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EQUAL RIGHTS AMENDMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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EQUAL RIGHTS AMENDMENT

TUESDAY, APRIL 30, 2019

HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Washington, DC.

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 2141, Rayburn Office Building, Hon. Steve Cohen [chairman of the subcommittee] presiding.

Present: Cohen, Nadler, Raskin, Scanlon, Dean, Garcia, Escobar, Jackson Lee, Johnson of Louisiana, Gohmert, Jordan, and Cline.

Staff present: David Greengrass, Senior Counsel; John Doty, Senior Advisor; Lisette Morton, Director Policy, Planning and Member Services; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Susan Jensen, Parliamentarian and Senior Counsel; James Park, Chief Counsel; Sophie Brill, Counsel; and Will Emmons, Professional Staff Member.

Mr. COHEN. Thank you. The Committee on—the Subcommittee on the Constitution, Civil Liberties, and Civil Rights is now in session. We will come to order.

Without objection, the chair is authorized to declare a recess of this subcommittee at any time. I welcome everyone to today's hearing on the Equal Rights Amendment.

I will first recognize myself for an opening statement. I am pleased today to convene today's hearing on the Equal Rights Amendment for the purpose of carrying out one of the subcommittee's most important functions—the consideration of an amendment to the United States Constitution.

The purpose of the ERA is simple but critical. It guarantees that women are treated equally under the law. The ERA was in fact approved by both the House and Senate nearly half a century ago.

In 1971 and 1972, it passed with overwhelming margins. The Constitution instructs that after a proposed amendment receives the required two-thirds of the vote in each of the houses it has to be ratified by three-quarters of the states.

After the ERA was sent to the states in '72 it was ratified by 35 of the necessary 38 state legislatures. But for decades that extraordinary progress toward equality stalled. A well-organized counter movement scared the American people into thinking that a guarantee of equality would somehow harm women who stay at home to raise their children and would erode American families.

What has started as a matter of broad consensus because another divisive issue in the culture wars. Today, we know better. We know that in the year 2019 it is unacceptable that women are still not paid equal wages for equal work.

We know that when women are treated with equal dignity and respect in the workplace and the home, our institutions of government our society at large, all of the American people stand to benefit and we know that a simple but fundamental guarantee of equality should be welcomed rather than feared.

At the same time, it is more important than ever to affirm that women have an equal place under the law and under our nation's Constitution. Although women have achieved some measure of equal status under the 14th Amendment, that progress is fragile.

As the Supreme Court has moved to the right, it could backtrack from fundamental decisions as it has in other areas and jeopardized the many strides that women have made.

Meanwhile, there are dark currents in our politics and culture seeking to undermine women's status in our society, whether it is by threatening their health care, objectifying women in the workplace, or ignoring or even condoning gender-based violence.

In the face of those challenges, I am heartened by the two panels and the extraordinary attendance we have here today. Your presence demonstrates that the march toward equality is alive and well.

I am also very, very pleased to recognize two outstanding members of the Congress, two of my colleagues—Congresswoman Carolyn Maloney of the state of New York and Congresswoman Jackie Speier, who will be speaking today. Jackie is a Californian.

And they have introduced two different propositions to get the Equal Rights Amendment rolling again. Congresswoman Maloney has worked tirelessly as an advocate for the new ERA and Congresswoman Speier introduced a resolution, H.J. Res. 38, to guarantee that the '72 ERA is not subject to an arbitrary ratification deadline.

Their extraordinary efforts have ensured that the important unfinished business of passing the Equal Rights Amendment is not forgotten and I am proud to be a co-sponsor of both measures.

I am also pleased that our chairman is championing this issue and has worked strongly to move it forward over the years and to have this hearing, and I thank Chairman Nadler for his efforts therein.

We are joined by two stars of show business. Well, maybe more, but at least two that I know of—Ms. Patricia Arquette and Alyssa Milano.

