In the United States District Court for the District of Columbia

Commonwealth of Virginia, *et al.*; *Plaintiffs,* *v.* **David S. Ferriero,** in his official capacity as Archivist of the United States; *Defendant,* **Alabama, Louisiana, Nebraska, South Dakota, and Tennessee**; *Intervenor-Defendants.*	**Civil Case No. 1:20-cv-00242-RC**

Brief of Amicus Curiae Independent Women's Law Center Supporting Intervenors' Motion for Summary Judgment

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STATEMENT OF INTEREST

Independent Women's Law Center ("IWLC") is a project of Independent Women's Forum (IWF), a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes policies that expand liberty, encourage personal responsibility, and limit the reach of government. IWLC supports this mission by advocating—in the Courts, before Administrative Agencies, in Congress, and in the media—for equal opportunity, individual liberty, and respect for the American constitutional order.

IWLC is concerned that allowing the proposed Equal Rights Amendment to become a part of our Constitution decades after it was originally proposed will disenfranchise a generation of Americans who have not had a chance to weigh in, through their elected representatives, on the question of whether women today need additional constitutional protections.[1]

[1] Neither a party nor a party's counsel authored any part of this brief or contributed funds to its preparation or submission. Only amicus curiae and its members have made such contributions.

INTRODUCTION

In 1923, when suffragist Alice Stokes Paul first proposed a constitutional amendment to guarantee equality of the sexes, women in America did not have the same legal rights as men. But by 1972, when Congress sent the Equal Rights Amendment ("ERA") to the states for ratification within seven years, the winds of political change were blowing strongly.

During the 1960s, Congress passed legislation outlawing unfair workplace discrimination. Throughout the 1970s, and in the years that followed, Congress and the legislatures of the 50 states passed additional laws aimed at combating discrimination and providing equal opportunity for women and girls. See *infra,* Part I.B.

In 1971, during this period of legislative and social change, Rep. Martha Griffiths introduced into Congress a new version of the equality amendment originally proposed by Alice Paul.[2] It read:

> Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.[3]

On October 12, 1971, the House of Representatives passed the measure by the requisite ⅔ majority. 117 Cong. Rec. 35815 (1971).

One month later, the United States Supreme Court decided a case that changed the constitutional landscape with respect to sex discrimination, holding that government policies that

[2] The Center for Legislative Archives, *Martha Griffiths and the Equal Rights Amendment* (Aug. 15, 2016), *available at* https://www.archives.gov/legislative/features/griffiths#:~:text=After%20months%20of%20debate%2C%20hearings,seven%2Dyear%20deadline%20for%20ratification.

[3] *Equal Rights Amendment,* National Organization of Women, https://now.org/resource/equal-rights-ammendment/ (last visited July 12, 2020).

unfairly discriminate against women violate the Equal Protection Clause of the 14th Amendment. *Reed v. Reed*, 404 U.S. 71 (1971).

On March 22, 1972, the Senate approved by two-thirds majority an identical version of the ERA previously approved by the House. 118 Cong. Rec. 9598 (1972). The joint resolution introducing the proposed amendment imposed a seven-year deadline for ratification by the states. H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972).

Between 1972 and 1977, 35 states ratified the ERA,[4] three short of the three quarters of states required by Article V of the U.S. Constitution.[5] Four of the 35 ratifying states later rescinded their approval. No additional states ratified before March 1979, when the deadline for ratification expired.[6]

[4] The states that ratified within the seven year time frame were Hawaii, New Hampshire, Delaware, Iowa, Idaho, Kansas, Nebraska, Texas, Tennessee, Alaska, Rhode Island, New Jersey, Colorado, West Virginia, Wisconsin, New York, Michigan, Maryland, Massachusetts, Kentucky, Pennsylvania, California, Wyoming, South Dakota, Oregon, Minnesota, New Mexico, Vermont, Connecticut, and Washington, Maine, Montana, Ohio, North Dakota, and Indiana. However, Kentucky, Nebraska, Tennessee, and Idaho later rescinded their ratifications. *Ratification of the Equal Rights Amendment*, Opinions of the Office of Legal Counsel, Vol. 44 (Jan. 6, 2020)("OLC Opinion"), *available at* https://www.justice.gov/olc/file/1232501/download.

[5] Article V of the Constitution provides, in pertinent part:

> 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.

U.S. Const., Article V.

[6] See Jeff Jacoby, *The Equal Rights Amendment died in 1979. Let it rest in peace*, Boston Globe (March 20, 2020), *available at* https://www.bostonglobe.com/2020/03/20/opinion/equal-rights-amendment-died-1979-let-it-rest-peace/.

Although the ERA failed, the status of American women continued to evolve. Today, women and men are legally equal, and society has embraced the principle that women and men deserve equal access and opportunity. Indeed, women in 2020 are more educated, more economically prosperous, and more politically powerful than ever before. Notably, women did not need to amend the Constitution or legally erase sex differences in order to achieve these milestones.

