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**TESTIMONY OF
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**HEARING ON
“EXAMINING PROPOSED CONSTITUTIONAL AMENDMENTS”**

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION AND LIMITED GOVERNMENT**

SEPTEMBER 19, 2023

Chairman Johnson, Ranking Member Scanlon, and distinguished members of this Committee,

Thank you for the opportunity to testify at this afternoon's hearing on examining proposed constitutional amendments.

Common Cause is a nonpartisan, grassroots organization dedicated to strengthening the values of American democracy. For more than five decades, we have worked to create an open, honest, and accountable government that serves the public interest and empowers all people to make their voices heard in the political process. Common Cause's 30 state chapters and 1.5 million members have helped to pass hundreds of pro-democracy reforms at the national, state, and local levels to help elevate the voices of everyday Americans.

Our Constitution has endured for 234 years not because it is perfect, but because it is a constant work in progress. Despite its famous first three words—"We the People"—the Constitution long excluded the people who make up the backbone of our nation. It excluded those whose ancestors were brought here in chains and whose descendants were counted as three-fifths of a person in the very charter that promised the "blessings of liberty." At our founding, it was only white, property-owning men who had the freedom to vote, the freedom that is preservative of all rights.

Yet through the hard work of generations of our fellow Americans, our Constitution has gradually expanded to protect some of our most cherished rights, expand freedom, protect equality, and make our Union more perfect.

It has been improved through the amendment process—including the Bill of Rights, the Fourteenth Amendment, and the equal protection of the laws. There is yet a long way to go.

Pursuant to Article V, the Constitution has been amended 27 times in our history.

For the entirety of the Constitution's existence, each time we have amended it, Congress has sent proposed amendments to the states after it passed them by two-thirds of the House and Senate. This process provides certainty and predictability to the process of amending our founding charter.

The other way to amend the Constitution is one that scholars, jurists, and others across the ideological spectrum have considered a dangerous path, for good reason.¹ This alternative process would require Congress to convene a constitutional convention if two-thirds of the states petition Congress to do so, but with no other guidance.

¹ See Common Cause, *Legal Scholars Warn of the Dangers of an Article V Convention*, January 15, 2019, <https://defendourconstitution.org/resource/legal-scholars-warn-of-the-dangers-of-an-article-v-convention/>.

This year, my colleagues at Common Cause have tracked 124 bills in 42 states dealing with a constitutional convention, either to convene a convention or rescind a previous call for a convention.

There are at least three reasons why convening a constitutional convention is a bad idea.

First, even if it is purportedly called to address a single issue, there are no rules to limit the scope of a constitutional convention to protect us from big, permanent changes to our constitutional rights that could set our country back.

Second, there is an extraordinary risk that secretive wealthy special interests—the same ones that pump millions of dark money into our elections—will use a constitutional convention to rig the rules in their favor and take power from the people.

And third, it puts at grave risk the rights and liberties that are enshrined in the Constitution.

There are no rules, and it is unclear how any rules would be enforced.

There are no rules to protect Americans from huge changes to their constitutional rights that a convention could undertake. Everything from our freedom to vote to our right to free speech would be up for debate and a total rewrite. Such a risky, untested system would enable wealthy special interests to easily rig and write the rules against the American people.

People on the left, the right, and the middle agree.

Harvard Law Professor Laurence Tribe said such a convention would mean “putting the whole Constitution up for grabs.”²

The late Justice Antonin Scalia said he “certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?”³

The late Chief Justice Warren Burger wrote that there “is no way to effectively limit ... the actions of a Constitutional Convention. The Convention could make its own rules and set its own

² Robert Greenstein, *A Constitutional Convention Could Be the Single Most Dangerous Way to “Fix” American Government*, WASH. POST, Oct. 21, 2014, <https://www.washingtonpost.com/posteverything/wp/2014/10/21/a-constitutional-convention-could-be-the-single-most-dangerous-way-to-fix-american-government/>

³ Michael Leachman and David Super, *States Likely Could Not Control Constitutional Convention on Balanced Budget Amendment or Other Issues*, Center on Budget and Policy Priorities, Jan. 18, 2017, <https://www.cbpp.org/research/states-likely-could-not-control-constitutional-convention-on-balanced-budget-amendment-or>.

