To: **Madame Chairman**
House Committee on Rules and Executive Nominations
Maryland General Assembly
From: **Rita Dunaway, J.D., National Legislative Strategist for COS Action**[1]
Subject: **Testimony and Rebuttal to Common Arguments Against an Article V Convention**
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The Convention of States Project is a non-partisan effort to shift power away from special interest groups and powerful corporate lobbyists, and back toward ordinary American citizens like those gathered here today.

We are deeply troubled by the extent to which our federal government continues to erode the rule of law set forth in our Constitution. We are deeply troubled by the fact that the brilliant system of federalism enshrined in our Constitution is on the brink of extinction as Washington takes over every area of policymaking.

We want to see the balance of power corrected. We want to see more policy decisions made at the state level, where the people have more access to and input in those decisions.

At this point in American history, the Article V convention process is the only way to do that. You, as state legislators, have a logical, constitutional, process available to act as a final "check and balance" on federal overreach.

<u>The Process of an Article V Convention for Proposing Amendments</u>

1. 34 states pass resolutions applying for convention on the same topic.
2. Congress has a "ministerial duty" to "call" the convention once 34 applications on the same topic are received. The "call" is a term of art, meaning setting an initial time and place for the meeting.
3. The subject matter stated in the 34 applications form the agenda for the meeting
4. State legislatures choose and instruct delegates to represent them as their agents at the convention.

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5. Voting is by state (one state, one vote).
6. Proposals that are supported by a majority of states are sent back to the states for ratification.
7. Only proposals ratified by 38 states can become part of "this Constitution."

Responses to Common Opposition Arguments

Argument 1: The Constitutional Convention in Philadelphia defied its authority in proposing a new Constitution, so we can expect an Article V convention to do the same.

Response: A number of opponents have repeated this tired old myth that denigrates the Founding Fathers and our Constitution. You will be interested to learn that a brand-new law review article has just been published in Volume 40 of the Harvard Journal of Law and Public Policy that definitively refutes the claim that our Constitution was the product of a runaway convention. You can find the article here.

In fact, the Philadelphia Convention was not a "runaway." It is important to understand the basis for the myth, which is a fundamental misunderstanding of how interstate conventions operate. When one understands that the states—not the national government—instruct and limit the convention delegates, then one can understand both why the Constitutional Convention was not a "runaway," and why a modern Article V convention for proposing amendments could not become a "runaway."

The Annapolis Convention, initiated by the states to address the regulation of trade among the states, provided the initial impetus for calling the Constitutional Convention. The commissioners from the 5 states participating at Annapolis concluded that a broader convention of the states was needed to address the nation's concerns, and their report requested that such a convention be conducted in Philadelphia on the second Monday in May. The goal of the proposed convention was "to render the constitution of the Federal Government adequate for the exigencies of the Union." It is important to note that, as used at this time, "constitution" did not refer to the Articles of Confederation, but rather, to the system of government more broadly.[2]

In response to the suggestion from the Annapolis Convention that a new convention with broader powers be held in May of 1787, six state legislatures issued resolutions commissioning delegates (or "commissioners") to the Constitutional Convention. These states instructed their commissioners in broad language, in accordance with the purpose stated in the Annapolis Convention resolution: "to render the constitution of the Federal Government adequate for the exigencies of the Union."

[2] See Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments*," 65 Florida L. Rev. 618, 673, n386 (May 2013) (citing 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775), which defined "constitution" as "The act of constituting, the state of being, the corporeal frame, the temper of the mind, and established form of government, a particular law.").

Congress played *no* role in calling the Constitutional Convention, and the Articles of Confederation gave it no authority to do so. The power of Congress under the Articles was strictly limited, and there was no theory of implied powers. The states, however, possessed residual sovereignty which included the power to call this convention.

