[ORAL ARGUMENT NOT YET SCHEDULED]

No. 21-5096

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF VIRGINIA, *et al.*,

Plaintiffs-Appellants,

v.

DAVID S. FERRIERO, in his official capacity as Archivist of the United States,

Defendant-Appellee,

and

STATE OF ALABAMA, *et al.*,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amicus curiae* represents that counsel for all parties have been sent notice of the filing of this brief. Plaintiffs-Appellants, Defendant-Appellee, and Intervenor-Defendants-Appellees consent to *amicus curiae*'s participation.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to protect the rights and freedoms that our nation's charter guarantees. CAC views the Constitution as an inherently progressive document—amended over the generations to become more just, equitable, and inclusive. Accordingly, CAC is well situated to discuss the history of the Archivist's role in certifying constitutional amendments and how that history bears on the issues in this case.

[1] Pursuant to Fed. R. App. P. 29(a), *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND *AMICI*

Except for *amicus curiae* Constitutional Accountability Center and any other *amici* who had not yet entered an appearance in this case as of the filing of the Brief for Appellants, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants.

II. RULING UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellants.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellants.

Dated: January 10, 2022

/s/ Brianne J. Gorod
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GLOSSARY

ERA	Equal Rights Amendment
GSA	General Services Administration
NARA	National Archives and Records Administration
OFR	Office of the Federal Register

INTEREST OF *AMICUS CURIAE*

Constitutional Accountability Center is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to protect the rights and freedoms that our nation's charter guarantees. CAC views the Constitution as an inherently progressive document—amended over the generations to become more just, equitable, and inclusive. CAC thus has an interest in how amendments to the Constitution are certified, as well as in ensuring meaningful access to the courts, in keeping with constitutional text and history.

INTRODUCTION

In January 2020, the Virginia state legislature voted to ratify the Equal Rights Amendment ("ERA"), which provides that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong. § 1 (1972). This vote followed nearly a century of concerted effort to have our national charter explicitly guarantee sex equality. *See* Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 Wm. & Mary J. Women & L. 113, 115 (1997).

According to the plaintiff states, Virginia's ratification of the ERA completed the amendment process outlined in the Constitution: two-thirds of both Houses of Congress passed the ERA in 1972, and by 2020 three-quarters of the states ratified it. *See* U.S. Const. art. V.[2] When the National Archives and Records Administration ("NARA") receives notice that an amendment has been adopted through this process, the Archivist "shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted." 1 U.S.C. § 106b. But when the Archivist received notification of Virginia's vote, he refused to certify and publish the amendment. J.A. 88. Even before Virginia's vote, the Archivist stated that he would not certify and publish the ERA "unless otherwise directed by a final court order." *Id.*

Virginia, Illinois, and Nevada, the three states to most recently vote to ratify the ERA, allege that the Archivist's refusal to certify the ERA has caused "widespread confusion regarding the effect of their ratification." *Id.* at 92. To ensure that the amendment is "properly recognized as the law of the land," *id.*, they sought a writ of mandamus to compel the Archivist to carry out this duty, *id.* at 91-92. But the district court granted the Archivist's motion to dismiss, concluding that the states

[2] *Amicus* takes no position on whether the ratification process outlined in Article V has been successfully completed. Instead, *amicus* submits this brief to demonstrate the errors in the district court's standing analysis, accepting the plaintiff states' legal and factual allegations as true (as they must be on a motion to dismiss).

lack standing. *Id.* at 325. In the district court's view, because "the certification they demand from the Archivist has no legal effect" as a matter of constitutional law, the states cannot have suffered "concrete injury," *id.*, and requiring the Archivist to certify and publish the ERA "would avail them nothing," *id.* at 328 (quotation marks omitted and alteration adopted). The district court faulted the states for assigning the Archivist's actions "too much weight." *Id.* at 327.

The district court's analysis rests on a premise that the court did not substantiate—that the only way the Archivist could cause harm in the amendment process is by depriving the ERA of its legal validity. That is wrong. Regardless of whether an Archivist's certification decision affects the constitutional legitimacy of an amendment (it does not), that decision has real-world consequences, precisely because Congress has put the Archivist in charge of making the important decision about when to notify the nation that a constitutional amendment has taken effect. Simply put, the Archivist's certification and publication decision plays a critical role—sometimes the *decisive* role—in determining whether the nation treats a new amendment as having become part of the Constitution.

