ERACOALITION FUND FOR WOMEN'S EQUALITY

April 30, 2019

Chairman Cohen, Ranking Member Johnson and Members of the Subcommittee
Subcommittee on the Constitution, Civil Rights and Civil Liberties
U.S. House Committee on the Judiciary
2141 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cohen, Ranking Member Johnson and members of the U.S. House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties,

We thank you for the opportunity to submit testimony for the record for the House Subcommittee on the Constitution, Civil Rights and Civil Liberties' April 30, 2019 hearing entitled *The Equal Rights Amendment.* The ERA Coalition additionally thanks you for this historic opportunity, the first hearing in Congress in 36 years to present the case for the Equal Rights Amendment - the case for equality for this country's 160 million women. Women have been seeking this fair fix to the Constitution for nearly a century.

In June of 2018, the Coalition worked with Congresswomen Carolyn Maloney and Jackie Speier to organize a Shadow Hearing on the ERA. Witnesses Alyssa Milano, Jessica Lenahan (the plaintiff in Gonzalez v. Castle Rock) and ERA Coalition board member Carol Robles Roman riveted the country with their testimony. It was there that Chairman Nadler promised a "real" hearing, should the Democrats retake control of the House. And here we are, promise kept. Thank you.

The Coalition is comprised of more than one hundred organizations and leaders across the country—national organizations like the American Association of University Women (AAUW), the Black Women's Roundtable, Equality Now, the Feminist Majority, the National Congress of Black Women (NCBW), the National Organization for Women (NOW), the YWCA, —and smaller groups of unwavering dedication, working at the local, grassroots level for decades.

Through our members, we represent millions of women who are watching from near and afar what we do here today. Many are here with us in this room. They have come from states like Arizona, Florida, Georgia, Louisiana, Missouri, North Carolina, Ohio, Oregon and Virginia where they work tirelessly for the ERA. They are here to celebrate the fact that a long denied full

hearing is now a reality. They are also here to determine the resolve of this deliberative body to raise to an equal status the women they represent.

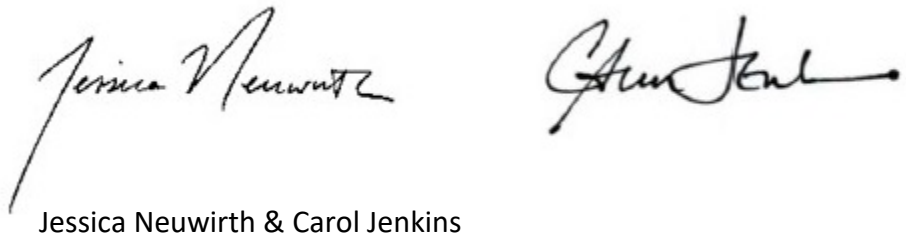
We believe the ERA is within our reach: 37 states have ratified the amendment. We need only one more state to ratify, and significant activity exists in almost every one of the thirteen non-ratified states to do that. Among the possibilities we are here today to consider is HJ Res 38, removal of the deadline on the ERA. Removal of the deadline eliminates the Congressional impediment to the ratification of the Equal Rights Amendment.

The ERA Coalition's Legal Task Force, comprised of world renowned constitutional scholars like Erwin Chemerinsky, Catharine MacKinnon, and Kathleen Sullivan, supports this option. In their legal brief, *The Equal Rights Amendment: Advocacy, Litigation and the 38th State*, attached, they conclude: "There are compelling political reasons for both Houses to pass this resolution, including the importance of women in the electorate. It would be unprecedented for Congress to allow a prior congressional resolution to stand in the way of an amendment that three-fourths of the states have approved."

Our research indicates that America is ready for this: 94% of Americans of all colors, ages, political persuasions believe in the constitutional equality of women. Eighty percent believe we have already passed the ERA, and are mystified by our failure to do so.

Today gives us the chance to rectify a centuries old exclusion from equal rights in our Constitution. While the original drafters may not have foreseen the possibility of an equal future for girls and boys, women and men, they did give us a way to make amends for the document's shortcomings. It's time to add the Equal Rights Amendment.

Sincerely,



Jessica Neuwirth & Carol Jenkins
Co-Presidents, ERA Coalition

ERACOALITION FUND FOR WOMEN'S EQUALITY

The Equal Rights Amendment: Advocacy, Litigation, and the 38th State

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

After decades of advocacy, ratification of the Equal Rights Amendment is within reach.

