118TH CONGRESS
1ST SESSION

S. RES. _____

Recognizing the expiration of the Equal Rights Amendment proposed by Congress in March 1972, and observing that Congress has no authority to modify a resolution proposing a constitutional amendment after the amendment has been submitted to the States or after the amendment has expired.

IN THE SENATE OF THE UNITED STATES

Mrs. HYDE-SMITH (for herself, Mr. LANKFORD, Mr. CRUZ, Mr. COTTON, Mr. MULLIN, Mr. VANCE, Mr. CASSIDY, Mr. RICKETTS, and Mr. RUBIO) submitted the following resolution; which was referred to the Committee on

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RESOLUTION

Recognizing the expiration of the Equal Rights Amendment proposed by Congress in March 1972, and observing that Congress has no authority to modify a resolution proposing a constitutional amendment after the amendment has been submitted to the States or after the amendment has expired.

Whereas article V of the Constitution of the United States gives two-thirds of the Senate and two-thirds of the House of Representatives the power to propose constitutional amendments and their mode of ratification by the States;

Whereas the Supreme Court of the United States in Dillon v. Gloss, 256 U.S. 368 (1921) unanimously held that Congress may, in proposing a constitutional amendment, incorporate ''a definite period for ratification [that] shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided ...'';

Whereas the Supreme Court in the Dillon v. Gloss decision held that whether Congress uses its power to include such a ''definite'' deadline was ''a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification'' of an amendment, which mode Congress has always dictated in the proposing clause of a resolution;

Whereas House Joint Resolution 208, 92nd Congress, referred to in this resolution as the ''Equal Rights Amendment Resolution'' contained a ratification deadline of 7 years in the proposing clause of the resolution, as has every constitutional amendment submitted by Congress to the States since 1960, and proposed an amendment referred to in this resolution as the ''Equal Rights Amendment'';

Whereas, in Illinois v. Ferriero, No. 21–5096 (D.C. Cir. 2023), a unanimous ruling issued on February 28, 2023, the United States Court of Appeals for the District of Columbia Circuit rejected the claim of the Attorneys General of Illinois and Nevada that a deadline in a proposing clause is not effective, with the court calling that claim ''unpersuasive'' and observing that ''if that were the case, then the specification of the mode of ratification in every amendment in our nation's history would also be inoperative'';

Whereas, in the same unanimous ruling, the United States Court of Appeals for the District of Columbia Circuit noted that the Supreme Court has affirmed the authority of Congress to set a binding ratification deadline, and the court of appeals refused to order the Archivist to certify the Equal Rights Amendment as part of the Constitution and dismissed the lawsuit brought by Illinois and Nevada;

Whereas Representative Martha Griffiths, the sponsor of the Equal Rights Amendment Resolution, said in 1971, speaking of the deadline for the Equal Rights Amendment, ''I think it is perfectly proper to have the 7-year statute so that it should not be hanging over our heads forever.'';

Whereas, under article V of the Constitution, a proposed amendment does not become part of the Constitution unless it is either ''ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof'' with one or the other mode of ratification being dictated by Congress in the proposing clause of a resolution;

Whereas only 35 States ratified the Equal Rights Amendment before its 7-year deadline, resulting in fewer than the 38 State ratifications necessary for adoption under article V of the Constitution;

Whereas, before the original deadline for the Equal Rights Amendment expired, 4 of the 35 States that voted to ratify voted to rescind their ratifications;

Whereas Justice Ruth Bader Ginsburg in 2020 observed, when explaining why she thought the Equal Rights Amendment needed to start over, ''If you count a late-

comer on the plus side, how can you disregard States that said we've changed our minds?'';

Whereas, in Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), Judge Marion Callister of the United States District Court for the District of Idaho held that article V of the Constitution did not permit Congress to extend a ratification deadline, writing, ''Once the proposal has been formulated and sent to the States, the time period could not be changed any more than the entity designated to ratify could be changed from the State legislature to a State convention or vice versa. Once the proposal is made, Congress is not at liberty to change it.'';

Whereas, on March 5, 2021, Judge Rudolph Contreras of the United States District Court for the District of Columbia held in Virginia v. Ferriero, 525 F. Supp. 3d 36 (2021) that the deadline contained in the Equal Rights Amendment Resolution was constitutionally valid and that the legislative actions of 3 State legislatures in 2017 through 2020, purporting to ratify the Equal Rights Amendment, ''came too late to count'';

Whereas Judge Contreras noted, ''Inclusion of a deadline was a compromise that helped Congress successfully propose the ERA where previous attempts to pass a proposal had failed.'';

Whereas, while Judge Contreras found it unnecessary to reach the question of whether Congress could retroactively alter a deadline, he did observe that ''the effect of a ratification deadline is not the kind of question that ought to vary from political moment to political moment ... Yet leaving the efficacy of ratification deadlines up to the political branches would do just that.'';

Whereas, on January 6, 2020, the Department of Justice Office of Legal Counsel issued a legal opinion stating, ''We do not believe, however, that Congress in 2020 may change the terms upon which the 1972 Congress proposed the ERA for the States' consideration. Article V does not expressly or implicitly grant Congress such authority. To the contrary, the text contemplates no role for Congress in the ratification process after it proposes an amendment. Moreover, such a congressional power finds no support in Supreme Court precedent.'';

Whereas the 2020 Office of Legal Counsel opinion also observed, ''Because Congress and the State legislatures are distinct actors in the constitutional amendment process, the 116th Congress may not revise the terms under which two-thirds of both Houses proposed the ERA Resolution and under which 35 State legislatures initially ratified it. Such an action by this Congress would seem tantamount to asking the 116th Congress to override a veto that President Carter had returned during the 92nd Congress, a power this Congress plainly does not have.''; and

Whereas in oral argument before the United States Court of Appeals for the District of Columbia Circuit in the Virginia v. Ferriero case on September 28, 2022, Judge Robert Wilkins of that Court asked Deputy Assistant Attorney General Sarah Harrington, ''Why shouldn't the Archivist just certify and publish [the Equal Rights Amendment] and let Congress decide whether the deadline should be enforced ...?'', and Ms. Harrington answered, ''The Constitution doesn't contemplate any role for Congress at the back end. Congress proposes the amendment, it goes out into the world, and the States do what they're going to do'': Now, therefore, be it

Resolved, That the Senate—

(1) recognizes that, under article V of the Constitution, the legitimate constitutional role of Congress in the constitutional amendment process for the Equal Rights Amendment ended when Congress proposed and submitted the Equal Rights Amendment to the States on March 22, 1972;

(2) recognizes that the Equal Rights Amendment expired when its ratification deadline passed with fewer than three-fourths of the States ratifying;

(3) recognizes that Congress has no power to modify a resolution proposing a constitutional amendment after the amendment has been submitted to the States, or after the amendment has expired; and

(4) recognizes that the only legitimate way for the Equal Rights Amendment to become part of the Constitution is provided in article V of the Constitution, and requires reintroduction of the same or modified language addressing the same subject, through approval of a new joint resolution by the required two-thirds votes in each house of Congress.