While the Constitution sets forth the requirements for amending its text, *see* U.S. Const. art. V, it does not specify a means for deciding that those requirements have been met. Resolving whether a particular amendment has been adopted through a sufficient number of ratifications requires making factual and legal

determinations that are subject to disagreement and confusion. As a practical matter, therefore, *someone* in the federal government must be entrusted with announcing that an amendment has been validly adopted. Although such decisions do not determine an amendment's constitutional legitimacy, there is a "very practical need to provide notice to members of our society when our most fundamental rules change," and "a widely accepted rule of recognition by a particular institution" helps "avert crises of constitutional doubt about which provisions remain legitimate." Brendon Troy Ishikawa, *Everything You Always Wanted to Know about How Amendments Are Made, But Were Afraid to Ask*, 24 Hastings Const. L.Q. 545, 582 & n.145 (1997). Congress charged the Archivist with certifying and publishing new amendments in order to provide that needed clarity.

Before the creation of the certification and publication role more than two centuries ago, confusion around the amendment process abounded. The Eleventh Amendment was left unrecognized for years after it was adopted, and at least one proposed amendment that had not been ratified by the requisite number of states was for a time mistakenly believed to be part of the Constitution. Amidst this confusion, Congress first attempted to make the amendment process more orderly in 1818, assigning the Secretary of State the responsibility to certify and publish newly adopted constitutional amendments. *See* Act of April 20, 1818, ch. 80, § 2, 3 Stat. 439. In the years since, when questions have arisen about the status of proposed

amendments, certification has repeatedly proved crucial in bringing about consensus as to whether those amendments had indeed taken effect.

The certification role was transferred to the General Services Administrator in 1951, *see* Act of Oct. 31, 1951, ch. 655, § 2(b), 65 Stat. 710, 710, and then to the Archivist in 1984, *see* National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(d), 99 Stat. 2280, 2291 (codified at 1 U.S.C. § 106b). The latter change was part of a campaign to ensure that essential record-keeping functions were performed objectively and professionally, helping to ensure broad recognition of newly adopted amendments.

Today, an Archivist's decision to certify an amendment triggers important processes that record, publicize, and commemorate the successful amendment of our Constitution—and provide the nation with the text of its newly revised national charter. The absence of those steps undermines an amendment's practical, if not legal, effects. Indeed, they have proven the single biggest factor in shaping whether Congress, government officials, and the public at large treat a new amendment as part of the Constitution.

In short, the Archivist's certification and publication decisions play a crucial role in determining whether the nation recognizes that a newly adopted amendment has become a binding part of the Constitution. While an Archivist's certification does not give an amendment legal effect, it does serve as an official statement from

an arm of the federal government that the amendment process is complete, helping to form consensus that the amendment has been validly adopted. And if an amendment is not recognized as valid by the federal official with the exclusive power to do so, that amendment is not likely to be widely accepted as part of the Constitution. An Archivist's certification decision, therefore, has palpable effects. Because the district court's ruling rested on a contrary assumption, it incorrectly concluded that the states lack standing to sue. That decision should be reversed.

ARGUMENT

I. The Certification and Publication Role Was Created to Eliminate Doubt About Whether Constitutional Amendments Have Been Adopted.

In recognition of the fact that the Constitution "will certainly be defective," and that therefore amendments "will be necessary," the Framers sought to provide an "easy, regular, and Constitutional way" to adopt such amendments. 1 *The Records of the Federal Convention of 1787*, at 202-03 (Max Farrand ed., 1911). But while the Constitution provided a means for its own amendment in Article V, it did not specify how proposed amendments would be tracked, or a process for the recognition of successful amendments. Indeed, James Madison "pleaded unsuccessfully" that the Article V process be defined "with more specificity and clarity," Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 Fordham L. Rev. 497, 498 (1992), or else "difficulties might arise as to the form, the quorum, &c. which in Constitutional

regulations ought to be as much as possible avoided," 2 *The Records of the Federal Convention of 1787*, at 630 (Max Farrand ed., 1937).

