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To: Members of the Legislature
State of Alabama

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Subject: HJR35, Equal Rights Amendment

As an attorney who has taught Constitutional Law and litigated constitutional cases for more than forty years, I urge you to vote AGAINST HJR35 which purportedly would ratify the Equal Rights Amendment.

Congress passed this amendment in 1972 and provided a seven-year period for its ratification. Many states quickly ratified, but as more citizens and legislators became aware of the possible ramifications of the amendment, the ratification process slowed to a virtual halt, and several states rescinded their ratification.¹ When the amendment seemed doomed to fail, Congress attempted to extend the ratification deadline to 1982. When that deadline expired, all assumed the amendment had failed.

Whether Congress has authority to extend a deadline that it has previously imposed is questionable. After Congress attempted to extend the ratification deadline for the ERA, a federal district court ruled that the attempted extension was invalid, *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981). As the court said,

{T}he Court is persuaded that the congressional act of extending the time period for ratification was an improper exercise of Congress' authority under article V. While Congress is not required to set a time period in advance of the requisite number of states acting to ratify, if it chooses to do so to remove uncertainty regarding the question, it cannot thereafter remove that uncertainty by changing the time period.

¹ Some question the constitutional validity of these states' recissions.

However, before the case reached the Supreme Court, the extended deadline had also expired, so the Supreme Court held that the issue was moot, 459 U.S. 809 (1982).

To attempt to resurrect the amendment now by renewing the ratification process, is to make a mockery of the Constitution and the amendment process set forth in Article V. When Congress passes an amendment and sends it to the states for ratification, by the Necessary and Proper Clause of Article I Section 8 Congress has the authority to set a date for ratification. When Congress passes an amendment and sends it to the states for ratification, Congress clearly has authority to impose a deadline for ratification. In *Dillon v. Gloss*, 256 U.S. 368 (1921), the United States Supreme Court unanimously held that Congress is empowered by Article V to fix a seven-year time limit for the ratification of the Eighteenth Amendment.

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[w]e do not find anything in the Article [V] which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections

at relatively the same period, which of course ratification scattered through a long series of years would not do.

...

Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to the rule. Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification.

Those in Congress who voted for the ERA, did so with the clear understanding that there was a seven-year ratification period. At that time no one even remotely thought the deadline could be extended, much less that the amendment could be "resurrected" nearly four decades later. That date has passed, and out of respect for constitutional process, those who want the Equal Rights Amendment or something like it should start anew in Congress. They could then reconsider and re-word the amendment if they so choose.

The ratification of the 27th Amendment refutes rather than supports the proponents' argument. This was one of twelve amendments passed by Congress in 1789 and known collectively as the Bill of Rights. Ten of these twelve were ratified by the states by 1792; two were not. But unlike the Equal Rights Amendment, when Congress sent these twelve amendments to the states for ratification, Congress placed no time limit on their ratification. Therefore, when the 38th state ratified in 1992, the ratification process was arguably still open. Even so, although the Director of Archives has certified the 27th Amendment as duly ratified, no court has ruled on the validity of its ratification.

The reason ERA proponents have advanced the "three-state strategy" is obvious: they have adopted it as a desperation move, because they know they do not have the support to gain its passage by Congress and its ratification by 38 states today. But the move does violence to the Constitution and to the ratification process set forth in Article V and

followed by Congress. The late U.S. Supreme Court Justice Ruth Bader Ginsburg, a strong ERA supporter, told an audience at Georgetown University Law Center that the original ERA could no longer be ratified and proponents should start over with a new amendment.
<https://thehill.com/changing-america/respect/equality/482744-ginsburg-says-process-to-ratify-equal-rights-amendment>

This proposal does not affect only Alabama; it affects the entire nation. Out of respect for the U.S. Constitution and the due process of law, the Foundation urges the Legislators of Alabama to vote NO on this proposal.

Thank you for considering my letter.

Sincerely and respectfully,

/s/

John Eidsmoe, Senior Counsel