No. 21-5096

In the United States Court of Appeals
for the District of Columbia Circuit

STATE OF ILLINOIS AND STATE OF NEVADA,
Plaintiffs-Appellants,
v.
DAVID FERRIERO, in his official capacity as Archivist of the United States,
Defendant-Appellee,

STATE OF ALABAMA, *et al.*,
Intervenors-Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

Brief *Amicus Curiae* of Eagle Forum, Eagle Forum Foundation, America's Future, U.S. Constitutional Rights Legal Defense Fund, California Constitutional Rights Foundation, Clare Boothe Luce Center for Conservative Women, Public Advocate of the United States, Del. David LaRock, Del. Bob Marshall, Sen. Dick Black, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Defendant-Appellee and Affirmance

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*

Except for the following, all parties, intervenors, and *amici curiae* appearing before the district court below and this Court are listed in the Briefs for the parties: *amici curiae* Eagle Forum, Eagle Forum Foundation, America's Future, The United States Constitutional Rights Legal Defense Fund, Inc., California Constitutional Rights Foundation, Clare Boothe Luce Center for Conservative Women, Public Advocate of the United States, Del. David LaRock, Del. Bob Marshall, Sen. Dick Black, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee.

Ruling under Review

References to the ruling at issue appear in the Appellant's Brief.

Related Cases

Counsel adopt and incorporate by reference parties' statements with respect to related cases.

CORPORATE DISCLOSURE STATEMENT

The *amici curiae* herein, Eagle Forum, Eagle Forum Foundation, America's Future, The United States Constitutional Rights Legal Defense Fund, Inc., California Constitutional Rights Foundation, Clare Boothe Luce Center for Conservative Women, Public Advocate of the United States, Del. David LaRock, Del. Bob Marshall, Sen. Dick Black, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee, through their undersigned counsel, submit this Corporate Disclosure Statement pursuant to Rules 26.1(b) and 29(c) of the Federal Rules of Appellate Procedure, and Rule 26.1 of the Rules of the United States Court of Appeals for the District of Columbia Circuit.

With the exception of Restoring Liberty Action Committee, which is an educational organization, these *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

These *amici curiae* are represented herein by William J. Olson, counsel of record, Jeremiah L. Morgan, and Robert J. Olson, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615; and Patrick M. McSweeney of McSweeney, Cynkar & Kachouroff, PLLC, 3358 John Tree Hill Road, Powhatan, Virginia 23139. Gary G. Kreep, 932 D Street, Suite 1,

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/s/ William J. Olson
William J. Olson

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY OF ABBREVIATIONS

ERA	Equal Rights Amendment
NOW	National Organization for Women

INTEREST OF *AMICI CURIAE*[1]

The *amici curiae* organizations are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code, with the exception of Restoring Liberty Action Committee, which is an educational organization. The three individual *amici* are current or former members of the Virginia state legislature. Most of these *amici* filed an *amicus curiae* brief in the district court below.

STATEMENT OF THE CASE

On March 22, 1972, Congress passed a Joint Resolution to send to the States for ratification a proposed amendment to the U.S. Constitution to add what was called the Equal Rights Amendment ("ERA"). The Joint Resolution read as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* 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:

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

"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." [92 H.J. Res. 208, 86 Stat. 1523 (1972) (emphasis added).]

In adopting this resolution, Congress employed the procedures set out in Article V of the United States Constitution for amending the Constitution — (i) a proposal by Congress, followed by (ii) ratification by state legislatures:

> The Congress, **whenever two thirds of both Houses shall deem it necessary**, **shall propose Amendments to this Constitution**, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, **when ratified by the Legislatures of three fourths of the several States**, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress…. [Article V (emphasis added).]

Moving quickly early on, by the end of 1972, 22 states had ratified the Equal Rights Amendment with eight more states added in 1973, leaving the proposed amendment eight states short of the three-fourths (38 states) needed for ratification. Soon the initial superficial appeal of the proposed amendment wore

thin, and as the amendment was subjected to serious scrutiny, the ratification train derailed.