SUMMARY OF ARGUMENT

The Equal Rights Amendment ("ERA") is expired, and its supporters should not be allowed to bootstrap it to the Constitution with a handful of 21st century endorsements. Allowing them to do so would ignore half a century of legal, social, and economic progress and violate the constitutional requirement that changes to our governing charter be adopted by contemporaneous super-majorities of our elected representatives.

This Court, of course, has no way of knowing whether the legislatures of the states that ratified the ERA during the 1970s would do so now that women and men have achieved full legal equality and now that cultural understandings of the word sex have changed dramatically. Perhaps they would. But today's voters—*many of whom were not yet born when Congress sent the proposed amendment to the states*—should have an opportunity to determine, through their elected representatives, whether to adopt a measure that might eliminate programs that benefit women and girls and that would likely be interpreted as requiring government to treat males and females exactly the *same*, irrespective of circumstances.

ARGUMENT

This Court should enter "judgment as a matter of law" for Defendants pursuant to Fed. R. Civ. P. 56(a) because the ERA is expired. Under Article V of the U.S. Constitution, an

amendment's proposal and ratification must be reasonably contemporaneous. In this case, almost half a century has passed since Congress sent the proposed amendment to the states for ratification –half a century in which changed legal, social, and cultural circumstances raise important questions as to what the text of the ERA means, whether the ERA is necessary, and whether the states that ratified the proposal during the 1970s would do so today.

I. IN 2020, WOMEN AND MEN ARE LEGALLY EQUAL, MAKING THE EQUAL RIGHTS AMENDMENT UNNECESSARY.

A. The Constitution Already Protects Women from Unfair Government Discrimination.

The legal equality of all persons is recognized by the Equal Protection Clause of the 14th Amendment of the United States Constitution, which prohibits state action that "den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV.[7] Although the 14th Amendment was added to the Constitution in 1868 after the Civil War for the purpose of protecting the newly freed slaves, its language is broad and guarantees that the government will treat all Americans equally.[8]

Despite the broad scope of the language of the Equal Protection Clause, for many years the courts failed to apply its mandate to government policies that discriminated against women. For

[7] Although the 14th amendment only refers to state action, the Due Process Clause of the 5th Amendment incorporates equal protection concepts, thereby also restricting the power of the federal government to unfairly discriminate. See, *e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (the Supreme Court's approach to Fifth Amendment equal protection claims is the same as its approach to Fourteenth Amendment equal protection claims); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (deprivations of equal protection violate the Due Process Clause of the 5th Amendment).

[8] See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 Conn. L. Rev. 1059, 1067-74 (May 2011) (explaining that the Equal Protection Clause was "designed to mitigate the effects of slavery on one minority group - Blacks" but because its language is general, courts have applied it broadly).

example, shortly after the amendment's passage, when Myra Bradwell challenged the state of Illinois' prohibition on women practicing law, the Supreme Court rejected her argument that the Equal Protection Clause prohibited such restrictions. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873). See also *Goesaert v. Cleary*, 335 U.S. 464 (1948) (holding that the Equal Protection Clause did not prohibit a law that banned women from becoming bartenders unless she be "the wife or daughter of the male owner"); *Hoyt v. Florida*, 368 U.S. 57, 64-65 (1961) (holding that the Equal Protection Clause did not prohibit laws that banned women from serving on juries unless specifically requested).

Court decisions like these, upholding blatantly discriminatory policies, were the driving force behind support for an amendment to the Constitution that would guarantee gender equality.[9] In 1971, however, shortly before Congress sent the ERA to the states for consideration, the Supreme Court unanimously ruled that a state statute preferring males to females in estate administration violated the 14th Amendment's Equal Protection Clause. *Reed*, 404 U.S. at 77. Although the Court in *Reed* found unconstitutional "dissimilar treatment for men and women who are thus similarly situated," *id.*, at 76, it would be years before the contours of the Equal Protection's Clause's prohibition on sex discrimination would become clear. See, *e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that benefits given by the United States military to the family of service members cannot be given out differently on the basis of sex); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994) (holding that peremptory challenges based solely on a prospective juror's sex violate the Equal Protection Clause); *United States v. Virginia*, 518 U.S.

[9] Andrew Schepard, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 Harv. L. Rev. 1499, 1502 (1971).

515 (1996) (striking down the Virginia Military Institute's long-standing male-only admission policy).

From the vantage point of 2020, it is now clear that the Equal Protection Clause broadly prohibits government policies that unfairly discriminate on the basis of sex. Indeed, Justice Ruth Bader Ginsburg, an early supporter of the ERA, has noted that "[t]here is no practical difference between what has evolved and the ERA."[10] As such, the original justification for the ERA—that it was needed because the Equal Protection Clause did not protect women from discriminatory government policies—is moot.