Congress passed the ERA in 1972 with overwhelming support from both sides of the aisle. State legislatures raced to be the first to ratify. By the late 1970s, 35 states had ratified—three short of the 38 required for a constitutional amendment. Now the ERA is surging forward once again. In 2017, Nevada became the 36th state to ratify. In 2018, Illinois became the 37th. Virginia is poised to take up the issue again soon, with several other states on its heels—including North Carolina and Arizona. Any one of these could become the final, 38th state.

So, what about the deadline? When Congress passed the ERA in 1972, it introduced the amendment in a joint resolution with a preamble saying that the amendment would be valid "when ratified by the legislatures of three-fourths of the several States within seven years of its submission by the Congress." In 1978, Congress voted to extend that period by three years and three months. The extension expired on June 30, 1982, with 35 states having ratified.

In general, under Article V of the Constitution, an amendment to the Constitution becomes effective when the 38th state ratifies. No further action by Congress or the Executive Branch is required. Practically speaking, once the National Archives and Records Administration receives notice of ratification from the necessary number of states, the Archivist certifies the amendment as part of the Constitution, specifying the states that ratified it. 1 U.S.C. § 106(b).

It is possible that the Archivist will certify the ERA immediately upon receiving notice of the 38th ratification. But given the expired deadline, this might not happen. Some other action may be necessary to resolve any question about the deadline.

Several strategies are available for resolving this question. Members of the Coalition will likely pursue all of them. As discussed further below, these different strategies are not inconsistent. They reinforce one another.

Legislative Strategy: *Press Congress to eliminate the prior deadline.*

The Coalition is actively pursuing a resolution in Congress that would remove the deadline, confirming that the ERA will become part of the Constitution "whenever" three-fourths of the states ratify it. There are compelling political reasons for both Houses to pass this resolution, including the importance of women in the electorate. It would be unprecedented for Congress to allow a prior congressional resolution to stand in the way of an amendment that three-fourths of the states have approved.

Passing this new resolution would be consistent with Article V of the Constitution, as well as with Congress's broad power to change prior resolutions. Article V—which governs the process of amendment—does not say anything about time limits for ratification. In fact, the latest amendment (the 27th) was proposed by James Madison in 1789 and ratified nearly 203 years later, in 1992. The practice of imposing deadlines did not begin until 1917, when Congress proposed the 18th Amendment (Prohibition). Since then, Congress has imposed a deadline on all but two of its proposed amendments.

The Supreme Court has confirmed that Congress has the power to impose a reasonable deadline. In the context of the 18th Amendment, the Court explained that Article V "invest[s] Congress with a wide range of power in proposing amendments." *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921). This necessarily includes the power to set a time frame for ratification. *Id.*; *Coleman v. Miller*, 307 U.S. 433, 452 (1939) ("We have held that Congress in proposing an amendment may fix a reasonable time for ratification.").

The ERA's deadline differs from the one in the 18th Amendment in a significant way: it appears only in the preamble of the joint resolution by Congress that introduced the amendment, not in the body of the amendment itself. As discussed below, some advocates believe this makes the deadline unconstitutional (or at least ineffective).

Setting that issue aside, however, the location of the ERA's deadline is significant *because it leaves Congress with the power to make changes*. The ERA's deadline was not part of the text that the states voted on when they ratified the amendment. Instead, it merely reflected a particular Congress's view at a particular moment. One of the guiding principles of our legislative branch is that one Congress cannot bind or limit the power of later Congresses. As noted above, Congress has already changed the ERA's deadline once, extending it by more than three years. In doing so, Congress relied in part on the deadline's location in the preamble, rather than in the body of the amendment.

No legal barrier prevents Congress from eliminating the deadline altogether—and doing so retroactively. No Supreme Court case has ever cast doubt on Congress's power with respect to the timing of ratification or suggested that Congress lacks the power to

extend or remove a ratification deadline after the fact. Although one district court judge in the early 1980s concluded that Congress did lack this power, the Supreme Court vacated his decision once the extension expired. *National Organization for Women v. Idaho*, 459 U.S. 809 (1982). In the process, the Supreme Court was not presented with—and did not resolve—any question about what would happen if Congress later removed the deadline altogether. To the contrary, under current Supreme Court precedent, Congress's power regarding ratification continues throughout the process, and its judgment in exercising that power is a "political question" that courts will not second-guess. *Coleman*, 307 U.S. at 449, 454.

