No. 20-1802

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

EQUAL MEANS EQUAL; THE YELLOW ROSES; KATHERINE WEITBRECHT,
Plaintiffs-Appellants,
v.
DAVID S. FERRIERO,
In his Official Capacity as Archivist of the United States,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Brief of Amicus Curiae Independent Women's Law Center in Support of Defendant-Appellee David S. Ferriero and in Support of Dismissal

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CORPORATE DISCLOSURE STATEMENT

Independent Women's Law Center ("IWLC") is a project of Independent Women's Forum ("IWF"), a non-profit corporation that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code. IWF does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

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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 issues. IWF promotes policies that advance women's interests by expanding freedom, encouraging personal responsibility, and limiting the reach of government. IWLC supports this mission by advocating for equal opportunity, individual liberty, and respect for the American constitutional order. IWLC opposes Appellants' claim to speak for American women and urges the Court of Appeals to uphold the District Court's ruling dismissing the case for lack of standing. Should the Court decide to rule on the merits, IWLC supports dismissal because the Equal Rights Amendment is expired.[1]

[1] All parties have consented to the filing of this brief *amicus curiae*. 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.

HISTORICAL BACKGROUND

In 1923, when suffragist Alice Stokes Paul first proposed a constitutional amendment to guarantee equal treatment of the sexes, American women were second-class citizens who did not possess the same legal rights as men.[2] Beginning in the 1950s, the role of women in society began to change dramatically.[3] In the 1960s and 1970s, American law began to reflect those changes. *See infra*, Part II.B.1 (describing developments in the law during the 1960s and 1970s).

In 1971, in the middle of this period of great legal and cultural change, Representative Martha Griffiths[4] introduced a version of the equality amendment originally proposed by Paul. Griffiths's version of the Equal Rights Amendment ("E.R.A.") read:

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[2] Gretchen Ritter, *Gender and Citizenship after the Nineteenth Amendment*, 32 POLITY 345, 346 (2000) ("while the Nineteenth Amendment diminished the gender distinctiveness of citizenship, it did not create equal citizenship"); NATIONAL LEAGUE OF WOMEN VOTERS, A SURVEY OF THE LEGAL STATUS OF WOMEN IN THE FORTY-EIGHT STATES (1930) (listing state-by-state restrictions on the right of married women to contract and own their own wages in 1930).

[3] *See, e.g.*, Noah Berlatsky, *Hey, the Gender-Role Revolution Started Way Before the Millennial Generation*, THE ATLANTIC, May 20, 2013 (noting that American attitudes towards sex roles, marriage, the family, and women in the workplace changed dramatically from the 1950s through the 1970s).

[4] The Center for Legislative Archives, *Martha Griffiths and the Equal Rights Amendment* (Aug. 13, 2020), https://www.archives.gov/legislative/features/griffiths#:~:text=After%%2020months%20of%20debate%2C%20hearings,seven%2Dyear%20deadline%20for%20ratification.

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

H.J. Res. 208 (January 26, 1971).

The Constitution requires that amendments be approved by two-thirds of both Houses of Congress and by three-fourths of the states. U.S. CONST., ARTICLE V. On October 12, 1971, more than two-thirds of the members of the House of Representatives voted for the E.R.A. 117 Cong. Rec. 35815 (1971). On November 22, 1971, before the Senate could vote, the Supreme Court, for the first time, held that the Equal Protection Clause of the Fourteenth Amendment prohibits the government from discriminating on the basis of sex against "persons similarly circumstanced." *Reed v. Reed*, 404 U.S. 71 (1971). *Reed* set the stage for a fundamental transformation of the law of sex discrimination.

On March 22, 1972, the Senate approved the E.R.A. by a two-thirds majority. 118 Cong. Rec. 9598 (1972). Congress then sent the proposed amendment to the states for ratification within seven years (*i.e.*, by March 22, 1979). H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972).

Twenty-two (of the necessary 38) states ratified the E.R.A. by the end of 1972. Within the next five years, an additional 13 states ratified the proposed amendment.[5]

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[5] The following 35 states ratified the E.R.A. before the congressionally imposed deadline expired: Hawaii, New Hampshire, Delaware, Iowa, Idaho, Kansas, Nebraska, Texas, Tennessee, Alaska, Rhode Island, New Jersey, Colorado, West

But, by 1978, five states had rescinded their ratifications or added a sunset provision.[6] Realizing that 38 states were unlikely to ratify before the 1979 deadline, Congress, *by simple majority*, voted in 1978 to extend the deadline until June 20, 1982. H.R.J. Res. 638, 95th Cong., 2d Sess., 92 Stat. 3799 (1978). No additional states ratified the E.R.A. before this "extension" expired, or, indeed, before the end of the 20th century.[7]

