40-year chain of rejections of ERA-is-alive legal claims by federal judges of all stripes,” said NRLC Senior Policy Advisor Douglas Johnson, director of NRLC’s ERA Project. “Today, three Democratic attorneys general set the stage for the hammering of yet more judicial nails into the ERA’s coffin lid.”

Judge Contreras ruled that the deadline included by Congress in the Proposing Clause of the 1972 ERA Resolution was constitutional, and the ERA therefore expired more than three decades ago. The legislative actions by Nevada (2017), Illinois (2018), and Virginia (January 2020) were not real ratifications because they “came too late to count,” Contreras ruled. Contreras also said that the Archivist of the U.S. was justified in refusing to certify (“publish”) the ERA as part of the Constitution, and indeed that the claim (made by the three attorneys general) that the Archivist should ignore the deadline was “absurd.”

While the mainstream news media has been receptive to the narrative that the 1972 Equal Rights Amendment is alive and perhaps on the verge of becoming part of the Constitution, examination of the history in the federal courts paints a very different picture. “Over a 40-year period, 20 federal judges and justices have taken adverse actions on ERA-revival legal claims,” Johnson said. “Not a single judge has accepted any element of the ERA-revival legal theories.”

An article by Johnson summarizing the 40-year string of defeats for ERA-revival advocates in the federal courts was published by NRLC on March 18, 2021. ([“Federal judges of every stripe have scorned legal theories intended to resuscitate the Equal Rights Amendment”](#)).

Meanwhile, a different federal appeals court will hear oral arguments this week in a separate ERA case. The pro-ERA advocacy group “Equal Means Equal” brought a lawsuit claiming that the ERA ratification deadline was unconstitutional, *Equal Means Equal v. Ferriero*. On August 6, 2020, U.S.

District Judge Denise Casper of the District of Massachusetts (another appointee of President Obama) dismissed this lawsuit for lack of standing. Equal Means Equal asked the U.S. Supreme Court to review that ruling, but in October 2020, the Supreme Court rejected the group's cert petition without a single dissent. The organization then pursued an appeal at the U.S. Court of Appeals for the First Circuit, where a three-judge panel will hear oral arguments on Wednesday, May 5, 2021. In a brief filed February 11, 2021, the Department of Justice Civil Division urged the appeals court to uphold Judge Casper's ruling on standing, and also asserted, "In this case, the validity of the ERA's ratification deadline is, indeed, obvious." NRLC's Johnson predicted that the First Circuit panel (made up of two judges appointed by Democratic presidents and one judge appointed by a Republican president) would uphold Judge Casper's ruling.

On February 10, 2020, in remarks at Georgetown University Law Center, the late Justice Ruth Bader Ginsburg indicated that she believed that the proper approach for ERA supporters, such as herself, would be "a new beginning. I'd like it to start over." Virginia's January 2020 adoption of an ERA resolution was, she said, "long after the deadline passed." If such "a latecomer" were to be recognized, she suggested, "how can you disregard states that said, 'We've changed our minds'?"

On March 17, 2021, the House of Representatives, on a near-party-line vote, approved a measure (H.J. Res. 17) that purports to retroactively "remove" the ERA ratification deadline – an exercise that the Justice Department's Office of Legal Counsel in 2020 compared to a current Congress attempting to override a veto by President Carter. At a May 1 "ERA Summit," Equal Means Equal lead attorney Wendy Murphy essentially agreed, stating, "It's obvious that they [Congress] cannot retroactively remove a deadline."

NRLC's Johnson said that the "deadline removal" measure faced a steep climb in the Senate: "Only two of the Senate's 50 Republican senators have announced support--the same two who supported it in years past. Despite much drum beating to the media, the pro-ERA groups have failed to produce a single new Republican supporter – which leaves them well short of the 60 votes they would need to pass this patently unconstitutional political gimmick."

National Right to Life opposes the 1972 ERA because it is likely to be employed as a textual constitutional foundation for judicial rulings that would invalidate virtually any state or federal law or policy that impedes access to abortion, or even that has a "disparate impact" on the availability of abortion, including any restrictions on government funding of elective abortion. While journalists sometimes write that "opponents claim" these things, in fact many of the strongest affirmations of the ERA-abortion link have come from leading abortion-rights advocates who support ERA. For example, NARAL Pro-Choice America asserted that "the ERA would reinforce the constitutional right to abortion... [it] would require judges to strike down anti-abortion laws..." A National Organization for Women factsheet on the ERA states that "...an ERA -- properly interpreted -- could negate the hundreds of laws that have been passed restricting access to abortion care..." The ACLU, in a March 16, 2021 letter to the House of Representatives, said that the ERA "could provide an additional layer of protection against restrictions on abortion...[it] could be an additional tool against further erosion of reproductive freedom..." Five pages of such footnoted quotes from leaders and attorneys associated with prominent abortion-rights organizations are found [here](#).

Douglas Johnson is NRLC's subject matter expert on the Equal Rights Amendment, an issue on which he has written and worked for 40 years. Mr. Johnson is available for interviews or email

exchanges to discuss the congressional and ratification histories of the ERA, to comment on the legal and political aspects of the issue, and to discuss the ERA-abortion connection.

@ERANoShortcuts is a non-NRL but recommended Twitter account dedicated exclusively to tracking ERA-related legal and political developments in the courts, Congress, Executive Branch, and state legislatures, from an “ERA-skeptical” perspective.

Founded in 1968, National Right to Life, the federation of 50 state right-to-life affiliates and more than 3,000 local chapters, is the nation's oldest and largest grassroots pro-life organization. Recognized as the flagship of the pro-life movement, NRLC works through legislation and education to protect innocent human life from abortion, infanticide, assisted suicide and euthanasia.