B. Numerous State and Federal Statutes Protect Women from Unfair Discrimination.

Not only does the U.S. Constitution's Equal Protection Clause outlaw governmental policies that unfairly discriminate on the basis of sex, but numerous statutes outlaw private discrimination and gender-based violence.

The U.S. Code is replete with prohibitions on sex discrimination by private, as well as public, entities. See, *e.g.*, 29 U.S.C. §206(d) (1963) (Equal Pay Act) (prohibiting employers from paying similarly-situated men and women unequally); 42 U.S.C. § 2000e (1964) (Title VII) (prohibiting sex-based discrimination in employment); 20 U.S.C. §1681 (1972) (Title IX) (prohibiting public and private educational programs that receive federal financial assistance from discriminating on the basis of sex); 15 U.S.C. § 1691(a) (1974) (Equal Credit Opportunity Act) (prohibiting sex discrimination against credit applicants); 42 U. S. C. § 3604 (Fair Housing Act)(1974) (prohibiting sex discrimination in the sale, rental, and financing of housing); 42 U.S.C.

[10] Jacoby, *supra* n. 6 (quoting Justice Ginsburg). See also Jane Kelly, *UVA Law Professor Breaks Down the Implications of the ERA, Just Passed in Virginia*, UVA today (January 16, 2020), https://news.virginia.edu/content/uva-law-professor-breaks-down-implications-era-just-passed-virginia (explaining that government policies that unfairly discriminate on the basis of sex are already prohibited by the Equal Protection Clause of the 14th Amendment).

§ 2000e(k) (1978) (Pregnancy Discrimination Act) (requiring employers to treat pregnant women the same as other similarly capable employees).[11] See also 34 C.F.R § 106.41(c) (Title IX Athletic Regulations) (requiring that recipients of federal funds with athletic programs provide equal athletic opportunity for members of both sexes).

In addition to these federal prohibitions against discrimination, the federal Violence Against Women Act protects women from criminal acts of gender violence by strengthening the federal penalties for repeat sex offenders, creating the National Domestic Violence Hotline, and establishing the Office on Violence Against Women within the Department of Justice, which authorizes grants to state, local, and tribal law enforcement entities to investigate and prosecute violent crimes against women.[12]

State laws often go further than federal law, providing additional remedies and alternate fora for redress from discrimination or gender violence.[13] For example, a number of states have

[11] Moreover, during the 1980s and 1990s, the U.S. Supreme Court held that sexual harassment can constitute a form of unlawful sex discrimination prohibited by Titles VII and Title IX. See, *e.g.*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (holding that a sexually hostile work environment can provide the basis for a claim of sex discrimination under Title VII); see also *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) (holding that a school's failure to act when notified of teacher-on-student sexual harassment may constitute sex discrimination under Title IX); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999) (holding that a school's failure to act when notified of student-on-student sexual harassment may constitute sex discrimination under Title IX).

[12] Title IV of P.L. 103-322 (1994); *see also* Lisa N. Sacco, *The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization*, Congressional Research Service (April 23, 2019), *available at* https://fas.org/sgp/crs/misc/R45410.pdf.

[13] National Conference of State Legislatures, *State Employment-Related Discrimination Statutes* (July 2015), *available at* https://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf (listing the employment discrimination laws of each state).

passed laws requiring employers to provide reasonable accommodations to pregnant workers not required by federal law.[14]

II. WOMEN HAVE MADE GREAT SOCIAL AND ECONOMIC PROGRESS WITHOUT THE ERA.

In addition to changes in state and federal law (or, some might argue, because of them), America has experienced significant changes in the social and economic status of women.

Prior to the advent of the coronavirus pandemic, America was experiencing the lowest female unemployment rate in almost 70 years.[15] In 2018, women aged 16 and over comprised 46.9 percent of the total labor force, compared to 38.5 percent of the labor force in 1972.[16]

As women have expanded their participation in the labor force, they have also increased their share of managerial positions. In 1972, women occupied only 20 percent of managerial

[14] See *e.g.*, Marsha Mercer, *States Go Beyond Federal Law to Protect Pregnant Workers*, PEW, January 7, 2015, *available at* https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/07/states-go-beyond-federal-law-to-protect-pregnant-workers.

[15] In February 2020, the female unemployment rate dropped to 3.4 percent, the lowest rate since 1953. See Federal Reserve Bank of Saint Louis, *Federal Reserve Bank Economic Data, Unemployment Rate—Women, available at* https://fred.stlouisfed.org/series/LNS14000002 (last visited July 11, 2020).