Difficulties did, in fact, arise. While Article V sets out the requirements for amending the Constitution, and an amendment becomes "part of the supreme law of the land" once those requirements are met, *U.S. ex rel. Widenmann v. Colby*, 265 F. 998, 1000 (D.C. Cir. 1920), *aff'd* 257 U.S. 619 (1921), Article V provides no process for notifying the government and the public that an amendment has satisfied those requirements. In the late eighteenth and early nineteenth centuries, this discrepancy led to "frequent confusion about whether proposed amendments had become part of the Constitution." Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense and Titles of Nobility*, 8 S. Cal. Interdisc. L.J. 577, 691 (1999). At that time, there was no regularized process for communicating states' actions on proposed amendments to the federal government. Instead, "the President informed Congress from time to time of ratifications of pending amendments," but did not do so in any consistent fashion. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 401 (1983).

This haphazard method for tracking and certifying constitutional amendments led to significant confusion regarding the status of the Eleventh Amendment. That amendment was drafted in response to the Supreme Court's 1793 decision in

Chisholm v. Georgia, in which the Court held that it had jurisdiction to adjudicate a debtor's claim against Georgia. 2 U.S. 419, 420 (1793); *see Alden v. Maine*, 527 U.S. 706, 719-21 (1999) (describing the history of the Eleventh Amendment). That decision "fell upon the country with a profound shock," because it raised the prospect that states would have to defend themselves against the claims of out-of-state plaintiffs. *Alden*, 527 U.S. at 720. Given the widespread outrage over the decision, it is no surprise that Congress acted quickly and decisively to propose an amendment overturning it. *See* 3 Annals of Cong. 29 (1794) (Senate passage); *id.* at 477 (House passage).

The Eleventh Amendment became legally binding in February 1795, when North Carolina, the twelfth out of fifteen states, ratified it. *See* The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 112-9, at 28 n.3 (2d Sess. 2013). And yet, some two years later, Congress was still not sure whether the Eleventh Amendment was, in fact, part of the Constitution, and so passed a resolution requesting that the President determine whether the states had "ratified the amendment proposed by Congress to the Constitution concerning the suitability of states; if they have, to obtain the proper evidence thereof." Joint Res. of March 2, 1797, 1 Stat. 519. It was only the following year that President John Adams reported to Congress that the Eleventh Amendment had been ratified by the requisite number of states. 1 *Messages and Papers of the Presidents* 250 (J.

Richardson ed., 1910). Thus, nearly *three years* passed between the adoption of the Eleventh Amendment and the federal government's recognition that it was in fact binding.

In the interim period between adoption and recognition, the cloud of doubt around the status of the Eleventh Amendment affected proceedings at the Supreme Court. Despite the fact that, as a constitutional matter, the Court was deprived of jurisdiction over certain suits against states as of 1795, such cases remained on the Court's docket, and it continued to issue subpoenas against state governors and attorneys general. 5 *Documentary History of the Supreme Court of the United States, 1789-1800*, at 136, 286-88 (Maeva Marcus ed., 1994). It was only in February 1798, after President Adams's report, that the Court removed cases involving these suits from its docket. *Id.* at 136.

Confusion around the amendment process also led government actors to mistakenly believe that a proposed amendment, which would have stripped citizenship from anyone who accepted a title of nobility from a foreign power, had been adopted. Silversmith, *supra*, at 579. Congress proposed the Titles of Nobility Amendment in 1810, *see* 20 Annals of Cong. 671 (1810); 21 Annals of Cong. 2050 (1810), and twelve states ratified it over the next four years, *see* 31 Annals of Cong. 865 (1818). When this amendment was proposed, there were only seventeen states, meaning that thirteen state ratifications were needed, but states were quickly joining

the Union: Louisiana in 1812, Indiana in 1816, Mississippi in 1817, and Illinois in 1818, making the number of ratifications needed for adoption a moving target. Silversmith, *supra,* at 596. By the time Congress finally requested clarification on the status of the Titles of Nobility Act in 1818, *see* 31 Annals of Cong. 865 (1818), the threshold was sixteen states—three more than the amendment had garnered.

But in the meantime, the Titles of Nobility Amendment was included in official publications as part of the Constitution, including the 1815 edition of the Statutes at Large, *see* Silversmith, *supra*, at 586, and copies of the Constitution printed for the Fifteenth Congress, *see* 31 Annals of Cong. 530-31 (1818). Secretary of State John Quincy Adams, among others, believed it had taken effect. In 1817, Adams advised a Philadelphia merchant that, "under the 13th Amendment to the constitution," he would no longer be a citizen of the United States if he accepted the title of Consul General of Hamburg. National Archives, 15 Gen. Records of the Dep't of State 139-40. And even after the official tally was finally recorded in 1818, this proposed amendment "continued to appear as part of the Constitution in official and unofficial publications well into the second half of the nineteenth century," including the Statutes at Large, state and territorial publications, textbooks, and the press. Silversmith, *supra*, at 588-89.

