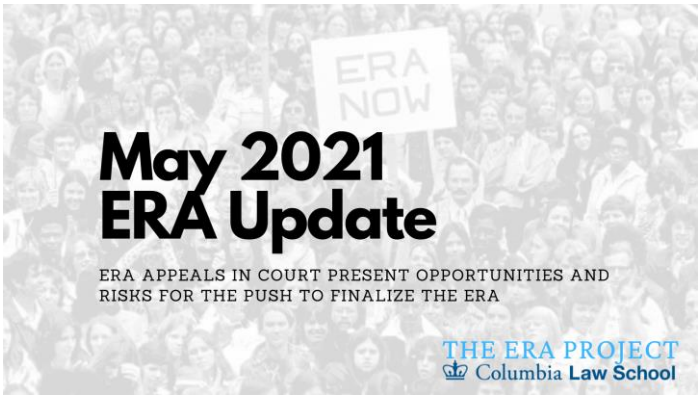
Columbia Law School
THE ERA PROJECT



Recent Appeals in ERA cases highlight progress but pose significant risks—an explainer from the ERA Project

Introduction

The campaign to finalize the Equal Rights Amendment is being waged on several fronts. One in the courts, one in Congress. Last week, there were developments in two important lawsuits seeking to have the Equal Rights Amendment declared finalized and a valid part of the U.S. Constitution, thus securing explicit sex equality protections in the Constitution.

Now that 38 states have ratified the ERA, energy behind the movement for the amendment continues to grow. The main obstacle, at this point, is that the final three ratifications took place after the expiration of time limits set by Congress. The ERA was passed by Congress in 1972 with a seven-year time limit for ¾ of the states to ratify the Amendment. The deadline was later extended three more years, to 1982. When the deadline expired, 35 states had ratified the ERA, falling three states short of the constitutional requirement of 38 states. (For more on the background of the ERA, see the ERA Project's FAQ on the Current Status of the Equal Rights Amendment to the U.S. Constitution).

In two pending lawsuits—*Virginia v. Ferriero* and *Equal Means Equal v. Ferriero*—advocacy groups and state Attorneys General have challenged the validity of the Congressional time limits. While both cases were dismissed by the trial courts, the plaintiffs have appealed those rulings. During the first week of May, oral arguments were held in *Equal Means Equal* and the plaintiffs in *Virginia* formally notified the courts that they would go ahead with an appeal.

These appeals present both opportunities and risks for the push to finalize the ERA.

Background

- **Thirty-eight states ratify the ERA**. The ERA was first introduced to Congress in 1923 and introduced every subsequent year until its successful passage in 1972. After approval by

Congress, Article V of the Constitution requires that proposed amendments are ratified by 38 states to become part of the U.S. Constitution. Congress included a seven-year time limit for state ratification of the ERA. By the time limit's expiration in 1979, 35 states had ratified the ERA, but despite a Congressional extension of the time limit to 1982, no further states ratified the ERA until Nevada in 2017 and Illinois in 2018. Virginia became the 38th state to ratify the ERA on January 15, 2020.

- **At least five states voted to rescind their ratifications**. Five states—Idaho, Kentucky, Nebraska, South Dakota, and Tennessee—voted to rescind their earlier ratifications of the ERA between 1973 and 1979. The North Dakota legislature voted to rescind their ratification in March of 2021. Rescissions are not mentioned in Article V of the Constitution or in any federal law relating to constitutional amendments, and the Supreme Court has not ruled on this issue. Some scholars argue that ratification is a one-time event, such that once done it cannot be undone because the Constitution only provides for ratification, not un-ratification. Other scholars hold the view that democratic values would be advanced by allowing state legislatures to rescind prior ratifications of proposed amendments to the constitution.
- **Department of Justice memo states ERA deadline has expired.** On January 27, 2020, the Department of Justice issued a memo stating that the original seven-year time limit for ratification was valid and had expired, and thus the ERA had fallen three states short of ratification. The Archivist of the U.S., who is charged with formally publishing ratified amendments in the Constitution, deferred to the Justice Department memo and declined to publish the ERA.
- **Lawsuits seek the ERA's recognition in the Constitution.** Some proponents of the ERA brought suit challenging the constitutionality of the seven-year time limit and asking the courts to compel the Archivist to fulfill his congressionally mandated ministerial duty to publish the amendment in the Constitution. (*see case discussions below*).
- **Congressional Action.** Meanwhile, others are seeking to address the deadline through Congressional action. In March 2021, the House passed a resolution (H.J. Res 17) to remove the time limit on ERA ratification and a similar bill is pending in the Senate (S.J. Res 1, co-sponsored by Senators Ben Cardin and Lisa Murkowski). In addition, Representative Carolyn Maloney introduced H.J. Res. 28, a new Equal Rights Amendment which would restart the ratification process on March 1, 2021.