agenda. Congress might try to limit the convention to one amendment or one issue, but there is no way to assure that the Convention would obey.”⁴

The late Supreme Court Justice Arthur Goldberg said that “there is no enforceable mechanism to prevent a convention from reporting out wholesale changes to our Constitution and Bill of Rights.”⁵

Archibald Cox, Common Cause’s late Chairman and former Solicitor General of the United States, said that “questions about such a convention have been debated for years by legal scholars and political commentators, without resolution. Who would serve as delegates? What authority would they be given? Who would establish the procedures under which the convention would be governed? What limits would prevent a ‘runaway’ convention from proposing radical changes affecting basic liberties?...With these thorny issues unsettled, it should come as no surprise that warning flags are being raised about a constitutional convention.”⁶

Article V provides no rules or guidance about how a convention would work, what rules would govern, how legal disputes would be settled, how the American people would be represented, and how to limit the influence of special interests at a convention that would rewrite our founding charter.

Consider the following questions that Professor Tribe asked about a constitutional convention:

- How will Congress add up the Article V applications?
- Can Congress and the states constrain the convention’s mandate based on those applications?
- May the convention propose amendments other than those it was called to consider?
- May Congress prescribe rules for the convention, or limit its powers in any way?
- May the convention set its own rules, independent of Article V, for how amendments that it proposes may be ratified?
- Are the states to be equally represented, or does the one-person, one-vote principle apply? What about the District of Columbia? Do the citizens of the District have a role in a convention?
- Could delegates be bound in advance by legislation or referendum to propose particular amendments or vote in a particular way?

⁴ Letter from Chief Justice Warren Burger, June 22, 1988, <https://i2i.org/wp-content/uploads/2013/11/Burger-letter2.pdf>.

⁵ Arthur Goldberg, *Steer Clear of Constitutional Convention*, MIAMI HERALD, Sept. 14, 1986.

⁶ Archibald Cox, *A Phony and Dangerous Quick Fix*, Feb. 16, 1987, Addendum to Common Cause Montana Testimony before the Montana House State Administration Committee, <https://montanacourts.org/External/leg/1987/house/02-16-hsa.pdf>.

- Could the convention propose amendments by a simple majority, or require a supermajority of two-thirds?
- If each state gets one convention vote, must delegates representing a majority of the population nonetheless vote for an amendment in order for it to get proposed?⁷

There are no settled answers to these questions. Now is not the time to experiment with the Constitution.

Simply put, there are no guardrails in place to ensure an orderly course for a constitutional convention. No judicial, legislative, or executive body would have clear authority to settle disputes about a convention, opening the process to chaos and protracted legal battles that would threaten the functioning of our democracy and our economy.

Any convention, regardless of its stated purpose, runs the risk of becoming a runaway convention. Nothing constrains the convention to only consider the issues originally proposed in a state's call for a convention. There is no saying what could happen to any of our rights or what could be traded in an exchange between special interests, who will most definitely have their hands in the process.

In sum, there is no predicting what could happen and far too many open-ended questions for this to be a good idea.

Wealthy special interests are backing the push for a new constitutional convention.

A constitutional convention would undoubtedly attract intense lobbying efforts from special interest groups and powerful individuals seeking to influence the outcome. They will seek to gerrymander the Constitution and our rights in the same way they have gerrymandered our elections. The influence of unlimited, big, special interest money and political pressure on the convention's delegates could lead to amendments that serve narrow interests rather than the common good. We should not allow the very forces we regulate through constitutional means to have a hand in rewriting the Constitution itself.

An intense lobbying effort to open the Constitution up to corporate special interest re-writes is already under way. One group—the American Legislative Exchange Council, or “ALEC”—has been particularly active in this effort.⁸ ALEC is one of the key big-money players pushing for a constitutional convention, pairing it with its push for a “balanced budget amendment” to the Constitution. Although ostensibly organized as a public charity underwritten by major corporations, ALEC brings together corporate lobbyists and state legislators to write model laws

⁷ Common Cause, *The Dangerous Path: Big Money's Plan to Shred the Constitution*, pg. 15-16, May 2016, <https://www.commoncause.org/wp-content/uploads/2018/03/dangerous-path-report-1.pdf>.