Leading that national effort was one woman — Phyllis Schlafly — the founder of STOP ERA, which was later folded into lead *amicus curiae* here, Eagle Forum.[2] The historic significance of Phyllis Schlafly's work against the ERA was grudgingly testified to by a fictionalized and inaccurate portrayal in the recently released miniseries "Mrs. America," sponsored by Hulu.[3] Gradually, state lawmakers came to understand that the ERA was not just about equal pay for equal work but also about a radical social agenda that was foreign to most Americans — most certainly in the 1970s during the period of ratification — and in large part continuing to this day.

Concerned women came to realize that the ERA likely would have adverse effects which would do everything but aid women and their lives, such as subjecting women to the military draft and front-line combat; abolishing all laws

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[2] *See, e.g.,* C. Holcomb, "Elites Hate Phyllis Schlafly Because She Defeated Them From Home With Six Kids In Tow," *The Federalist* (Apr. 13, 2020).

[3] *See* M.M. Olohan, "Phyllis Schlafly's Daughter Calls Out 'Mrs America' For 'Fictionalized,' Agenda-Driven 'Slurs' Against Her Family," *Daily Caller* (Apr. 16, 2020).

regulating or prohibiting abortion; requiring taxpayer-funded abortions; undermining the proposition that marriage was only between a man and a woman; eliminating tax exemptions for churches with male-only clergy; ending single-sex schools and sports teams; establishing unisex prison cells, hospital and nursing home rooms, and school dormitories; and invalidating all legislation passed to protect women in the workplace — to name but a few.

ERA supporters realized in 1977 that they could never obtain ratification by the necessary 38 states within the seven years specified in the congressional joint resolution. Those who had lost the battle in the state legislatures demanded that Congress "extend" the ratification deadline by seven additional years, and then settled for a purported extension to June 30, 1982 (just over three years), which was approved by Congress in October 1978 before the original seven-year deadline had expired. However, the purported extension was only approved by simple majorities of each house of Congress (calling into question whether the extension was valid if not approved by the necessary two-thirds as required by Article V).

By the end of the expiration of the extended ratification deadline of June 30, 1982, the ERA was still three states short of the 38 states required for

ratification. To remedy the loss suffered in failing to obtain ratification, the ERA was reintroduced into Congress in 1983 and has been reintroduced many times since. However, even the most ardent ERA supporters recognized that the original ERA had become null and void once ratification had failed decades ago, and Congress has not revived the 1972 ERA. *See* articles cited in *Virginia v. Ferriero*, 525 F. Supp. 3d 36, 43 (D.D.C. 2021).

With Congress unlikely to pass a new resolution, supporters of the ERA are now hoping that the judiciary will act to impose the ERA on the nation through litigation, such as that brought by Plaintiff States in this case.

Plaintiffs-Appellants Illinois and Nevada, along with former plaintiff Virginia, claim to be the 36th, 37th, and 38th states to ratify the expired ERA proposal, based on actions taken in 2019 and 2020. These three states brought this suit seeking an order directing the National Archivist to certify the ERA as the Twenty-Eighth Amendment to the U.S. Constitution.[4] Thereafter, five states, three of which had rescinded their previous ratifications of the ERA proposal, filed a motion to intervene to oppose the Plaintiff States' lawsuit. The Plaintiff

[4] On February 25, 2022, this Court granted Virginia's motion to dismiss it as a party.

States contend these post-deadline "ratifications" can be legitimately added to the original 35 state ratification resolutions from the 1970s and early 1980s.[5]

On March 5, 2021, the district court dismissed the Plaintiff States' suit because (i) the States have no concrete injury that would be cured if the Archivist certified the ERA as the Twenty-Eighth Amendment and (ii) the seven-year deadline for ratification of the ERA expired decades ago. The Plaintiff States thereafter filed this appeal.