It was in the midst of the confusion over the Titles of Nobility Amendment that Congress created the publication and certification role and assigned it to the

Secretary of State. *See* Act of April 20, 1818, ch. 80, § 2, 3 Stat. 439. This act required the Secretary to publish amendments "in the said newspapers authorized to promulgate the laws, with his certificate, specifying the states by which the same may have been adopted, and that same has become valid, to all intents and purposes, as a part of the constitution." *Id.* Since then, certification has been crucial in securing recognition of at least two amendments, as the next Section discusses.

II. Certification Has Been Crucial in Securing Widespread Recognition of Contested Amendments.

The certification and publication role helped to avoid the confusion in the Article V process that plagued some of the earliest proposed constitutional amendments. But the role has done more than solve a record-keeping problem. When uncertainty has arisen about the validity of an amendment's adoption, certification has more than once "initiated a process culminating in the recognition" of that amendment's legitimacy. Ishikawa, *supra*, at 590.

A. The adoption of the Fifteenth Amendment, though completed within one year of its proposal, was not without difficulties. The Secretary of State's role in tracking ratifications and certifying that the amendment had been adopted proved key in alleviating any lingering doubts about its validity.

Congress proposed the Fifteenth Amendment in 1869. *See* Cong. Globe. 40th Cong., 3d Sess. 1563 (1869) (House); *id.* at 1641 (Senate). Several states ratified the amendment almost immediately, including the "six southern states that had

completed the Reconstruction process," followed by those states that Congress required do so as a condition of readmission. Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* 108 (2019).

But as the amendment process continued, complications arose concerning certain states' ratifications. In 1870, after state elections in New York swept in a new Democratic majority, *id*., the state legislature purported to rescind its ratification of the Fifteenth Amendment, 1870 N.Y. Laws (2148). Meanwhile, two states that had initially voted to reject the amendment, Ohio and Georgia, changed course and ratified it. S. Doc. No. 112-9, at 33 n.7.

Congress contemplated resolving these uncertainties on its own, but ultimately deferred to the Secretary of State. In February 1870, a resolution was introduced in the Senate listing thirty ratifying states, including New York, Ohio, and Georgia, and accordingly proclaiming the amendment adopted. Cong. Globe, 41st Cong., 2d Sess. 1444 (1870). That resolution was referred to the Judiciary Committee, where it never received a vote. *Id.* at 3142. Instead, Congress passed a resolution directing the Secretary of State to "inform the Senate what States have ratified" the Fifteenth Amendment, and to "communicate to the Senate as soon as practicable" each subsequent ratification as well. *Id.* at 1653.

In response, Secretary of State Hamilton Fish issued a proclamation on March 30, stating that "it appears from official documents on file in this Department" that

the amendment had been ratified by thirty states, including New York, Georgia, and Ohio. 16 Stat. 1131 (1870). Therefore, in compliance with his duty under the Act of "the twentieth day of April, in the year eighteen hundred and eighteen," Secretary Fish "certif[ied] that the amendment aforesaid has become valid to all intents and purposes as part of the Constitution." *Id.* at 1131-32.

Although the amendment had already taken legal effect from a constitutional standpoint, the Secretary of State's certification of the Fifteenth Amendment was critical to widespread acknowledgment of its ratification. Even discounting New York's ratification, Nebraska's ratification of the amendment in February 1870 completed the ratification process required by Article V. S. Doc. No. 112-9, at 33 n.7. Yet it was only after Secretary Fish later certified the amendment that the House of Representatives formally recognized that it had been adopted. Cong. Globe, 41st Cong., 2d Sess. 5441 (1870). To this day, scholars point to the date of certification, March 30, 1870, as the date on which the states recognized that the Fifteenth Amendment took force. *See* Foner, *supra*, at 108 (explaining that on this date, all the state laws "that limited voting to white men were swept away"); William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* 128 (open access ed. 2019) ("When the official Proclamation of Ratification came on March 30, one hundred guns thundered forth at Hartford," marking the adoption of the Fifteenth Amendment.). The Secretary's certification did not give the Fifteenth

Amendment constitutional validity. But it served as an official statement that the amendment process was complete, helping to form consensus that the Amendment was indeed part of the Constitution.