⁸ See RUSS FEINGOLD AND PETER PRINDIVILLE, *THE CONSTITUTION IN JEOPARDY* 119-122 (2022).

that are then disseminated throughout the country in statehouses.⁹ ALEC has in the past endorsed policies like “stand your ground” gun legislation and laws that infringe on the freedom to vote and disproportionately affect voters of color, young voters, and others whose voices they want to silence.

ALEC and other big-money backed groups have been working hard to pursue an effort to convene a convention with the goal of writing a balanced budget amendment into the Constitution. Most proponents of a balanced budget amendment today assert that 28 states have called for a constitutional convention, leaving them six short of the necessary 34 that they need. Importantly, Common Cause and our allies have led work in eight states to rescind calls for a constitutional convention.¹⁰ Had these eight states not rescinded their applications in the past few years, proponents of a balanced budget amendment would have been one short of the 34 states needed to potentially trigger a constitutional convention.

A balanced budget amendment would have a deleterious effect on our nation’s economy. Such an amendment would trigger tax and program cuts that could spark an economic crisis and tip our nation into recession. It could force significant cuts to Social Security, military retirement benefits, and other important public services. The amendment could tie the hands of the federal government from responding to crises such as an economic downturn, natural disaster, an international conflict, and the next pandemic. In 1997, when Congress seriously considered a federal balanced budget, more than 1,000 economists—including 11 Nobel laureates—issued a joint statement calling it “unsound and unnecessary.”¹¹ It would be destabilizing, plain and simple.

A constitutional convention would put our rights at risk at a time of significant distrust in institutions.

Trust in government is at near record lows.¹² While a constitutional convention is a route authorized by our Constitution, there are deep disagreements over how a convention would work, who would write its rules, how those rules would be enforced, and how such a convention could be manipulated by wealthy special interests and others who have already shown a willingness to stack the deck against the people.

⁹ See *id.* at 122 (noting that “[r]ecent political science research has examined millions of lines of legislative text and shown that state legislatures usually adopt ALEC’s model bills unchanged, down to the last comma”).

¹⁰ Delaware (2016), New Mexico (2017), Maryland (2017), Nevada (2017), Colorado (2021), New Jersey (2021), Illinois (2022), Oregon (2023).

¹¹ Robert Greenstein and Richard Kogan, *A Constitutional Balanced Budget Amendment Threatens Great Economic Damage*, Center on Budget and Policy Priorities, July 27, 2011, <https://www.cbpp.org/research/a-constitutional-balanced-budget-amendment-threatens-great-economic-damage>.

¹² See Public Trust in Government: 1958-2022, Pew Research Center, <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022>.

When the stakes are as high as they are in our country and at this moment in history, too many people would question the legitimacy of whatever came out of the convention. This would invite constitutional chaos and crisis.

While the idea of an Article V Constitutional Convention may seem appealing to some—and we have serious structural issues with our government that must be addressed—the potential risks and uncertainties associated with such a convention should give us pause.

All of our constitutional rights and liberties would be on the table and up for debate. Many of the proponents of a convention want to repeal the progress we have made over the last century that are already under attack—racial justice, access to healthcare, reproductive freedom, climate justice, the freedom to vote, and the right to marry who we love to name just a few.

We all want things to improve in our country. But opening up the Constitution to an untested, risky process is the wrong way to make those improvements. We must exercise extreme caution before embarking on a path that could alter it in unpredictable and potentially harmful ways.

We cannot yield to the wealthy special interests who are lobbying states to rewrite our seminal charter at a constitutional convention with no referee. Ultimately, for democracy to deliver on its promise, we must do our part to ensure that our institutions are reflective, responsive, and representative of the people.

The Constitution is not without its imperfections and its enduring strength lies in its ability to adapt and evolve through a carefully structured amendment process. For the necessary changes we should make to our Constitution, the responsible path is to follow that of those who came before us and that worked for the 27 amendments added to the Constitution thus far.

Thank you for the opportunity to testify today.