SUMMARY OF THE CASE

The E.R.A. is expired and no longer pending before the states. Nevertheless, Appellants boldly ask this Court to add it to the Constitution. Appellants base their request on three untimely endorsements of the E.R.A. this century by Nevada (2017), Illinois (2018), and Virginia (2020).[8]

Virginia, Wisconsin, New York, Michigan, Maryland, Massachusetts, Kentucky, Pennsylvania, California, Wyoming, South Dakota, Oregon, Minnesota, New Mexico, Vermont, Connecticut, Washington, Maine, Montana, Ohio, North Dakota, and Indiana. *See* NATIONAL ARCHIVES, EQUAL RIGHTS AMENDMENT, LIST OF STATE RATIFICATION ACTIONS (updated March 4, 2020) https://www.archives.gov/files/foia/pdf/era-list-of-state-ratification-actions-03-24-2020.pdf

[6] The following five states either revoked or sunset their ratifications: Kentucky, Nebraska, Tennessee, Idaho, and South Dakota. *Id.*

[7] Independent Women's Law Center submits that the first 35 state ratifications expired on March 22, 1979 and cannot be revived. However, even if Congress's purported "extension" of the deadline until June 20, 1982 were to be valid, it too expired long ago.

[8] David Montero, *Thirty-five years past a deadline set by Congress, Nevada ratifies the Equal Rights Amendment*, L.A. TIMES, March 20, 2017; Rick Pearson and Bill

On January 7, 2020, Appellants Equal Means Equal, the Yellow Roses, and Katherine Weitbrecht filed this action in the District of Massachusetts against David S. Ferriero, the United States Archivist (the "Archivist"). The complaint sought a declaration that the E.R.A. amends the Constitution when approved by the 38th state. Appellants claimed that 37 states had already ratified the proposed amendment, Comp. ¶ 2, but they failed to account for the five states that revoked their ratifications (either by rescission or sunset). Moreover, they failed to acknowledge that the 35 timely ratifications are no longer valid or that the "ratifications" that occurred this century are not ratifications at all, but rather endorsements of a proposal that is no longer live.[9]

On August 6, 2020, U.S. District Judge Denise J. Casper granted the Archivist's motion to dismiss on the ground that Appellants lack Article III standing

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Lukitsch, *Illinois approves Equal Rights Amendment, 36 years after deadline*, CHICAGO TRIBUNE, May 31, 2018; Maureen Groppe and Ledyard King, *Virginia becomes 38th state to pass ERA for women, likely setting up issue for courts*, USATODAY, January 15, 2020.

[9] Appellants are, in essence, asking this Court to hold both that the E.R.A. never expires *and* that states may change course over time, but only in one direction (in favor of ratification). Such a regime would allow the proposed amendment to become part of the Constitution *even if it had the present-day support of only a single state* (if 37 other states that previously approved the measure later voted against it). Because this would clearly violate Article V's requirement that constitutional amendments have the support of large super-majorities, Appellants' arguments fail.

to demand that the Constitution be amended. Appellants request that this Court reverse the District Court and review the case on the merits.

ARGUMENT

Appellants do not speak for all (or even most) women and lack standing to bring this case. Even if this Court disagrees, it must reject Appellants' request to bootstrap the E.R.A. to the Constitution decades after the proposed amendment expired.

I. APPELLANTS LACK STANDING.

The Supreme Court has long held that, in order to demonstrate Article III standing to sue, litigants must show that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012) (reiterating the tripartite requirement of injury, causation, and redressability in order to sue). Here, Appellants are unable to articulate any particularized harm, let alone one caused by the Archivist, or one that a court can conceivably rectify through this litigation.

A. Equal Means Equal and the Yellow Roses have not suffered any injury in fact.

1. Appellants lack organizational standing.

Appellants Equal Means Equal and the Yellow Roses claim that the Archivist has stymied their efforts to "eradicate sex inequality."[10] Plaintiffs-Appellants' Opening Brief at 4 (hereinafter "Opening Brief"). But an organization's interest in advancing (or repealing) particular policies does not establish Article III standing. *Sierra Club v. Morton*, 405 U.S. 727, 738-39 (1972); *United States v. AVX Corp.*, 962 F.2d 108, 114 (1st Cir. 1992). *See also Equal Means Equal v. Dep't of Educ.*, Civil Action No. 17-12043-PBS at 5 (D. Mass., March 18, 2020) (no standing to challenge federal guidance regarding campus sexual misconduct proceedings despite a "strong interest" in the matter).

