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ERA Project FAQ on the Court of Appeals Decision in *Illinois v. Ferreiro*

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ERA PROJECT

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Illinois v. Ferriero is a lawsuit filed by the Attorneys General of the last three states that ratified the Equal Rights Amendment (ERA)—Nevada, Illinois, and Virginia—asking the court to require that the ERA be officially published by the U.S. Archivist as the 28th Amendment to the Constitution. On March 5, 2021, the District Court dismissed the lawsuit on standing grounds, meaning that the three states had not shown that they suffered a legally recognized injury. The court reasoned that the Archivist's actions have no legal effect and, as such, the states were not harmed by the Archivist's refusal to publish the ERA. See our FAQ on the District Court's decision.

Nevada and Illinois appealed the decision and a three-judge panel of the Court of Appeals for the D.C. Circuit, comprised of Judges Wilkins (Obama appointee), Rao (Trump appointee), Childs (Biden appointee), affirmed the lower court's decision and dismissed the lawsuit on the following grounds:

1. **The states that brought the lawsuit did not meet the requirements to obtain mandamus relief.** The court focused on mandamus relief as a threshold matter and dismissed the lawsuit based on the lack of subject matter jurisdiction. In a "mandamus action" the goal is to get a court to order a government official to do something they are obliged to do by law. To establish mandamus relief, plaintiffs must show that they had "a clear and undisputable right" and that "the federal official is violating a clear duty to act." The court found that the U.S. Archivist did not have a clear duty to certify and publish the ERA, and therefore the states did not meet the jurisdictional requirements to compel the Archivist to publish the ERA.

2. **The states did not prove the Archivist had a "clear duty" to publish the ERA.** In *Dillon v. Gloss*, 256 U.S. 368 (1921), the Supreme Court held that "Article V conferred a 'wide range of power' upon Congress when proposing amendments" (including a seven-year time limit for ratification), and in *Coleman v. Miller*, 307 U.S. 433 (1939), they held that Congress's power to impose ratification requirements flows from its authority under Article V to designate the "mode of ratification" of an amendment. In analyzing whether the Archivist's refusal to certify and publish the ERA was in clear violation of his duties, the court first looked to the Supreme Court's validation of Congress's authority to set reasonable limits for ratification. Second, the court found that while the states' reading of the law was "plausible," there were other "permissible" readings of what the law required in terms of publication of the ERA. As such, the states did not demonstrate that the Archivist had a "clear duty" to publish the amendment—the high standard required in a mandamus action. (p. 21-22.)

3. **In the context of mandamus review, the court was not persuaded that the placement of the time limit in the amendment's preamble, rather than in its text, rendered the time limit invalid.** Given Congress's constitutional authority in establishing the mode of ratification (whether by legislature or convention according to Article V of the Constitution)

and Congress's historical practice of including a preamble with valid instructions for state ratification in other constitutional amendments it had sent to states, the states' argument to invalidate one part of the preamble (time limit) would also seemingly invalidate the other parts (the mode of ratification).

4. **The court did not address several other key issues relating to ratification, leaving it to the political process.** The court did not express an opinion on the merits of the ERA as a matter of policy, nor did it address the question of states' power to rescind earlier ratifications of the ERA, or Congress's authority to amend, extend, or repeal ratification time limits. Thus, the court left it to Congress, as the most representative branch of our federal government charged with the ratification process by the Constitution, to deliberate and resolve.

Bottom Line: Congress has the preeminent role under Article V to clear the path for the ERA.

The court noted from the outset that Article V leaves open difficult questions that result from the ratification process of proposed amendments, but one thing is clear: it affirmed Congress's authority to determine the reasonable terms of ratification. This opinion, released during a Senate Judiciary Committee hearing on the ERA on February 28, 2023, affirmed Congress's constitutional authority under Article V to resolve legal issues within the ratification process, as it has done for nearly all of the previous amendments to the Constitution.

As such, the court's decision reaffirmed the position taken by leading scholars of constitutional law that Congress has the power to create, extend, and/or remove a deadline for state ratification of a proposed constitutional amendment, thus signaling that there are no legal impediments to Congress passing S.J.Res.4. This proposed joint resolution recognizes that 3/4 of the states have ratified the ERA, therefore lifting the time limit for ratifications and declaring the ERA the 28th Amendment to the Constitution.