The Honorable Mamie E. Locke  
Member, Senate of Virginia  
Post Office Box 9048  
Hampton, Virginia 23670

Dear Senator Locke:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issue Presented

You have requested an opinion as to whether Virginia may rescind its 2020 ratification of the Equal Rights Amendment.

Applicable Law and Discussion

Article V of the United States Constitution states:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, 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, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.\(^1\)

In March 1972, after strong, bipartisan approval by the House and Senate, the Congress of the United States, pursuant to the power conferred in Article V, formally proposed the Equal Rights

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\(^1\) U.S. Const., art. V.
Amendment to the states. The entirety of the text of the joint resolution proposing the Equal Rights Amendment provides:

**JOINT RESOLUTION**

Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

**ARTICLE —**

**SECTION 1.** Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

**SECTION 2.** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

**SECTION 3.** This amendment shall take effect two years after the date of ratification.²

The text of the proposed amendment provided that ratification was to occur upon the vote of the legislatures of the states.³ On January 27, 2020, Virginia became the thirty-eighth State to ratify the Equal Rights Amendment after the passage of joint resolutions by the House of Delegates and Senate of Virginia.⁴

Of these thirty-eight states, however, four states have, subsequent to their ratification vote, voted to rescind that ratification, raising questions about whether such rescission is constitutionally sanctioned.⁵ These rescissions are inconsistent with the text of Article V and with longstanding historical practice.

Article V addresses the ratification of proposed amendments in exclusively positive terms.⁶ Nowhere does the constitutional text provide that a State may void its ratification. Thus, under the plain language of Article V, when a State has ratified a proposed amendment, the State’s constitutional authority is exhausted and its role in the ratification process has come to an end.⁷

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⁶ U.S. Const. art. V ("when ratified by legislature of three fourths of the several states, or by convention in three fourth thereof" (emphasis added)).
⁷ Hawke v. Smith, 253 U.S. 221, 227 (1920) ("The language of [Article V] is plain, and admits of no doubt in its interpretation.".).
As the United States Supreme Court has recognized, "Article V, speaking solely of ratification, contains no provision as to rejection. Nor has the Congress enacted a statute relating to rejections." In accordance with this principle, previous purported rescissions of ratifications of constitutional amendments have not been given effect.

For example, in 1868, 29 states, one more than the required 28 at the time, had ratified the Fourteenth Amendment. Two of those states, however, had passed subsequent resolutions withdrawing their initial approval. The Secretary of State, the entity then-responsible for recognizing the ratification of constitutional amendments, issued a proclamation stating that the amendment had been ratified by the requisite number of states. Importantly, "the resolution of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislature of those states, which purport to withdraw the consent of said States from such ratification."

Similarly, New York attempted to rescind its ratification of the Fifteenth Amendment, but such rescission was not recognized by the Secretary of State. In 1920, after ratifying the 19th Amendment, Tennessee attempted to rescind its ratification; this rescission was never recognized (and the Secretary of State published the amendment including Tennessee among the ratifying States). Recognizing the inability of states to rescind, a constitutional amendment was proposed in Congress in 1924 to specifically grant states the power of rescission. It was defeated.

There is thus no federal authority from which I could conclude that a state may rescind its ratification of a constitutional amendment, after such ratification vote has occurred. This conclusion is supported by Virginia law, which speaks only to ratifications, and does not confer any method by which to rescind them.

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8 Coleman v. Miller, 307 U.S. 433, 450 (1939); aff'g 146 Kan. 390, 403 (1937) ("[W]here a state has once ratified an amendment it has no power thereafter to withdraw such ratification. To hold otherwise would make article 5 of the federal constitution read that the amendment should be valid 'when ratified by three fourths of the states, each adhering to its vote until three fourths of all the legislatures shall have voted to ratify.'").


10 Id.

11 Id. See 1 U.S.C. § 106b (currently vesting the role of publishing and declaring constitutional amendments to have been ratified with the Archivist of the United States).


13 16 Stat. 1131 (1871) (listing New York as one of the states to have ratified the amendment, while noting its subsequent rescission).


15 65 Cong. Rec. 4488 (1924) (proposing an amendment to Article V to provide "until three-fourths of the States have ratified or more than one-fourth of the States have rejected or defeated a proposed amendment, any State may change its vote").

16 Id.

17 VA. H.D. RULE 5 (2020-2021) ("All enrolled bills and joint resolutions proposing amendments to the Constitution will be signed by the Speaker and all writs and warrants issued by order of the House will be under her hand and seal, attested by the Clerk."); VA. SENATE RULE 55 (Jan. 8, 2020) (providing that the appendix to the Rules
The same conclusion has been reached by other states confronting the question of whether ratification may be withdrawn. 18 I agree that “a ratification once given cannot be withdrawn.” 19

Conclusion

For the foregoing reasons, it is my opinion that Virginia cannot rescind its ratification of the ERA.

With kindest regards, I am,

Sincerely yours,

Mark R. Herring
Attorney General

shall enumerate the votes required); VA. SENATE RULES, App’x (9)(d) (providing that a majority vote of members present and voting is required for ratification of an amendment to the U.S. Constitution). See also 1974-1975 Op. Va. Atty. Gen. 94 (describing method by which amendments to the United States Constitution may be voted on in the General Assembly).

18 See 1975-1976 Op. S.D. Att’y Gen. 110 (“We think the conclusion is inescapable that a state can act but once, either by convention or through its Legislature, upon a proposed amendment . . . . Therefore, . . . it is my opinion that this Legislature or any future Legislature is without authority to withdraw the previous ratification of the Equal Rights Amendment.”); 1972-1973 Op. Idaho Att’y Gen. 137, 138 (“Once a state acts through its legislative process to ratify a proposed amendment the United States Constitution, it has cast its one vote, and exhausted its power to affect the course of the proposed amendment. Subsequent attempts by the same state legislature to retract or appeal its prior ratification would be of no legal effect.”).