The Archivist's appropriate refusal to alter the Constitution without a clear indication that a super-majority of the states support amendment (as required by Article V) in no way prevents Appellants from working to eradicate sex discrimination or lobbying states to adopt (or repeal) particular policies. And the fact that Appellants have failed to achieve their policy objectives is not an "injury" that confers standing. *See Ctr. For Law and Educ. v. Dep't of Educ.*, 396 F.3d 1152,

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[10] Specifically, Equal Means Equal states that "it is unable to advocate at all for" legislative bodies to comply with the E.R.A. Amended Compl. ¶ 62. Similarly, the Yellow Roses alleges that its "mission . . . is impaired by the refusal of government officials to begin the process of examining and repairing sex discriminatory laws, regulations, and policies." *Id.* at ¶ 69.

1161-62 (D.C. Cir. 2005) (frustration of organizational objectives does not impart standing). In fact, a contrary holding would allow any women's organization to sue the Archivist, demanding that he add the E.R.A (or, presumably, demanding that he refrain from so doing). More broadly, it would enable almost *anyone* to fabricate standing by creating a special-interest group and claiming "injury" whenever the government does not immediately adopt the organization's agenda. As any American high school student should know, this is not how policy-making works in this country.

2. Appellants lack associational standing.

Equal Means Equal and the Yellow Roses claim to represent "persons protected by the [E.R.A.]"[11] and "women everywhere" who have allegedly suffered injury from the Archivist's inaction. Opening Brief at 27-29; Amended Compl. ¶ 64. Appellants, in fact, do not speak for "women everywhere." Indeed, many women and girls oppose the E.R.A.[12] These women and girls believe that *adopting* the

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[11] The E.R.A. mentions neither men nor women; instead, it prohibits the abridgement of rights "on account of sex" generally. Because it applies to both males and females, it would seem that Equal Means Equal claims not only to speak for all women, but also for all men.

[12] *See* Amicus Briefs of Concerned Women for America, Document 94-1 (filed 7/24/2020), Independent Women's Law Center, Document 90-1 (filed 7/15/2020), and Eagle Forum, Document 31-1 (filed 5/14/20) submitted in *Virginia v. Ferriero*, D.D.C, 1:20-cv-00242-RC (three major national women's organizations arguing against adoption of the E.R.A.).

E.R.A. would cause them harm by erasing all legal distinctions between males and females. *See infra*, Part II.B.1.b.

Appellants' further assertion that women are injured by the *risk* of gender-motivated violence and discrimination, Amended Compl. ¶ 46, ¶ 64, ¶ 68, is purely speculative. *See Clapper v. Amnesty International USA*, 568 U.S. 398 (2013) (to demonstrate standing, future injury must be "certainly impending"). Generalized concerns about violence and discrimination, however genuine, are not particularized injuries that establish standing. *See Allen v. Wright*, 468 U.S. 737, 755-56 (1984) (allowing groups concerned about government discrimination to sue "would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders'") (internal citations omitted). Because Appellants do not allege that any of the people they purport to represent have suffered or will suffer actual, particularized injury from the Archivist's inaction, their claim of associational standing fails.

B. The purported harms suffered by Appellants are not attributable to the Archivist.

To the extent Appellants claim they have been or will be harmed by gender-motivated violence, Opening Brief at 29-30, any such harm is a direct result of actions by individual perpetrators, not by the Archivist. To the extent Appellants claim they are injured by the failure of states to adopt or repeal particular policies, this "harm" is attributable *either* to Appellants' own failure to proffer convincing

arguments as to why their agenda should be adopted *or* to state policy-makers who are not are parties to this lawsuit.[13] *See Simon v. E. Ky. Welfare Rts.*, 426 U.S. 26, 41 (1976) (an actual injury is insufficient to establish standing to sue the federal government where the entity that inflicted the injury is not a defendant); *Katz*, 672 F.3d at 76-77 (injury alleged at the hands of some third party, does not satisfy the causation element of the standing inquiry).

C. Injuries alleged by appellants are not redressable by any court.

Appellants are not seeking remedies for individual acts of sex discrimination prohibited by American law.[14] Rather, they are seeking to *change* American law to eliminate all legal distinctions between males and females and to prohibit policies

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[13] *Compare Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (National Organization for Women had standing to intervene in a regarding the E.R.A. where the states were actual parties to the suit and where N.O.W. did not initiate the claim as a litigant), vacated as moot, *National Organization of Women, Int'l v. Idaho,* 459 U.S. 809 (1982).