We welcome their attendance here. Ms. Arquette will be on the panel. Ms. Milano, if you would rise and be recognized, I would appreciate it. Thank you.

[Applause.]

Mr. COHEN. I think it is so appropriate that we have these two giants of the industry with us because one of the best plays on Broadway today is a play that Heidi Schreck wrote called "The Constitution and Me."

It is a powerful play about the Constitution, penumbra rights, Justice Douglass, but emphasizing women, choice, and the ERA. So

thank you, Ms. Schreck, and thank you for all of industry that is working to see that we move forward on this issue.

A few years ago a great woman, a great person—Justice Ruth Bader Ginsburg—was asked in an interview what amendment she would most like to see added to the United States Constitution.

She answered it would be the Equal Rights Amendment. As she explained, the ERA means, quote, "that women are people equal in stature before the law," unquote, and that, quote, "that principle is in every Constitution written since the Second World War."

Justice Ginsburg said she would like her granddaughters, when they pick up the Constitution, to see that is a basic principle of our society.

I understand there is a possibility that Justice Ginsburg is watching today's hearing, and just to channel our president, Justice Ginsburg, if you are listening, get us the ERA. [Laughter.]

Mr. COHEN. I look forward to that day and to the discussion among today's witnesses.

Now I recognize the ranking member, my friend and colleague, Mr. Johnson.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chairman, and thank you all for being here. This is an important part of our democracy and our system, and your voices are important.

The Equal Rights Amendment—the so-called ERA—was first introduced in Congress back in 1923. I know you all know the history of that.

It was passed on to the states by Congress in 1972, ironically, the year I was born, Mr. Chairman. This has been around a while. But it wasn't ratified by the required three-fourths of the states before its expiration.

In 1983, the ERA was reintroduced, as it had to be following its failure to be ratified before the congressionally-set deadline, a deadline that was explicitly relied upon by those states.

It was the subject of five hearings in the House Subcommittee on Civil and Constitutional Rights, including one hearing called by the minority. It was last debated and marked up in the House Judiciary Committee on November 9th, 1983. It has been quite a while.

It was later brought up on the House floor under a suspension of the rules in which no amendments are allowed and in which 20 minutes of debate time each was allocated to proponents and opponents.

The ERA subsequently failed to pass the House of Representatives by the required two-thirds vote. Today, this subcommittee holds yet another hearing on the ERA which, as we will hear, will have to be passed by Congress and the states under the Constitution's super majority requirements before it becomes a part of the Constitution.

It should not become a part of the Constitution, many of us believe, for a number of reasons including this one. The bipartisan Hyde Amendment prohibits the use of federal funds for abortions except in cases of rape, incest, or when the life of the mother is endangered.

The Supreme Court upheld the Hyde Amendment's abortion funding restriction as Constitutional in Harris v. McRae. But the

people's right to protect the unborn would be eliminated if the ERA were to pass.

Back in the early 1980s, Representative Sensenbrenner requested that Congress's independent research arm, the Congressional Research Service, provide the committee with its own evaluation of the question.

As he said at the 1983 markup of the ERA, quote, "The executive summary of the CRS report says that under strict scrutiny the pregnancy classification in the Hyde Amendment would probably be regarded to be a sex classification under the ERA, meaning that if the ERA were to become part of our law, restrictions on abortion would automatically be struck down."

Today, however, with the benefit of even more recent history we can see that the concerns of Representative Sensenbrenner in 1983 were justified.

Five years later in 1988, the Colorado Supreme Court held that Colorado's ERA in its state constitution prohibits discrimination on the basis of pregnancy. Ten years later in 1998, the Supreme Court of New Mexico took the next step and relied on New Mexico's state level ERA to strike down a state reg that restricted state funding of abortions for Medicaid-eligible women.