B. Over a century later, certification again proved crucial in ensuring broad recognition that a constitutional amendment was validly adopted. The extreme delay between the proposal and final ratification of the Twenty-Seventh Amendment raised questions about whether it had become part of the Constitution. But the certification of the amendment helped to "tip[] the scales in favor [of] the Amendment's recognition." Ishikawa, *supra*, at 590.

The Twenty-Seventh Amendment requires that any law "varying the compensation" of members of Congress take effect only after an intervening election. U.S. Const. amend. XXVII. Congress passed this amendment in 1789, as part of a package of twelve amendments which included those that would become the Bill of Rights. Act of Sept. 23, 1789, ch. 27, 1 Stat. 97. Over the next two years, only six states ratified the amendment. Congressional Pay Amendment, 16 Op. OLC 85, 107 (1992). For nearly two centuries, the amendment essentially lay dormant, with only one state ratifying it in the nineteenth century. Bernstein, *supra*, at 534.

Courts and scholars assumed the amendment had "lost [its] vitality" due to the passage of time. Silversmith, *supra*, at 579 n.19. But in the 1980s, states once again began ratifying the Twenty-Seventh Amendment, precipitated largely by the

public campaign of a determined college student. Bernstein, *supra*, at 536-37. And in May 1992, Michigan became the thirty-eighth state to ratify the amendment, completing the Article V requirements for amending the Constitution. *Id.* at 539.

"Members of Congress and constitutional scholars reacted with confusion to the news" that the states had ratified an amendment proposed by Congress some two hundred years earlier. Bernstein, *supra*, at 539. Initially, some viewed Michigan's ratification of the amendment as the beginning of a debate, as opposed to the decisive final ratification needed for adoption. *See* Richard L. Berke, *1789 Amendment Is Ratified But Now the Debate Begins*, N.Y. Times, May 8, 1992, at A1 (explaining that the amendment had been "ratified by the necessary 38th state" that day, but claiming that it was "unclear whether the measure . . . will ever take effect"). While members of Congress reportedly "did not dare speak against" the substance of "an Amendment that touche[d] the sensitive issue of Congressional privilege," *id.*, they pointed to the unusual delay between the amendment's proposal and adoption as reason to doubt its validity, *see* Bill McAllister, *Across Two Centuries, a Founder Updates the Constitution*, Wash. Post, May 14, 1992, at A1. They also argued that the amendment was unnecessary, that it concerned a trivial matter unfit for inclusion in the Constitution, and that Congress had the authority to determine whether it had legal effect. *Id.* And scholars suggested that because the amendment was "proposed in a different era" and was not ratified then, it had "simply withered and died."

Berke, *supra*, at A1 (quoting Walter Dellinger).

But once the Archivist announced his plans to certify the Twenty-Seventh Amendment, all doubts about its validity suddenly dissipated. For example, the Speaker of the House, Representative Thomas S. Foley, had previously argued that Congress "ought to have the final say" on whether the amendment was valid and had proposed hearings to "clear up the issue." *Foley Backs Amendment on Congressional Raises*, N.Y. Times, May 15, 1992, at A14. But "one day after the Archivist of the United States had announced plans to certify that the amendment had been properly ratified by the states, Mr. Foley told reporters that he saw no need for Congressional action," and accepted that the amendment had been adopted. *Id.* Constitutional scholar Walter Dellinger, who previously had suggested that the amendment might have been proposed too long ago to be validly ratified, took the position that "Congress has no formal role to play," and that "[t]he amendment process is completed by act of the last necessary state." McAllister, *supra*, at A1.

On May 18, 1992, the Archivist certified that the Twenty-Seventh Amendment "has become valid, to all intents and purposes, as a part of the Constitution of the United States." 57 Fed. Reg. 21,187 (May 19, 1992). Two days later, Congress overwhelmingly affirmed the Archivist's decision. Richard L. Berke, *Congress Backs 27th Amendment*, N.Y. Times, May 21, 1992, at A26. In sum, while the Archivist's decision did not affect the constitutional validity of the

amendment, it played a decisive role in securing recognition of that validity, a critical step for a controversial amendment with an unusual path to ratification.

III. The Archivist's Certification Triggers Important Processes that Confer Legitimacy on New Amendments, and His Refusal to Certify the ERA Undermines its Legitimacy.