[14] If they were, they could hardly assert that the Archivist's action caused them injury, since American constitutional and statutory law *already* outlaws sex discrimination. *See infra,* Part II.B.1; *see also* U.S. CONST. AMEND. XIV (government may not "deny to any person within its jurisdiction the equal protection of the laws"); *Reed*, 404 U.S. at 76 (the Constitution forbids "dissimilar treatment for men and women who are thus similarly situated"); Jane Kelly, *UVA Law Professor Breaks Down the Implications of the ERA, Just Passed in Virginia*, UVA TODAY, Jan. 16, 2020, https://news.virginia.edu/content/uva-law-professor-breaks-down-implications-era-just-passed-virginia (the Equal Protection Clause prohibits government policies that discriminate on the basis of sex).

with a disparate impact on women as a class.[15] Opening Brief at 23-24. Appellants are, in effect, demanding that the Archivist declare the E.R.A. part of the Constitution so that they may seek to enforce their understanding of it. They seek, not an actual remedy, but a basis upon which to bring further lawsuits. Because a court order requiring the Archivist to add the E.R.A. to the Constitution would afford Appellants no immediate relief, they lack standing to pursue their claim.

II. THE E.R.A. IS EXPIRED.

Even if Appellants had standing to bring this case, their claim would fail, as the E.R.A. is expired.

A. The congressionally imposed ratification deadline passed last century.

The joint resolution passed by Congress on March 22, 1972 clearly states that the E.R.A. 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.

86 Stat. 1523 (emphasis added).

Accordingly, the E.R.A. expired on March 22, 1979. This should be the end of the matter, but Appellants claim that the Archivist is obliged to ignore the 7-year

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[15] This interpretation of the E.R.A. goes well beyond the amendment's original goal of equal treatment under law. *See* Reva B. Siegal, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1381-82, n.156 & n.158 (internal citations omitted).

deadline simply because it is contained in the proposing clause of the Joint Resolution, rather than in the amendment itself.

Congress plainly has the authority to impose a deadline for ratification of a constitutional amendment. *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921). Indeed, the 18th, 20th, 21st, and 22d Amendments all included deadlines for ratification within the text and were successfully ratified by three-fourths of the states before their deadlines expired. Beginning with the 23d Amendment Congress began separating ratification deadlines from the text of amendments, so as to avoid cluttering up the Constitution.[16] The 23d, 24th, 25th, and 26th Amendments were passed with ratification deadlines contained in the proposing clauses. The validity of these deadlines was never in doubt, and all four amendments were successfully ratified within their prescribed time frames. The location of the deadline for ratification of the E.R.A. is consistent with recent congressional practice. The Members of Congress who sponsored the E.R.A., as well as the Members who voted in favor of it, therefore, all understood the 7-year deadline to be valid and proper.[17]

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[16] *See Ratification of the Equal Rights Amendment*, Opinions of the Office of Legal Counsel, Slip Op., Vol. 44 at 18-22 (Jan. 6, 2020) ("OLC Opinion"), https://www.justice.gov/olc/file/1232501/download; David C. Huckabee, *Ratification of Amendments to the U.S. Constitution,* CRS REPORT FOR CONGRESS at 2 (Sept. 30, 1997), https://www.everycrsreport.com/files/19970930_97-922GOV_ebded0a0c9f961ffabb21b4364d260b76a0b8d11.pdf.

[17] Likewise, the state legislatures that considered the E.R.A. had no reason to question whether Congress meant what it said when imposing a 7-year timeframe

See, e.g., 117 Cong. Rec. 35814–15 (1971) (remarks of Rep. Griffiths, the E.R.A.'s chief sponsor) ("I think it is perfectly proper to have the 7-year statute [of limitations] so that it should not be hanging over our heads forever."). *Indeed, the sole reason that Congress attempted in 1978 to extend the ratification deadline was that it understood the 1979 deadline, which was rapidly approaching, to be binding.*

Congress's attempt in 1978 to extend the E.R.A.'s ratification deadline until 1982 is, however, invalid for precisely the same reason that the original deadline *is* valid: Article V's requirement that proposals to amend the Constitution pass by two-thirds of both Houses of Congress. *See Idaho v. Freeman*, 529 F. Supp. 1107, 1152-53 (D. Idaho 1982) (even if Congress could modify a ratification deadline, it could not do so by a simple majority "in violation of the constitutional requirement that Congress act by two-thirds of both Houses when exercising its article V power"), vacated as moot, *National Organization of Women*, 459 U.S. at 809. The 1978 "extension" did not receive the votes of two-thirds of both Houses of Congress, and is, therefore, invalid.[18]

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for ratification. *See* Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 HARV. L. REV. 1220, 1296 (2019).

[18] Nor does Congress have the power to extend a ratification deadline retroactively, even by the required two-thirds majority, long after that deadline has expired. *See* OLC Opinion, *supra* n. 16 at 3.