[16] *Women in the Workforce United States: Quick Take,* Catalyst (June 5, 2019), *available at* https://www.catalyst.org/research/women-in-the-workforce-united-states/#:~:text=Women%20Are%20Nearly%20Half%20the,of%20the%20total%20labor%20force.&text=57.1%25%20of%20women%20participate%20in,compared%20to%2069.1%25%20of%20men (citing Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, *Table 3: Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race* (2019), *available at* https://www.bls.gov/cps/cpsaat03.htm; U.S. Department of Labor Women's Bureau, Women in the Labor Force, *available at* https://www.dol.gov/agencies/wb/data/facts-over-time/women-in-the-labor-force (last visited July 12, 2020).

jobs.[17] But by 2019, 40 percent of managers were female.[18] In 1972, women owned just 4.6 percent of businesses, but today they own 40 percent of U.S. businesses[19] and are opening up new businesses at twice the rate of men.[20]

Female educational attainment has also risen substantially since the ERA was sent to the states for consideration. Today, on almost every available metric, high school girls significantly outperform boys.[21] This female academic advantage continues well beyond high school. In 2016,

[17] George Guilder, *Women in the Work Force: Gender disparity in the workplace might have less to do with discrimination than with women making the choice to stay at home*, The Atlantic, (Sept. 1986), *available at* https://www.theatlantic.com/magazine/archive/1986/09/women-in-the-work-force/304924/.

[18] Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, *Table 11: Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity* (2019), *available at* https://www.bls.gov/cps/cpsaat11.htm.

[19] Maddie Shepherd, *Women-Owned Businesses: Statistics and Overview (2020)*, Fundera, https://www.fundera.com/resources/women-owned-businessstatistics#:~:text=editorial%20team%20alone.,17%20Women%2DOwned%20Business%20Stats%20You%20Need%20to%20Know,US%20businesses%20are%20women%2Downed (last visited July 12, 2020); Women's Business Enterprise National Council, *Behind the Numbers: The State of Women-Owned Businesses in 2018*, *available at* https://www.wbenc.org/blog-posts/2018/10/10/behind-the-numbers-the-state-of-women-owned-businesses-in-2018 (last visited July 12, 2020); American Express, *2018 State of Women-Owned Businesses Report*, *available at* https://about.americanexpress.com/files/doc_library/file/2018-state-of-women-owned-businesses-report.pdf (last visited July 12, 2020).

[20] *Woman-Owned Businesses Are Growing 2X Faster On Average Than All Businesses Nationwide*, Business Wire (Sept. 23, 2019), https://www.businesswire.com/news/home/20190923005500/en/Woman-Owned-Businesses-Growing-2X-Faster-Average-Businesses.

[21] See Ashe Schow, *Girls outperforming boys in high school*, Washington Examiner (October 4, 2016) , *available at* https://www.washingtonexaminer.com/girls-outperforming-boys-in-high-school (young women are taking more honors classes, getting better grades and higher GPAs and class rankings than their male peers); VoA, *Study: Girls Outperform Boys on Tech, Engineering, Even Without Class* (April 30, 2019), https://learningenglish.voanews.com/a/study- girls-outperform-boys-on-tech-engineering-even-without-class/4898125.html; Maggie Fox, *Girls get better grades than boys, even in STEM subjects, study finds*, NBCNews.com (Sept. 25, 2018), https://www.nbcnews.com/health/health-news/girls-get-better-grades-boys-even-stem-subjects-study-finds-n912891.

more than 57 percent of all bachelor's degrees were awarded to women,[22] compared to 43 percent in 1972.[23] For the class of 2016–2017, women also earned more than half of all master's degrees (59.4 percent) and doctorate degrees (53.3 percent).[24] Women today comprise the majority of law students,[25] and, for the first time, make up the majority of medical students.[26]

Since 1972, high school and college aged women have achieved success not only in the classroom but in the athletic arena. In fact, the past four and a half decades have witnessed an explosion in women's high school and college sports, with the number of women playing college sports increasing 545 percent between 1972 and 2016 and the number of female high school athletes increasing by 990 percent during the same time period.[27]

[22] Mark J. Perry, *Table of the Day: Bachelor's degrees for the Class of 2016 by field and gender. Oh, and the overall 25.6% degree gap for men!,* American Enterprise Institute (June 18, 2018), https://www.aei.org/carpe-diem/table-of-the-day-bachelors-degrees-for-the-class-of-2016-by-field-and-gender-oh-and-the-overall-25-6-college-degree-gap-for-men/#:~:text=1.,year%20for%20every%20100%20men.

[23] National Center for Education Statistics, Digest of Education Statistics, *Table 310: Degrees conferred by degree-granting institutions, by level of degree and sex of student: Selected years, 1869-70 through 2021-22, available at* https://nces.ed.gov/programs/digest/d12/tables/dt12_310.asp (last visited July 11, 2020).