Today, the role of certifying and publishing constitutional amendments is still aimed at ensuring broad recognition that new amendments have been added to the Constitution, just as it has for the past two centuries. Without certification and publication, an amendment that has satisfied the requirements of Article V has little chance of being treated as a valid and binding part of the Constitution.

A. The Archivist is involved in the amendment process from start to finish. When Congress proposes an amendment, the original joint resolution is forwarded directly to NARA for processing and publication. *Constitutional Amendment Process*, National Archives (Aug. 15, 2016), https://www.archives.gov/federal-register/constitution. The Office of the Federal Register ("OFR"), located within NARA, adds legislative history and publishes the joint resolution in slip format. *Id.* OFR then sends an information package to the states that includes "red-line" copies of the joint resolution and the statutory procedure for ratification under 1 U.S.C. § 106b. *Id.* The Archivist formally submits the proposed amendment to the states by sending a notification letter to each governor. *Id.* When a state ratifies a proposed amendment, it sends the Archivist the original or certified copy of the ratification,

and OFR then maintains custody of the state ratifications. *Id.*

Once three-quarters of the states have ratified an amendment, OFR drafts a formal proclamation for the Archivist to certify that the amendment has become part of the Constitution. *Id*. The proclamation includes the text of the amendment, the date it was proposed by Congress, the list of states that ratified it, and finally, the Archivist's declaration that the amendment has "become valid, to all intents and purposes, as a part of the Constitution of the United States." *See, e.g.*, 57 Fed. Reg. 21,187 (May 19, 1992) (certifying the Twenty-Seventh Amendment). The form of these certifications has remained consistent over time. *Compare id. with* 13 Stat. 774, 774-75 (1865) (certifying the Thirteenth Amendment).

Once certification is complete, the signed proclamation is published in the Federal Register and the Statutes at Large and thus "serves as official notice to the Congress and to the Nation that the amendment process has been completed." *Constitutional Amendment Process*, *supra*. The Federal Register has a wide audience, playing an important role in "inform[ing] citizens of their rights and obligations," and is regularly read by "anyone . . . whose business is regulated by a Federal agency," "who is an attorney practicing before a regulatory agency," or "who is concerned with Government actions that affect the environment, health care, financial services, exports, education, or other major public policy issues." National Archives, *About the Federal Register* (August 8, 2018),

https://www.archives.gov/federal-register/the-federal-register/about.html.

The certification of an amendment is also noted in the annotated editions of the Constitution published by the Government Printing Office. *See, e.g.*, S. Doc. No. 112-9, at 44 n.19 (noting Archivist's certification of the Twenty-Seventh Amendment). Since 1970, that print of the Constitution has been published every ten years as a bound volume and is regularly distributed to new Members of Congress, as well as to the President and Vice President. *See* Pub. L. 91-589, §§ 3-4, 84 Stat. 1585, 1586-87 (1970) (now codified at 2 U.S.C. § 168b). Congress makes that copy of the Constitution available online, *see* Library of Congress, *Constitution Annotated*, constitution.congress.gov/browse/introduction/ (last visited Jan. 6, 2022), and it is also reproduced by prominent entities that make legal resources available to the public, such as the Legal Information Institute, *see* Legal Information Institute, *U.S. Constitution Annotated: Table of Contents*, law.cornell.edu/constitution-conan (last visited Jan. 6, 2022), which serves "well over 40 million unique visitors each year," Legal Information Institute, *About the LII*, law.cornell.edu/lii/about/about_lii (last visited Jan. 6, 2022).

These are the sources to which government officials and members of the public look to find the official text of the Constitution. An amendment missing from that text, like the ERA, has little chance of being treated as a part of the Constitution, even if it has been ratified by a sufficient number of states.

B. Congress entrusted the role of certifying and publishing amendments to the Archivist in order to lend credibility and stature to those decisions. When the official entrusted with that important responsibility refuses to certify an amendment, it undermines the legitimacy of the amendment.

As discussed above, Congress initially charged the Secretary of State with publishing and certifying newly adopted amendments. *See* Act of April 20, 1818, ch. 80, § 2, 3 Stat. 439. Subsequently, Congress transferred this role twice: first, to the General Services Administration ("GSA") in 1951, *see* Act of Oct. 31, 1951, ch. 655, § 2(b), 65 Stat. 710, 710 (current version at 1 U.S.C. § 106b), and then to NARA in 1984, when that agency was made independent from the GSA, *see* National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107 (d), 99 Stat. 2280, 2291 (codified at 1 U.S.C. § 106b).

