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Hearing on "The Equal Rights Amendment: Achieving Constitutional Equality for All"

Chairwoman Maloney, Ranking Member Comer, and distinguished members of the Committee on Oversight and Reform, I am honored to testify today on the proposed Equal Rights Amendment to the United States Constitution.

I currently serve as Senior Policy Analyst with the Independent Women's Voice and the Independent Women's Law Center. For almost 30 years, IWV has been the leading national women's organization dedicated to enhancing women's freedom and well-being. Independent Women's Law Center supports that mission by advocating for individual liberty, equal opportunity, and respect for the American constitutional order.

Today in the United States, men and women are equal under the law, but — crucially — not identical or interchangeable. We do not require that the law treat men and women exactly the same in all circumstances, even when incarcerated, in the sports arena, or on the front lines of combat.

In certain, limited situations, the law is permitted to recognize the biological and very real distinctions between males and females. In hundreds, perhaps thousands of instances, big and small, our current law recognizes that men and women are, in fact, different, and that acknowledging those differences sometimes makes all the difference for women and girls and allows them to take advantage of opportunities, compete, and feel safe.

The recognition of this fact has been a necessary and indispensable prerequisite for the enormous freedom, prosperity, and success American women have enjoyed for the past several decades. The reality of our differences, legal recognition of which the ERA intends to sweep away in favor of gauzy and symbolic promises, has created opportunities for women, maintained our

privacy, and even protected our safety in situations where those differences become relevant, and come with serious consequences.

Men and women are already equal under the law. State, federal, and Constitutional law protects that equality in 2021. The ERA, if written into our highest law in an illegitimate amendment process, will not advance the position of women and girls in our society, but instead undermine the successes we have already attained, and even place us in harm's way.

Consequences of the ERA

Today, numerous state and federal laws prohibit unfair sex discrimination. Our nation's law books are replete with prohibitions on sex discrimination in education, athletics, housing, the granting of credit, and employment, including prohibitions on sexual harassment and unequal pay based on sex. To the extent that discrimination against women in these areas still exists, it is already illegal and the ERA will add nothing to the protections women already enjoy.

In addition, the Supreme Court long ago interpreted the Equal Protection Clause of the 14th Amendment to require equal treatment of similarly situated men and women.

Even though our laws already require equal treatment, adopting the ERA now will not be merely symbolic. Courts will likely interpret an ERA layered on top of existing protections as requiring something more, lest the amendment be rendered redundant. In other words, courts are likely to require the government to treat men and women not just equally, but exactly the same in all circumstances.

Women's Privacy and Safety is at Stake

The ERA would potentially prohibit the government from hosting or funding dozens of female-only spaces that American women take for granted.

For example, incarcerated women have, until recently, been able to rely on being housed in a prison only with other women, on the commonsense assumption that it is dangerous to house female inmates with male ones in close quarters, and that co-ed prisons make women vulnerable to physical and sexual assault.

But under our current legal protections, even to prevent violence, the government cannot and should not discriminate on the basis of race the way it does by separating men's and women's prisons. In *Johnson v. California*, the Supreme Court held that preventing violence in prisons does not raise to the level of government interest required by strict scrutiny. If the same standard were applied to single-sex prisons under the ERA, women would quickly find themselves at the mercy of male prisoners.

These consequences are already happening in women's prisons in states that are allowing biologically male inmates who identify as female to transfer to the women's prisons, and that

policy has already resulted in sexual assaults on female inmates.[1] But the ERA could potentially make the problem far worse by extending that invitation, not just to the small percentage of people who are born one sex and identify as another, but to all male prisoners. After all, "discriminating" against men by keeping them out of women's prisons is discrimination on the basis of sex, exactly the kind of policy a plain-language reading of the ERA is intended to prevent.

The same rationale could apply to any context in which the government separates or distinguishes between men and women, for example, when selecting a same-sex TSA agent to administer a pat-down or body search at the airport. Similarly, public schools, whether K12 or at the university level, would not be able to maintain separate bathrooms, locker rooms, or sports teams for boys and girls. Universities would not be able to maintain separate dorms for male and female students, and campus-connected sororities and fraternities would potentially become, overnight, Constitutional violations.