[24] *Women in the Workforce, supra* n. 16.

[25] Enjuris, *Law School Rankings By Female Enrollment (2018),* https://www.enjuris.com/students/law-school-female-enrollment-2018.html (last visited July 12, 2020).

[26] Linda Searing, *The Big Number: Women now outnumber men in medical schools*, Washington Post (Dec. 23, 2019), *available at* https://www.washingtonpost.com/health/the-big-number-women-now-outnumber-men-in-medical-schools/2019/12/20/8b9eddea-2277-11ea-bed5-880264cc91a9_story.html.

[27] Beth A. Brooke-Marciniak and Donna de Varona, *Amazing things happen when you give female athletes the same funding as men*, World Economic Forum (Aug. 25, 2016), https://www.weforum.org/agenda/2016/08/sustaining-the-olympic-legacy-women-sports-and-public-policy/.

The political power of women has also increased since 1972. Although, women's percentage share of elected offices does not precisely mirror their percentage of the population, female elective office-holding in the United States stands at an all-time high. [28] Today, women make up nearly a quarter of the voting membership of the 116th Congress—the highest percentage in U.S. history.[29] Moreover, since 1971, the number of women serving in state legislatures has more than quintupled.[30]

Significantly, when they choose to run for office, women are as likely as men to win.[31] Perhaps most importantly, regardless of their share of elective offices, women are exercising political power like never before: they are both more likely to be registered to vote and more likely to actually vote in modern elections than men.[32]

The fact that all of this remarkable progress has been achieved without amending the Constitution or legally erasing sex differences demonstrates that the ERA is unnecessary and raises

[28] Kira Sanbonmatsu, *Women's Underrepresentation in the U.S. Congress,* Daedalus (Winter 2020), *available at* https://www.amacad.org/publication/womens-underrepresentation-us-congress.

[29] Drew Desilver, *A record number of women will be serving in the new Congress*, Pew Research Center (Dec. 18, 2018), https://www.pewresearch.org/fact-tank/2018/12/18/record-number-women-in-congress/.

[30] *Women in State Legislatures 2020*, Center for American Women in Politics, https://cawp.rutgers.edu/women-state-legislature-2020 (last visited July 9, 2020).

[31] Claire Cain Miller, *The Problem for Women Is Not Winning. It's Deciding to Run*, New York Times (Oct. 25, 2016), *available at* https://www.nytimes.com/2016/10/25/upshot/the-problem-for-women-is-not-winning-its-deciding-to-run.html.

[32] Center for American Women in Politics, *Gender Differences In Voter Turnout*, Eagleton Institute of Politics, Rutgers University (Sept. 16, 2019), *available at* https://www.cawp.rutgers.edu/sites/default/files/resources/genderdiff.pdf.

significant questions as to whether the representatives of the people of three quarters of the states would ratify the amendment today.

III. THE TIME FOR RATIFICATION OF THE ERA HAS LONG SINCE EXPIRED.

The deadline for ratification of the proposed ERA passed decades ago. The joint resolution introducing the measure and passed by Congress states that the amendment will "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." See 86 Stat. 1523 (emphasis added).

The Supreme Court has held that Congress may impose a deadline for ratification of a proposed constitutional amendment, so it will not languish in perpetuity.[33] See *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921) ("Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt."). And, indeed, the 18th, 20th, 21st, and 22nd Amendments all included deadlines for ratification and were successfully ratified by three-fourths of the states before their deadlines expired.[34]

[33] Although the ERA deadline is found in the resolution introducing the amendment, rather than in the text of the amendment itself, this is a distinction without a difference, where, as here, both houses of Congress passed the resolution by the requisite two-thirds majorities, and the state legislatures were aware of the deadline when they considered the resolution. See Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 Harv. L. Rev. 1220, 1296 (2019) (arguing that Members of Congress who passed the ERA understood full well that the resolution they adopted imposed a valid and enforceable time limit).

[34] *See* David C. Huckabee, *Ratification of Amendments to the U.S. Constitution*, CRS Report for Congress (Sept. 30, 1997), *available at* https://www.everycrsreport.com/files/19970930_97-922_ebded0a0c9f961ffabb21b4364d260b76a0b8d11.pdf.

Because the proposed ERA was sent to the states with a specific ratification deadline, both the Department of Justice and the Congressional Research Service have determined that the ERA died last century.[35]

Even without the congressionally imposed deadline, allowing ratification forty years after an expired deadline would be contrary to Article V of the Constitution, which is intended to ensure that a proposal has overwhelming support from the American people before it becomes part of our governing charter. Article V requires that constitutional changes be approved by super-majorities of both Congress (two-thirds) and the States (three-fourths). See U.S. Const., Art. V. As the Supreme Court held in *Dillon*, because "ratification is ... the expression of the approbation of the people," there is "a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sessions at relatively the same period, which of course ratification scattered through a long series of years would not do." 265 U.S. at 375.

