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Federal Appeals Court Unanimously Upholds Dismissal of Lawsuit Claiming Equal Rights Amendment Was Ratified; Extends Unbroken 40-Year Losing Streak For ERA-Resuscitation Legal Claims

WASHINGTON – A three-judge federal court of appeals panel today unanimously upheld the dismissal of Equal Means Equal v. Ferriero, one of two ongoing lawsuits that implausibly claim that the federal Equal Rights Amendment (ERA) has been ratified and is part of the U.S. Constitution.

“Today’s ruling continues an unbroken, 40-year losing streak by advocates of the ERA-is-alive cult in the federal courts, before federal judges of every stripe of judicial philosophy and political background,” said Douglas Johnson, director of the National Right to Life Committee’s ERA Project.

The lawsuit ruled on today was brought by Equal Means Equal, a pro-ERA advocacy group, with several allied plaintiffs. EME sued the Archivist of the United States for declining to certify the ERA as part of the Constitution after the Virginia legislature purported to “ratify” the ERA in January 2020, ostensibly thereby crossing the 38-state ratification threshold (a dubious claim widely accepted by the news media). The lawsuit argued that the 1979 ratification deadline that Congress included in the 1972 ERA Resolution was unconstitutional, and that the Archivist’s refusal to certify the ERA harmed women as a class and the plaintiffs individually.

On August 6, 2020, federal district Judge Denise Casper, an appointee of President Obama, dismissed the Equal Means Equal lawsuit, ruling that the plaintiffs had not shown the type of injury required to establish standing. Equal Means Equal’s attorney, Wendy Murphy, then filed a cert petition at the U.S. Supreme Court, urging the court to consider not only the standing issue but the question of whether the ERA was indeed part of the Constitution. The Supreme Court rejected the cert petition in October 2020, with not a single justice recording a dissent. EME then pursued a conventional appeal in the U.S. Court of Appeals for the First Circuit, which produced today’s unanimous ruling upholding Judge Casper’s dismissal.

“The federal constitutional questions that the plaintiffs’ complaint raises concerning the legal status of the ERA are significant,” the panel said. “To be fit for adjudication in federal court, however, they must be raised in a suit that satisfies the requirements of Article III.” The ruling was written by Chief Judge Jeffrey Howard, who was appointed by President George W. Bush; he was joined by Judges Sandra Lynch, appointed by President Clinton, and David Barron, appointed by President Obama.

In a separate lawsuit brought by the attorneys general of Virginia, Nevada, and Illinois (Virginia v. Ferriero), U.S. District Judge Rudolph Contreras (an appointee of President Obama) on March 5, 2021 ruled that the deadline included by Congress in the Proposing Clause of the 1972 ERA Resolution was constitutional, and the ERA therefore expired more than three decades ago. The
legislative actions by Nevada (2017), Illinois (2018), and Virginia (January 2020) were not real ratifications because they “came too late to count,” Contreras ruled. Contreras also said that the Archivist of the U.S. was justified in refusing to certify (“publish”) the ERA as part of the Constitution, and indeed that the claim (made by the three attorneys general) that the Archivist should ignore the deadline was “absurd.”

On May 3, 2021, the attorneys general appealed to the U.S. Court of Appeals for the District of Columbia, where the appeal will be heard likely late this year. Alabama and four other “anti-ERA” states are intervenor-defendants in Virginia v. Ferriero.

NRLC Senior Policy Advisor and ERA Project director Douglas Johnson, said, “While the mainstream news media have been receptive to the narrative that the ERA is alive and perhaps on the verge of becoming part of the Constitution, objective examination of the judicial history suggests something more akin to a political hoax. Devotees of the ERA-is-alive cult have suffered an unbroken, 40-year string of defeats before federal judges of every stripe of judicial philosophy and political background. The two current lawsuits claiming that the ERA is alive have now been rejected by a total of five federal judges, four of whom were appointed by Democratic presidents. Over a 40-year period, 23 federal judges and justices have taken adverse actions on various ERA-is-alive legal claims, and not a single judge has accepted any one of the ERA-is-alive movement’s grab-bag of legal theories.”