On February 18, 2022, the Commonwealth of Virginia filed a Motion to Dismiss Virginia as a party, explaining:

> Following the change in Administration on January 15, 2022, the Attorney General has reconsidered Virginia's position in this case. After careful review of the filings and pertinent precedents, Virginia is now of the view that **the district court correctly held that mandamus relief does not lie** against the Archivist in this suit. *See* 525 F. Supp. 36, 54–61 (D.D.C. 2021) (JA334–47). [Motion to Dismiss Appellant The Commonwealth of Virginia As a Party (Feb. 18, 2022) at 2 (emphasis added).]

Virginia's motion was granted on February 25, 2022, and the case continues to be pursued in the name of Illinois and Nevada.

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[5] One federal district court concluded the ERA died on March 22, 1979. *See Idaho v. Freeman*, 529 F. Supp. 1107, 1154 (D. Id. 1981), *vacated as moot* 459 U.S. 809 (1982).

ARGUMENT

I. APPELLANTS' CONTENTION THAT THE ARCHIVIST WAS REQUIRED UNDER 1 U.S.C. § 106b TO PUBLISH AND CERTIFY THE EQUAL RIGHTS AMENDMENT IS BASELESS.

A. 1 U.S.C. § 106b.

To justify mandamus relief, Appellants contend that the Archivist had a statutory "duty to publish and certify constitutional amendments," and that duty extended to validating the ratification of the Equal Rights Amendment under § 106b. Brief of Appellants ("Apt. Br.") at 38. That statute provides:

> Whenever official notice is received …that any amendment … has been adopted, according to the provisions of the Constitution, the Archivist … shall forthwith cause the amendment to be **published**, with his **certificate, specifying the States** by which the same may have been adopted, and that the same has become **valid**…. [1 U.S.C. § 106b (emphasis added).]

Appellants argue that under § 106b, the "'provisions of the Constitution' were satisfied" once sufficient "official notices" were received by the Archivist, triggering a "purely" ministerial duty which a court could use mandamus to order him to perform. Apt. Br. at 39-41. Appellants find in the statute no role for the Archivist other than to count "official notices" received, and when that count reaches 38 (three-quarters of the 50 states), to publish with his certificate "without assessing for himself the ratifications' validity." *Id*. at 42. While not

saying it expressly, Appellants are arguing that, no matter how irregular and illegal the "official notices" the Archivist receives may be, the Archivist may only count the notices. That view is inconsistent with the statute, and the district court correctly rejected that argument.[6]

First, the statute requires that upon the receipt of "official notices" of state approval by three-quarters of the states (38 states), the Archivist perform an act. Appellants view that act narrowly — publication of what could be described as a "Notice of Receipt." However, the statute specifies that the Archivist issue a "certificate, specifying the States by which the same may have been adopted, and that the same has become valid." Thus, the statute requires the Archivist to publish what could be called a "Certificate of Validity." Mere publication of a notice is quite different from a certification of validity, as required by the statute.

Even if mandamus would lie to direct the Archivist to publish a "Notice of Receipt," it is quite another matter to direct a government official to "certify" to the truth — the "validity" — of a fact. What meaning would a "Certificate of Validity" have if the Archivist was required to publish one when the state

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[6] *Virginia v. Ferriero*, 525 F. Supp. 3d 36, 56 (D.D.C. 2021) ("*Ferriero*") ("[T]he notices — on their face — revealed an obvious and direct contradiction [with] a deadline that Congress had imposed….").

ratifications were facially invalid? The official in charge of issuing a "Certificate of Validity" certainly has some authority to do more than count the official notices. The district court believed that the Archivist's authority was sufficiently broad to allow him to reject an "official notice" which on its face evidences that the state action occurred well after the deadline specified in the proposed constitutional Amendment.[7]