[35] OLC Opinion, *supra* n. 4; *The Constitution of the United States of America: Analysis and Interpretation,* Cong. Res. Serv. at 50 (2017), https://www.govinfo.gov/content/pkg/GPO-CONAN-2017/pdf/GPO-CONAN-2017.pdf.

Congress attempted to revive the proposed ERA in February 13, 2020, when the House of Representatives unilaterally voted to dissolve the deadline along party lines. Katherine Tully-McManus, *House votes to void deadline for Equal Rights Amendment ratification*, Roll Call (Feb. 13, 2020), https://www.rollcall.com/2020/02/13/house-votes-to-void-deadline-for-e qual-rights-amendment-ratification/.

Even if the Senate were to pass a similar measure, the ERA could not be resurrected. As the Department of Justice has explained, Congress's authority to impose a deadline does not authorize subsequent congressional action to retroactively extend expired deadlines imposed by its predecessors. OLC Opinion at 3 ("Congress may not revive a proposed amendment after the deadline has expired.").

Reasonably contemporaneous adoption is especially important where, as here, the legal landscape and meaning of the terms of the Amendment, including the meaning of "sex," have changed dramatically over time.[36] *Id.* at 375.

IV. A CHANGED CONSTITUTIONAL LANDSCAPE MAY IMPACT THE APPLICATION OF THE ERA.

In 1976, four years after Congress sent the ERA to the states for ratification, the U.S. Supreme Court clarified the standard for analyzing sex-based policies under the Equal Protection Clause. In *Craig v. Boren*, the Court explained that, although the 14th Amendment's guarantee of equal treatment prohibits government from unfairly discriminating on the basis of sex, it does not automatically forbid *all* sex-based classifications. 429 U.S. 190 (1976) (striking down an Oklahoma law that prohibited the sale of 3.2 percent beer to males under the age of 21 and females under the age of 18).

Under *Boren*, sex-based classifications receive heightened scrutiny. Thus, when considering claims that a policy discriminates on the basis of sex in violation of the Equal Protection Clause, courts do not defer to government policymakers, as they do when reviewing regular economic regulation under rational basis review. But neither do they apply the strictest

[36] Plaintiffs claim that the addition of the 27th Amendment to the Constitution more than two centuries after Congress sent it to the states for ratification supports their argument that the ERA has been properly ratified. (Compl., Doc. 1 at ¶ 69.) However, the ERA differs from the 27th Amendment in three significant ways. First, the 27th Amendment was not sent to the states with any expiration date. Second, the language of the 27th amendment, which prohibits any change in congressional pay from taking effect until the next term of the House of Representatives, is narrow and straightforward, its meaning not altered by the passage of time. Third, the issue of congressional pay was not in any way affected by changed circumstances. By contrast, the ERA was sent to the states with an expiration date; its language is sweeping and open to changing interpretations; and its necessity is made questionable by circumstances that have changed dramatically.

level of scrutiny, which is reserved for cases that implicate race or fundamental rights.[37] Instead, they receive "intermediate scrutiny," meaning that, in order to pass constitutional muster, sex-based policies must be "substantially related" to the achievement of "important governmental objectives." *Id.* at 197.

This approach is based on common sense: although race and sex are both immutable characteristics that have been the basis for discrimination, unlike race, biological sex differences often provide relevant grounds for distinction. For example, maintaining separate prisons for male and female inmates makes obvious sense, whereas housing black and white inmates separately does not.[38] Under the "intermediate scrutiny" standard established in *Boren*, policymakers may not arbitrarily discriminate against women without running afoul of the Equal Protection Clause. They may, however, adopt policies that reasonably distinguish between the sexes where actual biological differences would suggest different treatment.

The *Boren* standard creates legal space for the law to accommodate legitimate distinctions between males and females.[39] If, however, the proposed ERA is added to the Constitution now, it

[37] Courts subject race-specific policies and policies that implicate fundamental rights (such as voting) to the strictest level of scrutiny. These policies are presumed unconstitutional unless *necessary* to achieve a *compelling* government interest. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). By contrast, ordinary legislation is presumed constitutional under the Equal Protection Clause so long as it is *rationally related* to a *legitimate* governmental purpose. *FCC v. Beach Comm'ns, Inc.*, 508 U.S. 307, 314 (1993) (statutes involving economic policy a "strong presumption of validity.")

[38] *See* Inez Feltscher Stepman, *Don't Revive the ERA, City Journal* (Feb. 27, 2020), *available at* https://www.city-journal.org/new-equal-rights-amendment.