There is no reason to fear that eliminating or extending the deadline now could give some states a chance to "rescind" their prior ratifications, as a few states attempted to do in the 1970s. Historically, attempts to rescind prior ratifications have not been found effective. Indeed, the promulgation of the 14th Amendment depended on states that had ratified and then attempted to rescind—and yet all three branches of the federal Government treated the amendment as fully ratified. This reflects the specific role the Constitution gives the states in the national process of amendment. The only question under Article V is whether a state's legislature voted to ratify at some point in time. It does not matter if a subsequent legislature disagreed.

Litigation Strategy: *Ask the courts to declare the deadline ineffective.*

As Congress considers this legislation, plans are also underway by some ERA advocates for offensive litigation to challenge the deadline. This may take the form of a mandamus action demanding that the Archivist certify the ERA as soon as the 38th state ratifies it. It may also involve civil lawsuits to enforce the ERA's protections once they arguably come into effect.

Some ERA advocates may argue that the deadline is *unconstitutional*. They believe that deadlines for ratification improperly limit the power of the states under Article V. On that basis, they may argue that the Supreme Court should reverse its decision in *Dillon v. Gloss*—or at a minimum, that the Court should treat the ERA's deadline differently than the one addressed in *Dillon* because it appears in a preamble to Congress's joint resolution, rather than in the body of the amendment itself. This strategy would ultimately require persuading the Supreme Court to take up the issue.

Other ERA advocates may argue that the deadline—while constitutional—is *ineffective*. Article V states that an amendment proposed by Congress "shall be valid to all intents and purposes . . . when ratified by the legislatures of three fourths of the several states." Even assuming that Congress can build a time limit into the body of an amendment, it cannot limit the states' ratification powers under Article V simply by saying so in a joint

resolution. The ERA's "deadline" is therefore only a guideline—a statement of Congress's preference—rather than a binding limit on states with respect to ratification.

Sequence: *These strategies can proceed together, at the same time.*

These different strategies will likely move forward at the same time, reinforcing one another. The litigation could help to illustrate for members of Congress why removing the deadline is so important. And the legislation—if successful—would give advocates an additional reason to argue that the original deadline cannot have any force.

Importantly, asking Congress to remove the deadline does not require conceding that the deadline is constitutional and would be binding on the states absent congressional action. Nor does it require conceding that the courts have no role to play. In fact, some members of Congress may vote to remove the deadline *because they think judges will refuse to enforce it*—and they do not want the ERA to be stuck for years in the courts.

More broadly, pursuing a legislative solution is not inconsistent with pursuing constitutional litigation. A recent example confirms that this is so: marriage equality activists were pursuing same-sex marriage rights in state legislatures right up to the time when the Supreme Court found such rights in the Constitution, holding that state legislatures lack the power to deny them. The momentum of each reinforced the other.

This memorandum was drafted by the Chair of the ERA Coalition's Legal Task Force, Linda Coberly of Winston & Strawn LLP, which is one of the Coalition's Lead Organizations.

Critical research was provided by Liza Velazquez and the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP, the Coalition's pro bono legal counsel.

The memo has the endorsement of the following members of the ERA Coalition's Legal Task Force:

- *Erwin Chemerinsky, Dean and Professor of Law at Berkeley Law, University of California*
- *Catharine A. MacKinnon, Professor of Law at the University of Michigan and Harvard Law Schools*
- *Kathleen M. Sullivan, Quinn Emanuel Urquhart & Sullivan, former Dean of Stanford Law School*
- *Michele Bratcher Goodwin, Professor of Law at University of California - Irvine School of Law*
- *Linda J. Wharton, Professor of Political Science and Pre-Law Advisor, Stockton University*
- *Julie Suk, Professor and Dean for Master's Programs, Graduate Center, City University of New York*
- *Robinson Woodward-Burns, Assistant Professor of Political Science, Howard University*
- *Jessica Neuwirth, Co-President, ERA Coalition; Distinguished Lecturer and Rita E. Hauser Director of the Human Rights Program at Roosevelt House, the Public Policy Institute of Hunter College*