An article by Johnson summarizing the 40-year string of defeats for ERA-revival advocates in the federal courts was published by NRLC on March 18, 2021. (“Federal judges of every stripe have scorned legal theories intended to resuscitate the Equal Rights Amendment”).

In Congress, the focus of pro-ERA forces is currently on a legislative measure, approved by the House of Representatives on March 17, 2021 on a near-party-line vote, that purports to retroactively “remove” the ERA ratification deadline. In remarks to a virtual “Townhall” on June 26, 2021, Equal Means Equal attorney Wendy Murphy called “the silly deadline removal” measure “a complete joke,” said that would be “struck in a minute, in a heartbeat, by a federal judge, because you cannot retroactively remove an expired deadline.” Murphy said that the measure serves only as a fundraising tool for members of Congress.

In any event, only two Senate Republicans have endorsed the “deadline removal” measure (S.J. Res. 1), and they are the same two who supported such legislation in the previous Congress (Senators Murkowski and Collins). The measure cannot advance without at least 60 supporters in the Senate.

The Archivist of the United States did not certify the ERA in January 2020 because a legal opinion by the Office of Legal Counsel of the Department of Justice, issued January 6, 2020, found that the ERA expired in 1979, that Congress lacked power to retroactively undo that expiration, and that the only constitutional route for ERA advocates was to begin the amendment process over again. At a Senate Judiciary Committee confirmation hearing on June 23, 2021, Senator Chuck Grassley (R-Iowa) asked President Biden’s nominee to head the Office of Legal Counsel, Christopher Schroeder, how he intended to approach the 2020 OLC ERA opinion. Schroeder responded, “That specific opinion, I believe, is the object of litigation currently against the Archivist…In this instance, in particular, I think we will be all best suited if we allow the litigation process to answer that question.”
National Right to Life opposes the 1972 ERA because it is likely to be employed as a textual constitutional foundation for judicial rulings that would invalidate virtually any state or federal law or policy that impedes access to abortion, or even that has a “disparate impact” on the availability of abortion, including any restrictions on government funding of elective abortion. While journalists sometimes write that “opponents claim” these things, in fact many of the strongest affirmations of the ERA-abortion link have come from leading abortion-rights advocates who support ERA. For example, NARAL Pro-Choice America asserted that "the ERA would reinforce the constitutional right to abortion… [it] would require judges to strike down anti-abortion laws…” A National Organization for Women factsheet on the ERA states that “…an ERA -- properly interpreted -- could negate the hundreds of laws that have been passed restricting access to abortion care…” The ACLU, in a March 16, 2021 letter to the House of Representatives, said that the ERA "could provide an additional layer of protection against restrictions on abortion...[it] could be an additional tool against further erosion of reproductive freedom...." Five pages of such footnoted quotes from leaders and attorneys associated with prominent abortion-rights organizations are found here.

Douglas Johnson is NRLC’s subject matter expert on the Equal Rights Amendment, an issue on which he has written and worked for 40 years. Mr. Johnson is available for interviews or email exchanges to discuss the congressional and ratification histories of the ERA, to comment on the legal and political aspects of the issue, and to discuss the ERA-abortion connection.

@ERANoShortcuts is a non-NRLR but recommended Twitter account dedicated exclusively to tracking ERA-related legal and political developments in the courts, Congress, Executive Branch, and state legislatures, from an “ERA-skeptical” perspective.

Founded in 1968, the National Right to Life Committee (NRLC), the federation of affiliates in each of the 50 states and the District of Columbia and more than 3,000 local chapters, is the nation’s oldest and largest grassroots pro-life organization. Recognized as the flagship of the pro-life movement, National Right to Life works through legislation and education to protect innocent human life from abortion, infanticide, assisted suicide and euthanasia.