A boy whose 100m dash time qualifies him for the girls' team but not the boys' is kept off the former only by a "discrimination" on the basis of sex. Again, we are dealing with the ramifications of accommodating individuals whose gender identity does not match their born sex in all of these contexts, but the ERA could throw the doors wide open to all males in these settings and more.

Finally, it's not only government institutions that could feel the impact of the ERA. Any organization that takes municipal, state, or federal dollars could potentially find itself caught up in the ERA's requirements and prohibitions. For example, many battered women's shelters rely on some type of government grant or funding for their work, but exclude men in order to create a safe environment for women fleeing domestic violence. Presumably, they would have to admit men on an equal basis in order to keep that taxpayer funding.

These are just a fraction of the ways in which current law recognizes that, in order to maintain both women's privacy and their safety in certain situations, we must permit "discriminations" against men on the basis of their sex.

The ERA Could Place Women's Opportunities in Jeopardy

It's not just single-sex spaces of all types that could be on the Constitutional chopping block if the ERA is written into our law. The U.S. Government, along with state and local governments, administer countless programs and grants explicitly geared towards providing opportunities for women and girls.

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[1] In Illinois, Washington, and California, states which have permitted biologically male prisoners identifying as women to transfer to female prisons, incarcerated women have already suffered sexual assault. See, e.g. Zachary Evans, Female Inmate Claims She Was Raped by Transgender Inmate Who Was Placed in Illinois Women's Prison National Review, February 21, 2020, 11:17 Am, <https://www.nationalreview.com/news/female-inmate-claims-she-was-raped-by-transgender-inmate-who-was-placed-in-illinois-womens-prison/>.

For example, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), programs to encourage women's participation in STEM fields, grants administered pursuant to the Violence Against Women Act, and many others all rely on the ability of government to recognize women as a distinct legal category from men.

And according to Justice Ruth Bader Ginsburg's interpretation of the "Equality Principle," which the Justice believed the ERA to be enshrining, merely renaming these programs in gender-neutral terms would not be sufficient. If, to choose one representative program, spousal Social Security overwhelmingly provides benefits to stay-at-home wives and mothers, it could potentially run afoul of the ERA despite "wife" having been replaced by "spouse."[2]

Moreover, future courts could very easily interpret the amendment to require equal societal outcomes for males and females not only as individuals, but as groups. Instead of a "mere" raising of sex discrimination to the level of "strict scrutiny," which is a conservative interpretation of the ERA and would entail all the consequences above, it's possible that disparate impact theory might be applied to the many aggregate differences between male and female outcomes in any number of fields.

What does this mean?

Just to imagine one example, it could be become a Constitutional violation not only to fail to draft women alongside men, but to fail to draft men and women in equal numbers and to send equal numbers of women and men into combat positions. After all, relegating female draftees to non-combat positions would be a discrimination against male draftees on the basis of sex.

Consequences for Abortion Law

Independent Women's Voice and the Independent Women's Law Center do not take a position on the merits of abortion, so the following is provided only on an informational basis.

The ERA could have a serious impact on our current abortion law. In New Mexico, which has a state-level ERA, courts have found that the ERA requires taxpayer funding of abortion. In Connecticut, courts have made similar rulings.

While some proponents have tried to downplay the ERA's consequences for abortion law, other advocates have not been so shy. NARAL, for example, wrote (and then deleted) on its website that "the ERA would reinforce the constitutional right to abortion by clarifying that the sexes have equal rights, which would require judges to strike down anti-abortion laws."

[2] "Dependent women, whose primary responsibility is to care for children and household… must be eliminated from the code if it is to reflect the equality principle." Ruth Bader Ginsburg, *Sex Bias in the U.S. Code*, University of Michigan Library, (January 1, 1977), page 206.

ERA advocates in the 1970s and in the modern era have even rejected attempts to add language to the amendment to make it abortion-neutral, clarifying that the amendment would not be interpreted to have any impact on abortion law.

The Modern ERA Has Followed an Illegitimate Ratification Process

The purpose of the Article V process is to ensure that, before we place an amendment into the highest law of the land, we have a full national democratic conversation about it, and that the proposed amendment has overwhelming backing from the American people. To quote my former law professor at the University of Virginia, Sai Prakash, "Democracy rests upon majority rule. . . [which] surely demands that the putative majority actually demonstrate that it is a majority."