Appellants also appear to raise a constitutional argument against the Archivist having any discretion in issuing his "Certificate of Validity," arguing that "Article V does not mention the executive branch at all…." Apt. Br. at 48. If adopted, that argument may lead to outcomes which do not help Appellants. If the executive branch has no constitutionally permissible role whatsoever, that would seem to lead to the twin conclusions that: (i) § 106b itself is unconstitutional, and (ii) the executive branch may have no method whatsoever to keep track of which constitutional amendments have been adopted. But if § 106b is unconstitutional, then the court cannot grant mandamus to enforce it. And, if only Congress (which proposes) and the States (which dispose) are allowed to play any role in monitoring amendments, then Congress itself would be the only

[7] *See Ferriero* at 56.

federal institution that could track ratified amendments. That has never been the case. If Congress is barred by the Constitution from empowering the executive branch to perform this function, then one must conclude that the system that has been in place for most of the existence of the nation (*see Ferriero* at 41) has been unauthorized, but that constitutional deficiency was never discovered until Illinois, Nevada, and (formerly) Virginia conducted their analyses.

B. *United States ex rel. Widenmann v. Colby*.

Additionally, Appellants assert that this Court's decision in *United States ex rel. Widenmann v. Colby*, 265 F. 998 (1920), supports its position. It does not. *Colby* required the Secretary of State (previously performing the Archivist's role of certifying amendment ratifications) to accept only those notices issued "in due form." *Id.* at 999. The notices received here did not meet even that low bar, as they evidenced ratification occurring after the congressionally approved period. Thus, on their face, they are invalid. The *Colby* statements that the Secretary of State need not "determine whether or not the notices stated the truth" does not help Appellants, as the notices accurately reveal late ratification.

The *Colby* admonishment that the official "had no authority … to look behind the notices" (*id.* at 1000) was not violated here, as the Archivist looked

on the face of the notices to find them invalid, not behind them.[8] The district court correctly concluded that since the Archivist was able to determine the invalidity of the notices based solely "on their face," *Colby* did not apply. *Ferriero* at 56.

II. APPELLANTS' ARGUMENT THAT THE DEADLINE FOR RATIFICATION ESTABLISHED BY CONGRESS WAS NOT BINDING IS BOGUS.

Even if Appellants were able to convince the district court that the Archivist had a ministerial duty to publish and certify the validity of the state notices by turning a blind eye to the date of ratification on the face of those notices, it would avail Appellants nothing. As stated in *Colby*, "[i]t is the approval of the requisite number of states, not the proclamation, that gives vitality to the amendment and makes it a part of the supreme law of the land." *Colby* at 1000. Remaining in Appellants' path to give effect to the ERA is the

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[8] Lastly, *Colby* does not help Appellants with standing, as Chief Justice Smyth explained: "even if the proclamation was canceled by order of this court, it would not affect the validity of the amendment." *Colby* at 1000. The corollary of this statement would be, "even if the proclamation had been issued by order of this court, it would not affect the validity of the amendment." Since the court cannot grant Appellants meaningful relief, they lack standing. *See Ferriero* at 46.

fact that the recent ratifications occurred after the deadline set by Congress, and the fact that five states revoked their ratification during the ratification period.

A. Rescission of Ratification.

The district court did not need to, and therefore did not, address the effect of the consequences of rescission, as Appellants' case failed on other grounds. *Ferriero* at 46. However, even if Appellants prevailed on the issue of the duty of the Archivist, it would bring to the fore the effect of those rescissions. Appellants' position is that only state legislatures may reject ratification an unlimited number of times and then ratify, and that subsequent ratification is valid. On the other hand, once a legislature ratifies, Appellants argue, that decision is irreversible, and subsequent rescissions are without effect. This logic advances the interests of the Appellants, but has little appeal in terms of fairness or equity. Although the issue of rescission is not now before the Court, it would be raised in subsequent litigation should Appellants prevail on the issues presented here.

