Testimony of Kathleen M. Sullivan
U.S. Senate
Committee on the Judiciary
Hearing on Congress's Role in Ratifying the Equal Rights Amendment
February 28, 2023

Chairman Durbin and Members of the Committee:

Thank you for the honor of allowing me to testify in support of the Equal Rights Amendment ("ERA"), which provides that "[e]quality of rights under the law shall not be denied … on account of sex." Both Houses of Congress promulgated the amendment in 1972 by more than the two-thirds vote required by Article V, and 38 States have now ratified the amendment, as provided for in the co-equal role assigned to the States by Article V. The ERA is thus eligible to be added to the Constitution as the Twenty-Eighth Amendment without further action on the part of Congress or the States. I commend the bicameral and bipartisan efforts of Members of this Branch to further secure the ERA's place in our founding document through a joint resolution that would provide that the ERA "is valid to all intents and purposes as part of the Constitution, having been ratified by the legislatures of three-fourths of the several States, and that this is so "notwithstanding any time limit contained" in the prior joint resolution by which Congress proposed the ERA in 1972. S.J. Res. 4 (118th Cong. 2023-24).

I would like to focus today on three points. *First*, the ERA is the result of a century of extraordinary bipartisan cooperation. Authored by Alice Paul and Crystal Eastman after ratification of the Nineteenth Amendment in 1920, the ERA was introduced in Congress in 1923. In the 1960s and 70s, Republican Congresswomen Florence Dwyer (NJ), Charlotte Reid (IL), Margaret Heckler (MA), and Catherine Dean May (WA) worked across the aisle with Democratic Congresswomen Martha Griffiths (MI), Bella Abzug (NY), Patsy Mink (HI), Shirley Chisholm (NY), Louise Day Hicks (MA), and Edith Green (OR) to advocate for the ERA, with

Congresswomen Chisholm and Mink—the first women of color to serve in Congress—articulating the importance of the ERA to women of color. The ratification process was similarly bipartisan. For instance, Indiana's ratification in 1977 was a result of a bipartisan coalition, Hoosiers for the Equal Rights Amendment; ten of the 30 states that ratified the ERA within the first year of its proposal had legislatures controlled by Republican lawmakers; in another five, Republicans controlled or were tied for control in one house. The three latest states to ratify (Illinois, Nevada and Virginia) similarly did so by bipartisan vote.

The Members of this Branch would do great honor to this bipartisan history by taking steps now to enshrine the principle of women's equality and an explicit prohibition against sex discrimination in the nation's foundational document.

Second, the ERA should be enacted as an express constitutional provision notwithstanding existing judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment and Fifth Amendment Due Process Clause as impliedly prohibiting some forms of sex discrimination by the States and Federal Government. *See United States v. Virginia*, 518 U.S. 515 (1996). The judicial interpretation of those clauses is no substitute for an amendment to the Constitution formally guaranteeing sex equality as one of our enduring and foundational principles. Supreme Court decisions are necessarily the product of transient and shifting judicial majorities, and thus are dependent on the Court's makeup through the political process of presidential nomination and Senate confirmation at any given time. We the People speak through our Constitution with more permanence than any Court majority through its decisions.

Moreover, a Supreme Court ruling does not endure for ages to come; the constitutional law the Supreme Court makes can easily be unmade by that Court, with little regard for the principle of *stare decisis*. The Congress need look no further than *Dobbs v. Jackson Women's Health*

Organization, 142 S. Ct. 2228 (2022), which overruled the right to abortion provided for in *Roe v. Wade*, 410 U.S. 113 (1973), to see how precarious the judicial protection of women's constitutional rights may be. And indeed, before the 1970s, the Supreme Court had upheld against constitutional challenge state laws excluding women from jury service, admission to the bar as lawyers and even employment as bartenders. *Hoyt v. Florida*, 368 U.S. 57 (1961); *Bradwell v. Illinois*, 83 U.S. 130 (1872); *Goesaert v. Cleary*, 335 U.S. 464 (1948). The Court had also upheld the exclusion of women from voting, *Minor v. Happersett*, 88 U.S. 162 (1874), an inequality that our Nation did not redress until the 1920 ratification of the Nineteenth Amendment to the Constitution, which provides that "the right of a citizen of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