In any event, 1982 came and went without any additional state ratifications. It was well-understood at that time, by both the courts and the public, that the E.R.A. had died.[19]

B. Even without a congressional deadline, the Constitution forbids ratification across a half-century of seismic legal and social change.

In 2020, fully 62 percent of all eligible voters were either Millennials, Gen Z, or Gen X (meaning that they either were not yet born *or* were too young to vote when the nation last debated the E.R.A.).[20] These voters are entitled to a full public conversation and debate about the proposed amendment. Denying the people that opportunity would strike a serious blow to the requirement that constitutional amendments be ratified by contemporaneous super-majorities. *Dillon*, 256 U.S. at 375 (ratification must "reflect the will of the people … at relatively the same period").[21] This is particularly true where, as here, ***the law, the language, and the***

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[19] *See National Organization of Women,* 459 U.S. at 809 (dismissing as moot a challenge to the validity of the E.R.A. because, even if the deadline were properly extended, the amendment died when that extension passed); Marjorie Hunter, *Leaders Concede Loss on Equal Rights*, N.Y. TIMES, June 25, 1982, https://www.nytimes.com/1982/06/25/us/leaders-concede-loss-on-equal-rights.html.

[20] Anthony Cilluffo and Richard Fry, *An early look at the 2020 electorate,* PEW Research Center (Jan. 30, 2019), https://www.pewresearch.org/social-trends/2019/01/30/an-early-look-at-the-2020-electorate-2/.

[21] *See also* Prakash, *supra* n. 17 at 1224 ("Democracy rests upon majority rule. . . [which] surely demands that the putative majority actually demonstrate that it is a majority.").

culture have, over a half-century, changed dramatically in ways that impact both the rationale for the amendment and its likely effect.[22]

1. Significant changes in American anti-discrimination law undermine the original rationale for the E.R.A. and raise questions as to its likely impact.

American anti-discrimination law has evolved significantly over the past half-century, such that the state legislators who voted in favor of the E.R.A. in the early 1970s necessarily had a very different understanding of what the amendment would achieve.

a. Although the E.R.A. failed, America nevertheless achieved the goal of equal treatment under law.

In 1971, when the House of Representatives approved the E.R.A., it was not unlawful for the government to discriminate on the basis of sex.[23] This was the

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[22] Contrary to Appellants' suggestion, the adoption of the 27th Amendment, 203 years after it was initially sent to the states, does not support ratification here. To begin with, Congress did not provide an explicit expiration date for ratification of that amendment, as it did with respect to the E.R.A. Further, 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. The E.R.A., by contrast, contains language that is both sweeping and open to a variety of interpretations. *See infra*, Part II.B.2. In addition, concerns regarding self-dealing with respect to congressional pay raises are no different today than they were in 1789 and are not affected by changed circumstances. By contrast, major changes in American society and law have altered opinions about the status of women and whether they need additional legal protection in the 21st century.

[23] *See, e.g., Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1873) (rejecting an Equal Protection Clause challenge to the state of Illinois's prohibition on women practicing law); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a law that

driving force behind support for a constitutional amendment to guarantee equality of the sexes.[24] The following year, while the Senate was debating the E.R.A., the Supreme Court changed course, for the first time using the Equal Protection Clause to invalidate a law that treated similarly-situated men and women differently. *Reed*, 404 U.S. at 76–77. Over time, the Court broadly applied the equal protection mandate to sex-specific policies. *See Frontiero v. Richardson*, 411 U.S. 677 (1973) (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) (peremptory challenges based solely on a prospective juror's sex violate the Equal Protection Clause); *United States v. Virginia*, 518 U.S. 515 (1996) (Virginia Military Institute's long-standing male-only admission policy violates the guarantee of Equal Protection). From the perspective of 2021, it is clear that the Equal Protection Clause outlaws governmental policies that unfairly discriminate on the basis of sex.[25]

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banned women from becoming bartenders unless "the wife or daughter of the male owner"); *Hoyt v. Florida*, 368 U.S. 57, 64-65 (1961) (upholding a law that banned women from serving on juries unless they had specifically requested to do so).

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

[25] *See* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1067-74 (May 2011) (in the modern era, courts have applied the general language of the Equal Protection Clause broadly).