Because of the short-circuited and illegitimate process advanced by ERA proponents, we have not had that full and democratic conversation. Instead, they propose to inscribe the ERA into the U.S. Constitution based on the contemporaneous votes of just three states — Illinois, Nevada, and Virginia — counting 35 additional ratifications from the 1970s, but somehow ignoring that four of those 35 rescinded their ratifications when presented with the potential consequences of the amendment, and one had a sunset clause.

62 percent of eligible voters today were either not old enough to vote at the time of our last national debate over the ERA, or, like myself, not even born, yet somehow these three modern ratifications are supposed to speak as an overwhelming majority in favor of the amendment.

Furthermore, to inject a note of irony, the ERA is being withheld for contemporary consideration from an electorate that itself has a female majority, both of registered voters and of actual votes cast in modern elections.

Any attempt by this body to resurrect a proposal to amend the constitution that expired last century would not only short-circuit the constitutionally mandated ratification process contained in Article V, it would deprive two generations of American women their right to fully consider the ramifications of the proposed amendment and choose for themselves whether they want to live in a world that treats them exactly the same as men all of the time.

Nearly four in five Americans agree with the statement "it is very important for women to have equal rights with men" in polls.[3] It beggars belief that a majority-female electorate, with the overwhelming support of both male and female voters, cannot protect women's equality through the normal political process without a Constitutional amendment with potentially radical consequences.

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[3] Rachel Minkin, "Most Americans support gender equality, even if they don't identify as feminists," Pew Research Center (July 14, 2020), available at <https://www.pewresearch.org/fact-tank/2020/07/14/most-americans-support-gender-equality-even-if-they-dont-identify-as-feminists/?fbclid=IwAR1lTdOxIhsqmxconNg7mBYCRXGElTxxW4Q4qiPokeh3fstNuUwl0M05fnM>.

Even the word "sex" in the amendment's simple language does not have the same meaning as it did in the 1970s, and we are now engaged in a nationwide debate about who counts under the legal banner of "female" that would be wholly foreign to the representatives who ratified the ERA 50 years ago. To imagine that those ratifications are part of one contemporaneous procedure, as required by *Dillon v. Gloss*, with ratifications in the last several years, is to gut the spirit of the Article V process.

Under the legal theories of ERA proponents, states may ratify an amendment after any number of years, with no opportunity to rescind or reject a previously-ratified amendment, in defiance of any Congressionally imposed deadlines. Simply put, under the process proponents imagine, America can never reject a Constitutional amendment.

Even Justice Ruth Bader Ginsburg, one of the ERA's most celebrated and vociferous proponents, did not endorse the three-state strategy relied upon by today's advocates. In 2020, the late Justice argued that there was "too much controversy about late comers"[4] long after the ratification deadline had expired, and, in 2019 at an event in Georgetown University, that it should be "put back in the political hopper, starting over again, collecting the necessary number of states to ratify it."[5]

Conclusion

Recognition of biological reality is not bigotry or discrimination. And when we fail to recognize reality, and treat men and women as though there are no differences in size, strength, and otherwise between them, we create female victims. "Equal" doesn't mean "the same." Treating males and females exactly the same — regardless of biology, privacy, or circumstances — hurts women and girls.

Unfortunately, in 2021, the ERA has no upside. The language might sound nice, but it will not improve women's lives. To the contrary, by prohibiting public policy from ever taking into account biology and common sense, the ERA would have significant negative consequences on women and girls, and I urge you to vote against its much-belated resuscitation.

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[4] Ariane de Vogue, "Ruth Bader Ginsburg says deadline to ratify Equal Rights Amendment has expired: 'Id' like it to start over'", CNN (February 11, 2020), available at <http://lite.cnn.com/en/article/h_f8ef79f64b87a58443dad0145626ed09>.

[5] Staci Zaretsky, "Ruth Bader Ginsburg On The One Thing That's Missing From The Constitution," Above the Law (September 13, 2019), available at <https://abovethelaw.com/2019/09/ruth-bader-ginsburg-on-the-one-thing-thats-missing-from-the-constitution/>.