[39] *Compare Orr v. Orr*, 440 U.S. 268 (1979) (striking down as unconstitutional an Alabama law that said husbands, but not wives, can be required to pay alimony upon divorce) and *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980) (striking down a provision of Missouri's workers' compensation law that granted death benefits to widows but denied them to widowers unless incapacitated or dependent on wife's earnings) with *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (upholding as constitutional a California statutory-rape law that made it unlawful for a man to have sex with a woman under eighteen years of age but punished only the

is possible that it would be interpreted as going further than the Equal Protection Clause, lest the amendment be rendered redundant. And, indeed, this is exactly what the ERA proponents hope will happen. In their view, adding the proposed amendment now will require courts to apply strict scrutiny to eradicate all sex-based classifications.[40]

The indeterminant text of the ERA, of course, says nothing about the level of scrutiny that would apply to gender distinctions. But, if proponents get their way, the prohibition on sex discrimination under the ERA will provide no flexibility for situations where meaningful biological differences between males and females matter.

Adopting the ERA now would, thus, likely require women to register for the selective service and jeopardize private female-only spaces, such as bathrooms, women's shelters, and sports teams. Moreover, the ERA would put at risk hundreds, if not thousands, of policies and programs designed to support women and girls.[41]

For example, the ERA could be used to prohibit the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), spousal Social Security benefits, and even

male participant) and *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding as constitutional the practice of requiring only men to register for the draft).

[40] See EqualRightsAmendment.org, *ERA Fact Sheet, available at* https://www.equalrights amendment.org/faq (last visited July 12, 2020) ("Governmental actions that treat males or females differently as a class would be subject to strict judicial scrutiny and would have to meet the highest level of justification"); Lisa Baldez, *The U.S. might ratify the ERA. What would change?*, Washington Post (January 23, 2020), *available at* https://www.washingtonpost.com/ politics/2020/01/23/us-might-ratify-era-what-would-change/ (if the ERA passes, courts will treat sex the same as race, applying the highest level of scrutiny to eradicate all sex-based classifications).

[41] See Stepman, *supra* n. 38. See also Kelly, *supra* n. 10 ("the ERA would harm women because it would not only bar government discrimination against women, like current law does, it would also ban all distinctions on the basis of sex, including policies designed to benefit girls and women.").

federal grants that attempt to increase the participation of women and girls in STEM programs, such as the WAMS (Women and Minorities) STEM Field Grant Program,[42] and the nineteen grants administered pursuant to the Violence Against Women Act.[43]

V. CHANGED UNDERSTANDINGS OF LANGUAGE MAY ALSO IMPACT THE APPLICATION OF THE ERA.

While it is possible that courts might interpret the phrase "equality of rights under law" simply to enshrine into law the simple concept of legal equality for women and men, it is more likely that courts would interpret that phrase as requiring the government to always treat men and women the same. See *Bostock v. Clayton County*, No. 17-1617, slip. op. at 33 (S. Ct. June 15, 2020) (holding that equality requires a *but-for* test under which it is always unlawful to consider biological sex).

Indeed, proponents of the ERA have made clear their desire to see Amendment interpreted not only to prohibit unfair discrimination but also to outlaw *all* sex-based distinctions and to "provide the possibility of recourse when women are clearly disadvantaged . . . without having to prove intent to discriminate."[44]

[42] United States Department of Agriculture, *Women and Minorities in Science, Technology, Engineering and Mathematics Fields Grant Program (WAMS), available at* https://nifa.usda.gov/program/women-and-minorities-science-technology-engineering-and-mathematics-fields-grant-program (last visited July 12, 2020).

[43] *OVW Grants and Programs*, Dept. of Justice, https://www.justice.gov/ovw/grant-programs (last visited July 11, 2020). See also Kelly, *supra* n. 10 ("State and federal programs to increase female participation in STEM fields, corporate management and business ownership, for example, would likely violate the ERA.")

[44] ERA Coalition Fund for Women's Equality, *Why We Need an Equal Rights Amendment, available at* http://www.eracoalition.org/wp-content/uploads/2019/09/Why-We-Need-the-ERA.pdf (last visited July 12, 2020).

The phrase "on account of sex" in the proposed amendment is likewise vague and subject to different interpretation today than in 1972. In the *Bostock* case decided this term, the United States Supreme Court held that discrimination "because of sex" includes discrimination because of sexual orientation and transgender status. *Bostock,* No. 17-1618, slip op. at 33. If the term "because of sex" includes "because of transgender status," it is hard to see how the ERA's prohibition of different treatment "on account of sex" will not also be interpreted to preclude differential treatment of individuals who were not born female.[45]

The ramifications of such an interpretation—for bathrooms, locker rooms, and other private spaces, women's sports, housing, employment in religious organizations, healthcare coverage, and even freedom of speech—are discussed at length in Justice Alito's *Bostock* dissent. *Id.* at 45-51 (Alito, J., dissenting).