Today, federal law also contains a plethora of prohibitions on both private and public discrimination. *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);[26] 15 U.S.C. § 1691(a) (1974) (Equal Credit Opportunity Act) (prohibiting sex discrimination against credit applicants); 42 U.S.C. § 3604 (1974) (Fair Housing Act) (prohibiting sex discrimination in the sale, rental, and financing of housing); 42 U.S.C. § 2000e(k) (1978) (Pregnancy Discrimination Act) (requiring employers to treat pregnant women the same as other similarly capable employees). *See also* 34 C.F.R § 106.41(c) (1980) (Title IX Athletic Regulations) (requiring that recipients of federal funds with athletic programs provide equal athletic opportunity for members of both sexes); Title IV of P.L. 103-322 (1994) (Violence Against Women Act) (strengthening the federal penalties for repeat sex offenders, creating the National Domestic Violence Hotline, and authorizing grants to state, local, and

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[26] During the 1980s and 1990s, the 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); *Gebser v. Lago Vista Independent School District,* 524 U.S. 274 (1998); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999).

tribal law enforcement entities to investigate and prosecute violent crimes against women).[27]

Constitutional scholars on both the right and the left have, therefore, concluded that "the successful legislative and litigation strategies women's-rights advocates pursued in the early 1970s have given way to a 'de facto ERA.'"[28] Indeed, no less an authority than the late Justice Ruth Bader Ginsburg, an early supporter of the E.R.A., observed that "[t]here is no practical difference between what has evolved and the E.R.A."[29] Because current law prohibits sex discrimination, the original congressional rationale for the E.R.A. no longer applies, and ratifications from last century are no longer valid.

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[27] Lisa N. Sacco, *The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization*, CONGRESSIONAL RESEARCH SERVICE (April 23, 2019), https://fas.org/sgp/crs/misc/R45410.pdf.

[28] Erika Bachiochi, *The Contested Meaning of Women's Equality*, 46 NATIONAL AFFAIRS (Winter 2021), https://nationalaffairs.com/publications/detail/the-contested-meaning-of-womens-equality.

[29] Jeff Jacoby, *The Equal Rights Amendment died in 1979. Let it rest in peace*, BOSTON GLOBE, March 20, 2020 (quoting Justice Ginsburg). *See also* Siegal, *supra* n. 15 (the Supreme Court has interpreted the Equal Protection Clause to mean what the E.R.A. would have meant, had it been ratified).

b. Adopting the E.R.A. now, on top of our current anti-discrimination framework, would have consequences to which states have not consented.

Because current law prohibits both private and public sex discrimination, adding the E.R.A. to the Constitution now, would either (1) be merely symbolic or (2) require something more than equal treatment of similarly-situated persons. What that "something more" would look like is anyone's guess, but it would certainly differ from anything state legislators thought they approved in the 1970s.

Under current Equal Protection Clause jurisprudence, courts treat sex differently than race. *Compare City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (a race-based policy is unconstitutional unless the government can demonstrate that it is *necessary* for the achievement a *compelling* government interest) *with Craig v. Boren*, 429 U.S. 190 (1976) (a sex-based policy is unconstitutional if it is not *substantially related* to the achievement of *important* governmental objectives). The reason for "strict scrutiny" of race-based, but not sex-based, policies is that racial distinctions are almost *never* justifiable – whereas biological sex differences *sometimes* 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.[30]

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[30] *See* Inez Feltscher Stepman, *Don't Revive the ERA*, CITY JOURNAL, Feb. 27, 2020; *see also Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 926 (D.C. Cir. 1996) (citing *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989)) (segregating inmates by sex is "unquestionably constitutional").

By recognizing the inherent difference between race and sex, courts have carved out space to accommodate legitimate distinctions between males and females, while still prohibiting discrimination. *Compare Orr v. Orr*, 440 U.S. 268 (1979) (Alabama law that said husbands, but not wives, can be required to pay alimony upon divorce is unconstitutional) and *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980) (Missouri law that granted death benefits to widows but denied them to widowers in most cases is unconstitutional), *with Michael M. v. Superior Court*, 450 U.S. 464 (1981) (statutory-rape law punishing men, but not underage females is constitutional) and *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding the male-only draft). *See also Clark v. Arizona Interscholastic Ass'n,* 695 F.2d 1126, 1131 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983) (upholding female only athletic teams) and *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (upholding separate public rest rooms for men and women).

Had the E.R.A. been adopted in the 1970s, it is likely the Supreme Court would have interpreted the amendment along the same lines that it interpreted the Equal Protection Clause – *as a prohibition on discrimination against similarly-situated individuals, not as a mandate for the legal erasure of biological sex*. If, however, the E.R.A. is added to the Constitution in 2021, courts will almost certainly

interpret it as imposing strict scrutiny,[31] so as not to render the amendment redundant. This would eliminate any flexibility to allow the separation of the sexes where biology or legitimate privacy concerns are at issue. [32] Likewise, it could require not just equal treatment of individuals, but equal societal outcomes for males and females *as groups*.[33] In practice, this might require women to register for the selective service and require the military to send equal numbers of women and men into combat; it might prohibit the government from operating or funding any female-only spaces, such as women's shelters, sororities, bathrooms, and sports teams;[34] and it might prohibit hundreds (if not thousands) of programs designed to support women