On February 21, 1787, Congress voted to "recommend" the Constitutional Convention that had been called by six states. It did not even purport to "call" the Convention (it had no power to do so). It merely proclaimed that "in the opinion of Congress, it is expedient" for the convention to be held. It recommended that the convention "revise" (not merely "amend") the Articles of Confederation in such a way as to "render the federal constitution adequate to the exigencies of Government & the preservation of the Union."

Ultimately, twelve states appointed commissioners. Ten of these states followed the phrasing of the Annapolis Convention with only minor variations in wording ("render the Federal constitution adequate"). Two states, New York and Massachusetts, followed the formula stated by Congress ("revise the Articles" in order to "render the Federal Constitution adequate").

Every student of history should know that the instructions for commissioners came from the states. In Federalist 40, James Madison answered the question of "who gave the binding instructions to the delegates." He said: "The powers of the convention ought, in strictness, to be determined by an inspection of the commissions given to the members by their respective constituents [i.e. the states]." He then spends the balance of Federalist 40 proving that the commissioners from all 12 states properly followed the directions they were given by each of their states. According to Madison, the February 21st resolution from Congress was merely "a recommendatory act."

The bottom line is that the states, not Congress, called the Constitutional Convention. They told their delegates to render the Federal Constitution adequate for the exigencies of the Union, and that is exactly what they did.

Because neither the Constitutional Convention nor any other of the 35-plus conventions of the states in American history have "run away" or exceeded their legitimate authority, there is absolutely zero precedent for a "runaway" convention.

Argument 2: **Nothing in Article V limits the convention to a single topic, and in fact, states cannot limit the scope of an amendment-proposing convention. Once convened, state delegations will be free to rewrite the Constitution, and no public body has the power to stop them.**

Response: The states whose applications trigger the convention retain the right to limit the scope of the convention however they choose. This is inherent in their power of application. In fact, this is the only reason there has never yet been an Article V convention; while over 400 state

applications for a convention have been filed, there have not yet been 34 applications for a convention on the same subject matter.

As the agents of the state legislatures who appoint and commission them, the delegates only enjoy the scope of authority vested in them by their principals (the state legislatures). Any actions outside the scope of that authority are void as a matter of common law agency principles, as well as any state laws adopted to specifically address the issue.

The inherent power of state legislatures to control the selection and instruction of their delegates, including the requirement that said delegates restrict their deliberations to the specified subject matter, is reinforced by the unbroken, universal historical precedent set by the interstate conventions held nearly 40 times in American history. On the other hand, those who make a contrary claim cannot cite a single historical or legal precedent to support it.

As far as the power of other bodies to stop an Article V convention from re-writing the Constitution, there are multiple answers. First of all, remember that the convention's only power is to "propose" amendments to "this Constitution" (the one we already have). Only upon ratification by 38 states does any single amendment become part of the Constitution. Second, Congress has no duty to submit off-topic amendment proposals to the states for ratification in the first place.

Argument 3: A report by the Congressional Research Service points out that in the 70's and 80's, Congress introduced many bills in which it purported to control such matters as selection of state delegates to an Article V convention, voting methods, rules, etc.

Response: The only possible precedent set by bills that fail to pass is that the bills did not enjoy the support of the majority of the body. Even if Congress were to ever pass such a law, it would be challenged in court and struck down based upon common law agency principles (an agent can only act upon a grant of authority from its principal); historical precedent (every interstate convention in American history has operated on a one state, one vote basis) and legal precedent (Congress may not use any of its Article I powers, including its power under the Necessary and Proper Clause, in the context of Article V. *See Idaho v. Freeman*, 529 F.Supp. 1107, 1151 (D. Idaho 1981) ("Thus Congress, outside of the authority granted by article V, has no power to act with regard to an amendment, i.e., it does not retain any of its traditional authority vested in it by article I.") (vacated as moot)).

Argument 4: The states are largely powerless with respect to an Article V Convention; Congress holds all the power under the Necessary and Proper Clause of Article I.