B. Ratification after the Congressionally Established Deadline.

Insofar as Appellants concede that the action by the required number of states occurred well after the expiration of both the original and extended

deadline to ratify the ERA, Appellants are compelled to find some way to circumvent that express requirement. Neither of the theories they offer is persuasive.

Appellants propose this Court wholly ignore the words "within seven years" contained in the Congressional ERA proposal on two theories.

First, Appellants argue that since Congress did not include that time frame in the proposed Amendment text, but rather in a preamble, it could be disregarded. Apt. Br. at 50, *et seq*. Appellants concoct a theory that only if the ratification date were in the text of the proposed Amendment, the states could "exercise their constitutional prerogative to ratify that amendment at any time even if the amendment is ultimately inoperative." Apt. Br. at 58-59. The logic of this argument escapes these *amici*. Second, Appellants posit that Congress may never include time frames for ratification for any constitutional Amendment.

The district court identified numerous flaws in these arguments. *See Ferriero* at 57-60. To those reasons, these *amici* would only add one additional point. Both theories require the court to disregard the language of the proposal. *See Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). *See also* A. Scalia & B. Garner, "Surplusage Canon," Reading Law (Thomson/West: 2012) at 174-179.

III. THE EQUAL RIGHTS AMENDMENT IS TOTALLY UNLIKE THE TWENTY-SEVENTH AMENDMENT.

Appellants predict "serious practical repercussions" if this Court were to agree with what nearly everyone has believed and virtually everyone still believes — that Congress has the authority to set ratification deadlines for a proposed constitutional amendment. Apt. Br. at 54 n.27. Appellants argue that it can take considerable time for states to consider constitutional amendments, pointing to an Illinois state law which prevents a ratification vote from occurring until a year or two passes after an amendment is proposed. *Id*. That Illinois statute certainly is an outlier, as 22 states had ratified the ERA during the one-year period after the Equal Rights Amendment was proposed. *Ferriero* at 42. Appellants' Brief cites as support for its argument that there are no lawful ratification periods the ratification of the Twenty-Seventh Amendment as to why states should not be expected to ratify within any fixed time period Congress may choose — even if longer than seven years.

Appellants' reliance on the Twenty-Seventh Amendment as precedent against the legitimacy of periods of ratification is unavailing for several reasons. First, when Congress proposed the Twenty-Seventh Amendment to the states — unlike the Equal Rights Amendment — it established no fixed period for

ratification to occur. Second, the Twenty-Seventh Amendment was certainly not an illustration of the argument being made by Appellants — that states need an unlimited number of years to ponder the amendment. The states were not considering the Twentieth Amendment diligently for over 200 years — rather, they were oblivious to that amendment until it was brought to their attention in recent years. Third, even in an earlier time of slow and difficult communication, the states had no problem ratifying the 10 amendments constituting the Bill of Rights that were proposed at the same time as the Twenty-Seventh Amendment — those amendments being ratified within 27 months of being proposed by Congress.

Furthermore, the two amendments are of an entirely different nature. The Twenty-Seventh Amendment, which prohibits any law that increases or decreases the salary of members of Congress until the next term for the House, was wholly uncontroversial.[9] Demonstrating almost universal support, on May 20, 1992, the House passed a concurrent resolution confirming the validity of the ratification by a vote of 414 to 3, and the Senate did the same unanimously, by a vote of 99-

[9] The Twenty-Seventh Amendment was submitted for ratification on September 25, 1789, and deemed ratified on May 7, 1992 — over 202 years later.

0.[10] Although the purpose of the Twenty-Seventh Amendment was clear and largely uncontested, the same is not true of the ERA. In fact, the Twenty-Seventh Amendment is the polar opposite of the Equal Rights Amendment, which has generated conflict and controversy unknown since the Prohibition amendments.