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[31] Although the indeterminant text of the E.R.A. says nothing about the level of scrutiny that should apply to sex-specific policies, many modern-day proponents of the E.R.A. (including Appellants) argue that its adoption now would subject all sex-based classifications to strictest constitutional scrutiny. Opening Brief at 23-24. *See also* Lisa Baldez, *The U.S. might ratify the ERA. What would change?*, WASHINGTON POST, Jan. 23, 2020 (passage of the E.R.A. now would require courts to apply the highest level of scrutiny.).

[32] *See* Kelly, *supra* n. 14 (the ERA would "ban all distinctions on the basis of sex, including policies designed to benefit girls and women.").

[33] *See* Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 BROOK. L. REV. 397, 418 (2015) (adding the E.R.A. to the Constitution now would "invalidate governmental action that has a disparate impact on gender.")

[34] *See, e.g., Attorney General v. Massachusetts Interscholastic Athletic Ass'n,* 378 Mass. 342, 393 N.E.2d 284 (1979) (under the Massachusetts state Equal Rights Amendment, public schools may not bar males from playing on women's sports teams).

and girls—programs such as the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), federal grants that attempt to increase the participation of women and girls in STEM programs,[35] and grants administered pursuant to the Violence Against Women Act.[36] It is unclear whether the state legislators who voted in favor of the E.R.A. in the 1970s understood themselves to be ratifying an amendment that would prohibit all sex-separation and outlaw any policy with a disparate impact on women, and we cannot assume that state ratifications from the 1970s reflect the will of the people today.

2. Changed understandings of the word "sex" suggest the E.R.A. today is not the same amendment the states ratified in the 1970s.

The E.R.A. does not define the term "on account of sex." Whether or not that term's meaning was obvious in 1971, it is far from obvious today.[37] Indeed, just last Term, the Supreme Court held that a federal statutory prohibition on discrimination "because of sex" includes discrimination "because of gender identity." *See Bostock*

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[35] *See, e.g.*, U.S. Dept. of Agriculture, *Women and Minorities in Science, Technology, Engineering and Mathematics Fields Grant Program (WAMS)*, https://nifa.usda.gov/program/women-and-minorities-science-technology-engineering-and-mathematics-fields-grant-program (last visited February 15, 2021).

[36] *See, e.g.*, Dept. of Justice, *OVW Grants and Programs* https://www.justice.gov/ovw/grant-programs (last visited February 15, 2021).

[37] *See* Cristina Richie, *Sex, Not Gender. A Plea for Accuracy*, 51 EXP MOL MED 1 (2019) (noting that the tendency to use the terms "gender" and "sex" interchangeably compromises accuracy.)

v. Clayton County, No. 17-1617, slip op. at 33, 590 U.S. ___ (2020) (interpreting Title VII of the Civil Rights Act of 1964). The profound ramifications of this ruling are discussed at length in Justice Alito's *Bostock* dissent. *Id.* at 45-51 (Alito, J., dissenting). Suffice it to say, if the statutory term "because of sex" includes "because of gender identity," then the E.R.A.'s prohibition of different treatment "on account of sex" will almost certainly also include gender identity.

This would have far-reaching implications for all sorts of thorny issues, from bathroom usage and single-sex education to eligibility for single-sex athletic teams. Although Americans could certainly choose to amend the Constitution to resolve permanently these complex issues without exception, who voted for the E.R.A. in the 1970s undoubtedly did not understand that they were doing so. In effect, those states ratified a different amendment, one that was overtaken by changed linguistic interpretations and is, therefore, no longer in play.

3. Changes to the social and economic status of women suggest that state legislators who voted in favor of the E.R.A. in the 1970s might not view it as necessary today.

Law and language are not the only things that have evolved since the early 1970s. The social and economic status of women also has changed dramatically in the past half-century. Where women in 1972 made up only 38.5 percent of the labor

force,[38] held only 20 percent of managerial positions,[39] and owned only 4.6 percent of all businesses,[40] women today comprise approximately 47.0 percent of the labor force,[41] hold approximately 40 percent of managerial positions,[42] and own 40 percent of American businesses.[43] These advances are, perhaps, not surprising, given the massive increase in the educational attainment of American women during this same

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[38] U.S. Department of Labor Women's Bureau, *Women in the Labor Force*, https://www.dol.gov/agencies/wb/data/facts-over-time/women-in-the-labor-force (last visited February 9, 2021).

[39] 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.