Response: This argument is based on ignorance of existing precedent, holding that Congress may not use any of its Article I powers in the context of Article V. *See Idaho v. Freeman*, 529 F.Supp. 1107, 1151 (D. Idaho 1981) ("Thus Congress, outside of the authority granted by article V, has no power to act with regard to an amendment, i.e., it does not retain any of its traditional authority vested in it by article I.") This case was later vacated as moot for procedural reasons,

but the central holding remains unchanged. Congress may not use its power under the Necessary and Proper Clause with respect to the operation of an Article V Convention.

Argument 5: It is a myth that the states can bypass Congress in the Article V process.

Response: Alexander Hamilton explained, in Federalist #85, "[T]he national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be obliged 'on the application of the legislatures of two thirds of the States at which at present amount to nine, to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof.' The words of this article are peremptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about the disinclination to a change vanishes in air. . . We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority."

The entire reason the convention mechanism was added to Article V was to give the states a way to bypass Congress in passing amendments that Congress opposed.

Argument 6: COS's claims that State legislatures have the power to control Delegates, Delegate selection, convention rules, subject matter, etc., is speculation and wishful thinking at best.

Response: Actually, these claims are based upon both the common law principles of agency and upon the unbroken, universal historical precedent set by the interstate conventions held nearly 40 times in American history. On the other hand, those who make a contrary claim cannot cite a single historical or legal precedent to support it. The reason the details of the interstate convention process are not recited in the Constitution is not because they were unknown to the drafters, but rather because they were *known*. Consider the fact that our Constitution contains multiple references to the word "jury," without defining what a jury is or how it operates. This is because, as with the basic operations of interstate conventions, the basic operations of juries were well-known as a matter of historical precedent.

Argument 7: There is no such thing as a convention of states; it is a term that has been used as a gimmick.

Response: "Convention of states" is the label first applied to an Article V convention for proposing amendments by the General Assembly of the Commonwealth of Virginia when it passed the first application for an Article V Convention to propose the Bill of Rights in 1788. The United States Supreme Court has also adopted the term. *See Smith v. Union Bank*, 30 U.S. 518 (1831).

Argument 8: We cannot be confident that the high (38-state) threshold for ratification will protect us from bad amendments, because an Article V Convention could simply change the ratification requirement.

Response: This argument fails based on the plain language of Article V. No constitutional amendment—including an amendment to the ratification requirement—can be achieved without first being ratified by three-fourths of the states (38 states). With regard to the 1787 Constitutional Convention, every state did, in fact, ratify the change in the ratification requirement prior to the Constitution's adoption.

Argument 9: Adding amendments to the Constitution won't help anything, because federal officials simply ignore the Constitution anyway.

In one sense, this is true. If our Constitution were being interpreted today—and obeyed—according to its original meaning, we would not be facing most of the problems we face today in our federal government. But opponents are overly simplistic in their assessment that the issue is as simple as modern-day "ignoring" or "disobeying" the Constitution. The real issue is that certain provisions of our Constitution have been wrenched from their original meaning, perverted, and interpreted to mean something very different.

As just one example, consider the individual mandate provision of the Affordable Care Act. Of course, nowhere in the Article I of the Constitution do we read that Congress has the power to force individuals to purchase health insurance. However, our modern Supreme Court "interprets" the General Welfare Clause of Article I broadly as a grant of power for Congress to tax and spend for virtually any purpose that it believes will benefit the people. Now we know from history that this is not what was intended. But it is the prevailing modern interpretation, providing a veneer of legitimacy to Congress' actions—as well as legal grounds for upholding them.

The federal government doesn't "ignore" the Constitution—it takes advantage of loopholes created through practice and precedent. The only way to close these loopholes definitively and permanently is through an Article V Convention that reinstates limitations on federal power and jurisdiction in clear, modern language.

For more detailed responses to these questions or to any questions not addressed here, please contact Rita Dunaway at rdunaway@cosaction.com**.**

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