In New Mexico, Right to Choose/NARAL v. Johnson, the court held as follows: quote, "Neither the Hyde Amendment nor the federal authorities upholding the constitutionality of that amendment bar this court from affording greater protection of the rights of Medicaid-eligible women under our state constitution in this instance. Article II Section 18 of the New Mexico Constitution guarantees that equality of rights under law shall not be denied on account of the sex of any person." "We construe," the court said, "the intent of this amendment is providing something beyond that already afforded by the general language of the equal protection clause." More recently, NARAL Pro-Choice America in a March 13th, 2019 national alert admitted their belief that the Equal Rights Amendment would, quote, "reinforce the constitutional right to abortion. It would require judges to strike down anti-abortion laws," unquote.

Look, of course, we all believe—I am the father of two daughters, one of them is sitting in the room this morning—that women should be protected from discrimination based solely on their sex, and that is the law today.

But the Supreme Court has significantly ratcheted up the standard the government must meet in order to discriminate based on sex since the 1980s.

For example, in U.S. v. Virginia, the court stated that, quote, "Parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action."

The court also stated the burden of justification is demanding and it rests entirely on the state. As Justice Rehnquist noted in his concurrence in that case, the court had, in effect, made the government's burden much more difficult than it had been previously.

Justice Scalia, in his dissent, pointed out that the standard governing review of the government's actions of the discriminate based on sex that had previously been in place was, quote, "a standard

that lies between the extremes of rational basis review and strict scrutiny. We have denominated this standard intermediate scrutiny and under it have inquired whether the statutory classification is substantially related to an important governmental objective."

Yet, in U.S. v. Virginia, Justice Scalia pointed out that the majority in that case had, quote, "Executed a de facto abandonment of the intermediate scrutiny that has been our standard for sex-based classifications for decades," unquote, and replaced it with even a higher standard, he said, which is the law today.

The majority opinion in U.S. v. Virginia, it should be noted, was written by Justice Ruth Bader Ginsburg, and hello, Justice Ginsburg, if you are watching us.

In the 1970s, she was intimately involved in the preparation of a report published by the United States Commission on Civil Rights in 1977. It specifically supported the federal ERA, as you know, along with its ramifications.

If it is adopted, it would include the elimination of the terms fraternity and sorority chapters, for example, and the required sex integration of single-sex organizations, among many other things that I think most Americans today would probably object to.

With that, we look forward to hearing from our all our witnesses here today. We certainly respect your voices and we are glad you are part of the process.

I yield back.

Mr. COHEN. Thank you, Mr. Johnson, and what is your daughter's name?

Mr. JOHNSON of Louisiana. Abigail.

Mr. COHEN. Abigail, welcome. I was a friend in college of somebody in your—William Dawson Larry. He was somehow your cousin or your uncle or somebody, a long time ago. Smart good guy, and so was your father.

I now recognize the full committee chairman, the great congressman from the great state of New York, the Empire State, Mr. Nadler.

Mr. NADLER. Thank you for that florid introduction, Mr. Chairman. [Laughter.]

Mr. NADLER. And thank you for convening this critical hearing.

The first version of the Equal Rights Amendment was proposed nearly 100 years ago by Alice Paul, who helped lead the campaign to secure women's right to vote, which culminated in passage of the 19th Amendment.

She and the other courageous women who led that movement soon recognized that ratification of women's suffrage was only the start. They knew that if women were to achieve true equality our nation's founding document needed to be amended to reflect that core principle.

Alice Paul's Equal Rights Amendment was introduced in both houses of Congress in 1923. But 96 years later, the United States Constitution still does not explicitly declare that women have equal rights under the law.

We have, of course, made important strides in large part thanks to the brilliant legal strategy pioneered by now Justice Ruth Bader Ginsburg. The courts have recognized that the 14 Amendment prohibits many forms of outright discrimination.

But in troubling ways women rights have begun to slide backwards in recent years. This administration continues to threaten women's health and safety on an almost daily basis. Whether it is by trying to roll back laws that prohibit health insurers from charging more to women just for being female or by allowing women's health care choices to be dictated by their employers' religious beliefs.