The ERA states 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." The phrase "equality of rights under the law" is not defined, so inevitable court analysis of whether a particular action violates the ERA would unavoidably lead us into an interminable conflict in assessing the authorial intent of the drafters and ratifiers as to what was really meant by "equality of rights" as events unfolded over a half-century.

Additionally, the ERA's language "on account of sex" is similar to "because of sex" as used in the 1964 Civil Rights Act. The authorial intent of the phrase "because of sex" was clear in 1964 — protecting women from discrimination — but the Supreme Court disregarded authorial intent and

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[10] Congress took this action likely for purely political reasons, to demonstrate to constituencies its concern about salaries, not because post-ratification affirmance by Congress is necessary for an amendment to become effective.

fashioned a new meaning for those words just two years ago. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020). Since a half-century has passed since the ERA was proposed, what those in Congress meant by this key phrase in 1972, and the states that ratified within the seven-year time frame understood, may be wholly unconnected to what the late ratifying states understood and how the Supreme Court would interpret those words today.

Appellants invoke the **original** meaning of the Amendment's words "on account of sex" when they assert "the Constitution was finally amended to expressly protect women as equals." Apt. Br. at 1. Appellants ignore the likely **current** judicial meaning of those same words. If a Court were required to determine the meaning of "on account of sex," would they adopt the views of those in Congress in 1972 and the understanding of the early ratifiers or later ratifiers? Would the Court understand those words to have a more modern (but less textually faithful) meaning as understood in *Bostock*? There, the Supreme Court first admitted that this was certainly not the view of those in Congress who wrote the 1964 law, and yet five justices concluded the 1964 language in the Civil Rights Act prohibiting discrimination "because of … sex" now prevents an employer from firing "someone simply for being homosexual or transgender."

Bostock at 1737. Appellants failed to address the issue of how the meaning of terms changes over time, making non-contemporaneous ratifications of vague amendments highly problematic.

Lastly, the ERA would result in an epic shift of power from Congress and state legislatures to the Courts, who could strike down laws of all sorts based on their perceived meaning of the ERA, just as was done in *Bostock*. Bills that Congress has refused to enact, such as having women drafted or serve in combat, would become judicially "enacted" by this Amendment — allowing judges to exercise legislative power under the guise of interpreting an Amendment — in violation of the Separation of Powers. And every action by a state government would be subject to federal review, in a way that would undermine federalism. It would federalize all of family law, which historically has been entrusted to the states. When government must meet the standard of "due process of law," at least the judges have the common law to draw from in understanding what that requires. But as to "equality of rights," there is no common law antecedent. And there is no context provided by the Amendment. Although proponents point to the simplicity of the language of the Amendment as a strength, the fact that it introduces a term with no historic or other demonstrated meaning into law,

empowers federal judges to do whatsoever they think right. That is just one of the reasons that the ERA must not be imposed upon the Constitution by federal courts, as the judges of those courts which would be the primary recipient of the Amendment's vast shift of power.

IV. APPELLANTS LACK STANDING.

The district court concluded that Appellants lacked standing to bring suit against the Archivist for several reasons. *Ferriero* at 46-49. There are additional reasons to believe this was the correct conclusion.

Prior to the litigation brought by Appellants, Alabama led a group of several states to file suit against the Archivist to **prevent** him from certifying the ratification of the ERA. *Alabama, et al. v. Ferriero*, No. 7:19-cv-2032 (N.D. Ala.). Alabama dismissed that suit after it was satisfied that the Archivist was not going to move forward with certification. *See* Brief for Intervenors-Appellees ("Int. Br.") at 9-10. At that point, Appellants filed suit to **compel** the Archivist from certifying the ratification of the ERA. In response, Alabama and other states intervened in opposition to Appellants' suit.