Virginia v. Ferriero

- **The Attorneys General of Nevada, Illinois, and Virginia—the final three ratifying states— sued in the District Court of D.C.** to compel the Archivist to include the ERA in the Constitution, arguing that the Congressional deadline was invalid. Numerous parties filed amicus briefs on all sides and another group of states—Alabama, Louisiana, Nebraska, South Dakota, and Tennessee—intervened in the case, contending that the ERA was not

properly ratified due to the expiration of the time limit and because five states that had previously ratified the ERA voted to rescind the ratifications.

- **The court granted the defendant's motion to dismiss**. As we noted in the ERA Project's FAQ on the district court's decision in *Virginia v. Ferriero*, Judge Rudolph Contreras concluded that the plaintiffs lacked standing to bring the case against the Archivist and that, even if they did, the Constitutional deadline was valid and thus the ERA did not meet the Article V requirements for inclusion in the Constitution. The judge did not address the question of whether states have the power to rescind earlier ratifications of proposed constitutional amendments.
- **Notice of appeal to the D.C. Circuit Court filed on May 3, 2021.** The parties will brief the issues in the coming months and ultimately a panel of judges from the D.C. Circuit will rule on the appeal.

Equal Means Equal v. Ferriero

Meanwhile, a similar appeal is moving forward in the First Circuit Court of Appeals. As in *Virginia v. Ferriero*, the plaintiffs in *Equal Means Equal* ask the court to order the Archivist to publish the ERA following Virginia's ratification. The plaintiffs here are non-profit organizations and an individual, as opposed to state Attorneys Generals.

- **The plaintiffs argued that the Congressional time limit is unconstitutional** because it imposes unlawful constraints on the states' ability to ratify the ERA and because the time limit was in the preamble of the ERA rather than the text of the amendment itself. As such, the time limit was not subject to approval by the States. Equal Means Equal also argued that the recissions of states that have ratified the ERA are not valid under the historical precedent set by the ratification of the 14th Amendment.
- **The District Court of Massachusetts dismissed the case in August 2020**. Judge Denise Jasper ruled that the Plaintiffs lacked standing, meaning that they were not directly impacted by the Archivist's failure to publish the ERA. Specifically, Judge Casper rejected Equal Means Equal's argument that due to their legal interest in the "continued vitality of the ERA," they were injured by the Archivist's actions in a concrete and particularized manner required to be the party bringing this kind of challenge. Unlike the court in *Virginia*, the Court did not reach the merits of the case and did not address the validity of the time limit or the recission issue.
- **The plaintiffs are appealing the case.** First, Equal Means Equal sought to appeal the ruling directly to the Supreme Court, skipping appellate review. After the Supreme Court denied Plaintiff's appeal in October 2020, plaintiffs filed an appeal to the First Circuit. On May 5, 2021, the parties argued their appeal in front of a First Circuit panel of judges. The government asked the Court to reaffirm the District Court's decision and restated their arguments that the Plaintiffs had indeed shown a legally recognizable injury sufficient to establish standing to bring the suit. Plaintiffs asked the court to overrule the lower court

decision on the standing issue and additionally wanted the court to rule on the merits – that the ratification process is complete, and that the Archivist should publish the amendment as finally ratified.

Opportunities and Risks

These recent developments reflect the significant momentum of the ERA and speak to the need for the recognition of gender equality on a national, constitutional level. The appeals keep the ratification of the ERA front and center in the national conversation, putting pressure on the Office of Legal Counsel to consider withdrawing the opinion declaring that the deadline for the ERA had passed. If these appeals are successful, they would result in the recognition of the ERA in the Constitution.

On the other hand, some scholars and advocates have urged the parties not to press the cases further, as doing so would raise the possibility of several significant risks:

- **Risk of an adverse decision.** As the federal judiciary, including the Supreme Court, has become more conservative, pressing these cases in the courts of appeals and the Supreme Court risks the issuance of judicial rulings on the ERA and the constitutional amendment process that would be significant setbacks for the larger struggle to secure gender equality and justice under the Constitution. From this perspective, it is better to absorb the losses at the trial court level and shift the focus of advocacy to the political process.

- **Political question.** Some scholars hold the view that the question of the validity of the ERA, and the process of amending the Constitution more generally, is a purely political—not legal—question. As such, courts should not be asked to resolve the issue of the finalization of the ERA and appealing the trial court rulings merely compounds the error of inviting courts to adjudicate this matter when it should be resolved by Congress. Several scholars submitted a friend of the court brief arguing this view in the *Virginia v Ferriero* case.

- **Political legitimacy.** Others hold the view that as a practical—not technical, legal—matter, the better course is to walk away from the courts and return to the political arena to fight the fight over the ERA because doing so is a better strategy from the perspective of building political legitimacy for the ERA.