Although Americans could certainly choose to amend the Constitution to prevent the government from distinguishing between transgender women and natal females, the legislatures that ratified the ERA in the 1970s were unlikely to have thought they were approving such a measure. *See Bostock,* No. 17-1618, slip op. at 4 (Alito, J., dissenting) (observing that not "a single dictionary from that time [] defined 'sex' to mean sexual orientation, gender identity, or 'transgender status.'").

In short, the meaning of "sex" and of the phrase "on account of sex" is potentially far-reaching and could lead to the elimination of legally-distinct sex categories altogether. Today's

[45] Susan Chira, *Do American Women Still Need an Equal Rights Amendment?*, New York Times (Feb. 16, 2019), *available at* https://www.nytimes.com/2019/02/16/sunday-review/women-equal-rights-amendment.html (explaining that "our understanding of gender has changed in ways unimagined either by the suffragists who first drafted an equal rights amendment when women won the vote a century ago or the backers of the E.R.A. a half-century later" and that, as a result, "[a] real push for this amendment now might affect the treatment of trans people and who is legally seen as a man or a woman.")

citizens must be given an opportunity under Article V to assess and consider the ERA based on the "current understanding" of the Amendment's meaning in today's legal and cultural landscape.

VI. TODAY'S VOTERS SHOULD HAVE AN OPPORTUNITY TO DEMOCRATICALLY PARTICIPATE IN DETERMINING WHETHER THE GOVERNMENT MUST ALWAYS TREAT MEN AND WOMEN THE SAME.

In light of the potentially broad and ill-defined scope of the ERA, and the tremendous strides in women's equality since 1972, it would thwart the entire constitutional amendment process to permanently bind 21st century Americans to this fifty-year-old proposal.

We cannot possibly know whether the legislatures of the states that voted to ratify the ERA in the 1970s would do so today. But allowing plaintiffs to cobble together ratifications over decades would violate the principle of contemporaneous consensus established by the Supreme Court in *Dillon*, 256 U.S. at 375 ("[A]s ratification is but the expression of the approbation of the people, . . . there is a fair implication that it must be must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sessions at relatively the same period, which of course ratification scattered through a long series of years would not do").[46] It also undermines democratic participation in our government by inviting the courts to be the final arbiters on all sorts of issues, leaving no chance for representative politics to make any modifications.

In 2020, fully 37 percent of eligible voters are either Millennials or members of GenZ, meaning that they were born after 1980 and after the ERA's original ratification deadline had passed. Another 25 percent are members of Gen X, meaning that they were not yet born or too young to vote when the nation last debated the ERA. These voters, who together comprise at least

[46] See also Prakash, *supra* n. 33 at 1224 ("Democracy rests upon majority rule. . . [which] surely demands that the putative majority actually demonstrate that it is a majority.").

62 percent of all eligible voters [47]are entitled to a full public conversation and debate about the potential consequences of the Amendment and an assessment of the text of the Amendment given the "current understanding" of its terms. This right is guaranteed by Article V of the Constitution.

It is, perhaps, worth noting that the last time the United States had such a public conversation, ratification of the ERA went from seemingly inevitable to dead in its tracks.[48] This Court should not allow ERA proponents to short-circuit the process simply because they are afraid to lose again.

CONCLUSION

Amending the Constitution to require that the government treat men and women the same in all circumstances will have consequences that the framers of the ERA, and those who voted to approve it in the 1970s, never anticipated. Women (and, indeed, all Americans) in 2020 should have an opportunity to consider those consequences and determine through the political process whether the ERA should become law of the land. Before it can become part of our Constitution, Congress must, in the words of Justice Ruth Bader Ginsburg, put it "back in the political hopper" and start again.[49]

[47] Anthony Cilluffo and Richard Fry, *An early look at the 2020 electorate, PEW Research Center* (Jan. 30, 2019), https://www.pewsocialtrends.org/essay/an-early-look-at-the-2020-electorate/.

[48] Lesley Kennedy, *How Phyllis Schlafly Derailed the Equal Rights Amendment*, (March 19, 2020) (noting that the ERA was on track to become the 27th amendment to the U.S. Constitution until a grassroots movement halted its momentum), https://www.history.com/news/equal-rights-amendment-failure-phyllis-schlafly.

[49] Ariane de Vogue, *Ruth Bader Ginsburg says deadline to ratify Equal Rights Amendment has expired: 'I'd like it to start over'*, CNN.com (February 10, 2020), *available at* https://www.cnn.com/2020/02/10/politics/ruth-bader-ginsburg-equal-rights-amendment/index.html.

Accordingly, this Court should grant Intervenors' motion for summary judgment on the grounds that the ERA is expired.

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Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of a true and correct copy of the foregoing amicus brief was served electronically on all counsel of record on July 15, 2020, through the Court's CM/ECF system.

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