[40] Women's Business Enterprise National Council, *Behind the Numbers: The State of Women-Owned Businesses in 2018*, https://www.wbenc.org/news/behind-the-numbers-the-state-of-women-owned-businesses-in-2018/ (last visited February 9, 2021).

[41] Catalyst, *Women in the Workforce United States: Quick Take* (October 2020), https://www.catalyst.org/research/women-in-the-workforce-united-states/#:~:text=Women%20%20%20Are%20Nearly%20Half%20the,of%20the%20total%20labor%20force.&text=57.1%25%20of%20women%20participate%20in,compared%20to%2069.1%25%20of%20men (last visited February 9, 2021).

[42] 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), https://www.bls.gov/cps/cpsaat11.htm (last visited, February 9, 2021).

[43] Maddie Shepherd, *Women-Owned Businesses: Statistics and Overview (2021)*, Fundera, https://www.fundera.com/resources/women-owned-business-statistics (last visited February 9, 2021). And women are opening up new businesses at twice the rate of men. *Woman-Owned Businesses Are Growing 2X Faster On Average Than All Businesses Nationwide*, BUSINESS WIRE, Sept. 23, 2019.

timeframe. While men, as a group, were better educated than women in 1971, today women earn the majority of bachelor's degrees (57.7 percent), master's degrees (61.4 percent), and doctorates (53.3 percent),[44] and they outnumber men in both law school and medical school.[45]

The political power of American women also has increased exponentially since the 1970s. Today, U.S. female elective office-holding is at an all-time high,[46]

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[44] 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* , https://nces.ed.gov/programs/digest/d12/tables/dt12_310.asp (last visited February 9, 2021). By contrast, in 1972, women earned 46.3 percent of bachelor's degrees, 39.7 percent of master's degrees, and 11 percent of doctorates. *Id.*

[45] Enjuris, *Law School Rankings By Female Enrollment (2018)*, https://www.enjuris.com/students/law-school-female-enrollment-2018.html#:~:text=North%20Carolina%20Central%20University%20is,%2C%20and%20Northeastern%20(65.76%25) (last visited February 9, 2021); Linda Searing, *The Big Number: Women now outnumber men in medical schools*, WASHINGTON POST, Dec. 23, 2019.

[46] Kira Sanbonmatsu, *Women's Underrepresentation in the U.S. Congress,* DAEDALUS (Winter 2020), https://www.amacad.org/publication/womens-underrepresentation-us-congress. Since 1971, the number of women serving in state legislatures has more than quintupled. *Women in State Legislatures 2020*, Center for American Women in Politics, https://cawp.rutgers.edu/women-state-legislature-2020 (last visited February 9, 2021). In 2021, women hold at least 27% of the seats in the U.S. Congress, the highest percentage in history. Kaia Hubbard and Horus Alas, *The Women of the 117th Congress*, U.S. NEWS & WORLD REPORT, Jan. 12, 2021. Significantly, when they choose to run for political office, women are as likely as men to win. Claire Cain Miller, *The Problem for Women Is Not Winning. It's Deciding to Run*, N.Y. TIMES, Oct. 25, 2016.

and American women are both more likely than men to be registered to vote and more likely than men actually to vote.[47] All of this remarkable progress has been achieved without amending the Constitution to erase all sex-specific laws.

Due to the legal, linguistic, and societal changes outlined above, state ratifications from the 1970s are no longer valid. As such, they cannot now be used to cobble together a faux super-majority in favor of amending the Constitution. Rather, today's voters must be given an opportunity to consider, in light of current circumstances, whether they wish to make the E.R.A. a permanent part of our governing charter.

CONCLUSION

The only way to determine, consistent with Article V, whether large super-majorities of Americans today want to amend the constitution to add the E.R.A. is, in Justice Ginsburg's words, to put it "back in the political hopper"[48] and start again. Only then can we have a truly contemporaneous national conversation about sex discrimination and about the advantages and disadvantages of this proposed amendment.

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

[48] 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).

It is worth noting that the last time the citizens of the United States had such a national conversation about the merits of the Equal Rights Amendment, its ratification went from being seemingly inevitable to dead in its tracks.[49] This Court should not allow E.R.A. proponents to short-circuit the constitutionally prescribed process simply because they are afraid to lose again.

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Respectfully submitted,

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

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7) because it contains 6,435 words, excluding the items that may be excluded. This brief also complies with the typeface and type-style requirements of Rules 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Jennifer C. Braceras

CERTIFICATE OF SERVICE

I e-filed filed this brief with this Court via CM/ECF. All participants in this case are registered CM/ECF users, and service will be accomplished via CM/ECF.

Dated: March 2, 2021 */s/ Jennifer C. Braceras*