Congress separated NARA from the GSA so that there would be no question that the Archivist could perform his various roles in a "non-partisan professional" manner, without having to look "over his shoulder for approval of his actions by the person who appointed him." 130 Cong. Rec. 28857 (1984) (statement of Sen. Eagleton); *see* H.R. No. 98-1124 (1984) (Conf. Rep.) ("Public confidence in the Archivist's role will also be enhanced if the office is permitted to pursue objectively and independently" its duties.). Congress thus framed the functions performed by the Archivist, including the decision whether and when to certify constitutional

amendments, as neutral, professional decisions. It is no wonder, therefore, that contested amendments find widespread recognition after being certified by the Archivist (as did the Twenty-Seventh Amendment) but fail to obtain that recognition when an Archivist refuses to certify them (as with the ERA).

C. Finally, the act of signing an amendment's certification "has become a ceremonial function attended by various dignitaries," including the President, *Constitutional Amendment Process*, *supra*, further enhancing the perceived legitimacy of new amendments. When this opportunity to increase public awareness and acceptance of a new amendment is denied, legitimacy suffers.

For example, when the Twenty-Fourth Amendment, abolishing poll taxes, was ratified, the General Services Administrator (then responsible for certifying amendments) signed the amendment's certification in the Cabinet Room at the White House, and President Lyndon B. Johnson signed it as a witness. Nan Robertson, *24th Amendment Becomes Official*, N.Y. Times, Feb. 4, 1965, at 14. President Johnson gave remarks about the importance of that moment before giving the pen he used to sign the certification to the Senator who had been the principal sponsor of the amendment. *Id.*

The Twenty-Sixth Amendment, which lowered the voting age to eighteen, was certified to even greater fanfare. Certification took place during a large public ceremony at the White House. *See Nixon Hails Youth Vote as 26th Amendment Is*

Certified at the White House, N.Y. Times, July 6, 1971, at 1. The certification was signed on "a mahogany desk thought to have been used by Thomas Jefferson during the Continental Congress in Philadelphia." *Id.* President Nixon himself signed the certification as a witness and invited three eighteen-year-olds to sign it as well. *Id.*

* * *

While the Archivist's refusal to certify the ERA has no bearing on its constitutional validity, that does not mean this refusal has no effect. For more than two hundred years, the certification of amendments has not only helped avoid the type of confusion that clouded the ratification of the Eleventh Amendment, but has also helped secure broad recognition of amendments when questions arose about their adoption, as with the Fifteenth and Twenty-Seventh Amendments. The Archivist's certification constitutes an endorsement from a neutral, professional, and non-partisan entity of an amendment's successful adoption; triggers publication of the new amendment to notify Congress and the nation of its adoption; and provides opportunities for ceremonial efforts that celebrate the new amendment and promote its acceptance among the public. Moreover, following its certification, a new amendment is incorporated into the official version of the Constitution promulgated by the federal government.

An Archivist's decision to certify an amendment—or not—therefore carries great weight. One scholar has gone so far as to say that it is the Archivist who

"determine[s] whether the ERA gets added to America's founding document." Robinson Woodward-Burns, *The Person Who Changes the Constitution*, The Atlantic (Jan. 17, 2020), https://www.theatlantic.com/ideas/archive/2020/01/person-who-changes-constitution/605104/. While that may not be true in a *legal* sense, it is certainly true in a *practical* sense. Here, because the Archivist has refused to certify the ERA, the amendment has not been published in the Federal Register or the Statutes at Large, it is not included in the federal government's official version of the Constitution, and there have been no ceremonies or official public statements marking its adoption.

In citing public confusion about the effect of their ratifications of the ERA, J.A. 92, and in seeking to have the amendment recognized as the law of the land, *id.*, the states have not assigned the Archivist's decisions "too much weight." *Id.* at 322. Instead, it is the district court that has misperceived the significance of the Archivist's role, improperly denying the states' standing as a result.

CONCLUSION

For the foregoing reasons, this Court should hold that the plaintiff states have standing.

Respectfully submitted,

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Dated: January 10, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5,481 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 10th day of January, 2022.

/s/ Brianne J. Gorod
Brianne J. Gorod

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2022, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: January 18, 2022

/s/ Brianne J. Gorod
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