The district court below ruled, consistent with *Dillon v. Gloss*, 256 U.S. 368 (1921), that the Archivist's certification neither adds to nor takes away from

the validity of the ERA. The district court found that mandamus relief would not lie in a situation like this, where the relief sought would not give meaningful relief to Appellants, but rather would be symbolic. *See Dillon* at 376; *Ferriero* at 47. That is the correct ruling. Even though a bogus certification by the Archivist would cause a measure of confusion, Appellants have not established that preventing confusion confers Article III standing. In fact, the challenge brought by Alabama made out a better case for standing to prevent confusion (if there is such a thing) than that filed by Appellants, as Alabama wanted to protect its people from filing suits of all manner based on that confusion. *See generally Ferriero* at 47-48.

Indeed, the citizens of Illinois and Nevada would not "benefit" from the enactment of the ERA. Illinois already has an ERA-type provision in its state constitution. *See* Illinois Constitution, Article I, Section 18. And, Nevada has a state constitutional ERA-type amendment on the ballot in the upcoming November 2022 election, where the result will likely be known before this litigation is resolved. *See* Nevada Senate Joint Resolution No. 8 (2019). Since Illinois and possibly Nevada do not need the federal ERA for its citizens, it becomes clear that Appellants are litigating to impose the ERA on other states

which chose either not to amend their own state constitutions or ratify the ERA. Certainly that effort to meddle in the affairs of another state would not confer standing.

V. THE SUPREME COURT'S DETERMINATION THAT THE EXPIRATION OF THE PERIOD FOR RATIFICATION OF THE ERA MOOTED AN EARLIER LAWSUIT HAS RELEVANCE HERE.

In 1982, the U.S. Supreme Court had occasion to consider a challenge to the validity of the extended expiration date of the ERA as well as to the validity of state rescissions of their ratification of the ERA. *See National Organization for Women v. Idaho*, 459 U.S. 809 (1982) ("*NOW*"). During the Supreme Court's consideration, the extended deadline for ERA ratification expired without a single additional state having ratified the ERA, leading to the United States filing a suggestion of mootness with the Court. The Court agreed and summarily vacated the proceedings and remanded with instructions to dismiss the complaints therein as moot. *Id*. Appellants argue that *NOW* is completely irrelevant in determining whether the congressionally established expiration date for ratification is valid, because "the Court did not explain why the case was moot." Apt. Br. at 61.

To be clear, the Supreme Court's decision in *NOW* was: (i) to **vacate** the district court's decision and (ii) to **direct** the district court to dismiss the case as moot. It was not, as the Appellants contend, that the Supreme Court "summarily **dismissed** the action as moot and vacated the district court's decision." Apt. Br. at 60 (emphasis added).[11] Instead, what the Court did in *NOW* was preserve the status quo by vacating the district court's decision, as is its practice, to prevent the lower court's decision from having *res judicata* effect on the parties, as explained in the Supreme Court's decision in *United States v. Munsingwear*, 340 U.S. 36 (1950), cited by the Court in its order in *NOW*.

While the Supreme Court's summary disposition has no precedential value with respect to the merits, it is instructive on mootness. Stated another way, although the Supreme Court made no ruling on the merits of the underlying claims in *NOW*, the basis for its determination of mootness is obvious: the deadline for ratification of the ERA had expired. If the Supreme Court believed, as Appellants do, either that Congress may establish no period for ratification, or that the period must be stated in the text of the Amendment, it would not have

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[11] The Intervenor States also describe the Supreme Court's action in *NOW* as dismissing the case (instead of directing the district court to dismiss). *See* Int. Br. at 8.

mooted the case. There is good reason to believe that the Supreme Court would view this case to be moot for the same reason.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ William J. Olson

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Eagle Forum, *et al.*, in Support of Defendant-Appellee and Affirmance complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 4,827 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 21.0.0.81 in 14-point CG Times.

/s/ William J. Olson

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William J. Olson
Attorney for *Amici Curiae*

Dated: March 11, 2022

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Eagle Forum, *et al.*, in Support of Defendant-Appellee and Affirmance, was made, this 11th day of March 2022, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson

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