Thus, even though landmark decisions culminating in the current case law on equality for women were achieved by brilliant advocacy and had momentous importance in helping to dislodge entrenched sex discrimination from our Nation's state and federal laws, they lack the strength, endurance, and efficacy of an express constitutional amendment.

Third, the Congress clearly has the constitutional authority to eliminate the deadlines it previously set for ratification of the ERA by 1979 and later 1982, and thus deadline-removal proposals like S.J. Res. 4 are entirely proper and constitutional. Prior Congresses had authority to set the earlier deadlines just as the current Congress has the authority to remove those deadlines. As the Office of Legal Counsel correctly opined in 1977, Congress may lift or extend a ratification deadline by majority vote of both Houses. Memo to Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Att'y Gen., Off. L. Counsel, *Re: Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment* (Oct. 31, 1977).

Importantly, the earlier deadlines were not part of the text of the proposed ERA as Congress sent it out to the States for ratification, but rather only part of the preamble. As preamble, they were not a part of the ERA itself, and not part of the constitutional text the ratifying States voted to ratify. By contrast, earlier ratification deadlines, such as those in the 18th, 20th, and 22nd Amendments, make those Amendments "inoperative" as a matter of text unless ratified within a particular time. It follows that Congress can amend or remove the deadlines by majority vote rather than an Article V supermajority, and also that those deadlines are not binding on the States, who ratified the text and not the preamble.

Moreover, it makes no difference that Congress proposed the ERA fifty years ago or that 35 States ratified in the 1970s while Nevada, Illinois and Virginia brought the tally to 38 in the past several years. There is no "contemporaneity" requirement in Article V. Consider the Twenty-Seventh Amendment, proposed in the First Congress, long thought dead, but then ratified over 200 years later to become embodied in our Constitution's text as the law of the land. That amendment, which provides that Congress may not raise salaries for Senators and Representatives "until an election of Representatives shall have intervened," was proposed by the First Congress in 1789 as part of the original Bill of Rights authored by Framer James Madison. But that Amendment, often called the "Madison Amendment," was not ratified until over two hundred years later, after it was revived among the States for ratification in 1982 and ultimately adopted in 1992 when Michigan became the thirty-eighth State to vote to ratify. See T. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, Congressional Research Service Report 20-23 (July 18, 2018). And this Branch affirmed the legitimacy of the Twenty-Seventh Amendment, voting almost unanimously to "concur" in the Archivist's certification.

If the Twenty-Seventh Amendment confirms that Article V places no time limits on the ratification process, so does the text of Article V, which provides that "[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, … which … shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States." This plain text places no time limits on the States' ratification process. Nothing in Article V says that ratification must be synchronous, contemporaneous, or bounded within any particular time frame. To the contrary, Article V says simply that "[an amendment is valid 'when ratified.' There is no further step." W. Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 398 (1983). Of course, the Framers knew how to impose deadlines or otherwise allow for time limits when they wished to. *See, e.g.*, U.S. Const. Art. I, Sec. 7 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law…"); Art. I, Sec. 2 (census every ten tears); Art. I, Sec. 3 (senatorial term limit of six years); Art. I, Sec. 8 (military budget term of two years); Art. I, Sec 8. (copyright term will be set); Art. II, Sec. 1 (presidential term of four years). But the Framers made no mention of time limits or return deadlines in Article V.

For all these reasons, the deadline-removal proposal in S.J. Res. 4 is proper and constitutional, and merits swift passage.

Thank you very much for allowing me to share these remarks with the Committee.