ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

January 18, 2019

Dear Chairman Cole and Vice Chairman Ransone:

You asked for my opinion regarding whether the proposed ERA resolution is properly before the Virginia Assembly. The ERA—the one that Congress proposed to the States in 1972—is dead. No matter how many States purport to "ratify" it, the ERA cannot be added to the Constitution. The only way it could be added to the Constitution would be if Congress re-proposed it, the ratification process started from scratch, and enough States agreed to ratify the ERA again.

The ERA is dead because the deadline to ratify it has expired. When Congress proposed the ERA to the States, the relevant resolution contained a seven-year deadline. H.J. Res. 208. It gave the States until March 22, 1979, to decide whether they would approve or reject the ERA.

But when that day arrived, only 35 States had ratified the ERA—three States short of the 38 needed to put it in the Constitution. (And five of those States *rescinded* their earlier ratifications, putting the real number of approving States at 30.) Congress decided to give the States a little more time. It extended the deadline to June 30, 1982. H.J. Res. 638. (The legality of that extension is doubtful, since it was approved by a bare majority of Congress instead of the two-thirds required by the Constitution. *See Idaho v. Freeman*, 529 F. Supp. 1107, 1150-53 (D. Idaho 1981).)[1] Even still, the new deadline also came and went, without a single additional State having ratified the ERA. If the ERA had not expired in 1979, it definitely expired in 1982.

Some pro-ERA activists believe that Congress has no power to set deadlines on constitutional amendments. Nothing could be further from the truth. Congress frequently puts time limits on constitutional amendments; for example, it included identical seven-year deadlines in the resolutions proposing the Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments. The Supreme Court has blessed Congress's power to impose these deadlines. As early as 1921, the Court held there was "no doubt" that the "period for ratification" is "a matter of detail which Congress may determine." *Dillon v. Gloss*, 256 U.S. 368, 376 (1921).

In fact, when the deadline for ratifying the ERA expired in 1982, the Supreme Court dismissed all pending lawsuits challenging the ERA "as moot." *Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809, 809 (1982). The Court concluded that the parties objecting to the

ERA had nothing left to fight, since the ERA had expired and could never be revived. The Supreme Court rejected the idea that congressional deadlines are unenforceable and that the ERA lives on in perpetuity.

Some pro-ERA activists make a more sophisticated argument. They concede that Congress can impose deadlines on constitutional amendments. But they argue that, if one more State ratifies the ERA, then the current Congress could *remove* the original deadline. Then Congress could pretend that

[1] I was counsel for Washington State lawmakers in *Idaho v. Freeman*.

the original deadline never existed, add up the old ratifying States with the new, and declare the ERA part of the Constitution.

This theory is no better than the first. As one federal court explained, giving such a power to Congress "runs completely counter to the intentions of the founding fathers." *Freeman*, 529 F. Supp. at 1126. The process for amending the Constitution, James Madison explained in Federalist No. 39, is "neither wholly national nor wholly federal." It is a careful negotiation between Congress and the States; both sides must give their full consent, and neither side can unilaterally change the terms of the bargain.

The States that ratified the ERA in the 1970s did so on the understanding that the amendment had a seven-year deadline. In other words, they agreed to the ERA, so long as 37 other States also agreed within the timeframe specified by Congress. Removing that deadline now would fundamentally alter the deal. Take the definition of "sex," for example. In the 1970s, everyone understood that term to refer to the biological sexes, male and female. In 2019, however, many courts interpret "sex" to include sexual orientation and gender identity—an interpretation that, to put it mildly, would shock the States that ratified the ERA forty years ago. *See, e.g.*, *Hivley v. Ivy Tech Cmty. College*, 853 F.3d 339 (7th Cir. 2017); *EEOC v. R.G. & G. R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Doe v. Boyertown Area Sch. Dist.*, 893 F.3d 179 (3d Cir. 2018).

That societal attitudes, and even the meaning of words, can change dramatically over time is precisely why Congress sets deadlines on constitutional amendments—and why courts enforce them. To quote the Supreme Court again:

> [A]n alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and …, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.

Dillon, 256 U.S. at 375. If supporters of the ERA want that amendment to become part of the Constitution, they must go back to the drawing board. Trying to revive the version of the ERA that died decades ago is a pointless exercise. Under controlling Supreme Court precedent, such a "zombie" ERA would be quickly tossed out of court.

Sincerely,

Michael P. Farris
President, CEO & General Counsel
Alliance Defending Freedom