Women still earn only 80 cents for every dollar that men earn with women of color earning even less, and there are uneven protections against other forms of discrimination and against harassment in the workplace.

With these disturbing facts in mind, and I would add to my written text—I will go off script for a moment—we have a Supreme Court that has been so sympathetic that when Congress passed the Pregnancy Discrimination Act in 1978—can't discriminate against women who are pregnant if you are an employer—the Supreme Court has interpreted that to mean that if you behave decently toward other employees you have to behave decently toward pregnant women. But if you are terrible to other employees you can be terrible to pregnant women and they don't need any consideration.

With these disturbing facts in mind, it is clear that an Equal Rights Amendment is more important than ever. Members of Congress regularly debated the ERA from the 1920s through the 1970s. But the issue has largely remained dormant in recent years, making this hearing long overdue.

In 1971 and 1972, the House and Senate passed the ERA by overwhelming margins. It contained these simple words: quote, "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex," closed quote.

One would think that shouldn't be terribly controversial. In the years that quickly followed, dozens of states ratified the ERA through their legislatures. By the end of the 1970s, the ERA was just a few states short of full ratification.

But then progress on the amendment stalled. Thankfully, due in large part to the hard work of several of the witnesses here today, the momentum has picked back up.

First, Senator Spearman led the effort to ratify the ERA in Nevada state legislature. Illinois followed suit last year. Meanwhile, women have been elected to office in unprecedented number including here in this Congress.

Now, for the first time ever, more than a hundred women are serving in the United States House of Representatives—106, in fact.

Some of the women who are part of this inspiring wave are on this subcommittee and they are helping to lend their voices to the critical effort to ratify the ERA.

In addition, H.J. Res. 38, introduced in this Congress by Congresswoman Jackie Speier with 185 co-sponsors, will ensure that the ERA can become law if and when a sufficient number of states ratify it.

Although there is some debate about the mechanism for determining when a sufficient number of states have ratified the ERA, I hope there is no need to debate—I am sorry, I hope there is no

debate about the need for enshrining in the Constitution a clear and firm statement guaranteeing women equal rights under the law.

We are on the verge of a breakthrough for equality in this country, despite all the obstacles in our current political and social climate. Adopting the ERA would bring our country closer to truly fulfilling our values of inclusion and equal opportunity for all people.

I thank the witnesses for their participation including my colleagues, the gentlewoman from California, Ms. Speier, and the gentlewoman from New York, Ms. Maloney, who have both been champions for the ERA and have done much to bring us where we sit this morning.

I look forward to their testimony and to the testimony of all our distinguished witnesses. I thank you, and I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Chairman.

We welcome our witnesses and thank them for participating in today's hearing. Please note that your written statements will be entered into the record in their entirety but your oral statements will be limited to five minutes.

So to stay within that limit there are lights on the table. When the light switches from green to yellow, you will have one minute remaining to give your testimony and when it turns red, over.

Before proceeding with the testimony I want to remind each witness that all of your written and oral statements made to the subcommittee in connection with this hearing are subject to penalties of perjury pursuant to 18 USC 1001, which may result in the imposition of a fine or imprisonment for up to five years, or both.

On our first panel today our first witness is Congressman Carolyn Maloney. Congressman Maloney represents the 12th Congressional District of New York. She has been a member of Congress since 1993.

Among her many accomplishments she is the lead sponsor of H.J. Res. 35, which proposes a new Equal Rights Amendment.

Congressman Maloney, you are recognized and, if you don't mind, just for three minutes. But I am not going to cut you off if you take eight.

Thank you, Congressman Maloney.

Mrs. MALONEY. Thank you so much, both chairmen. I can't tell you what this means to me personally. But today—although there are two bills in front of Congress, today we are focusing on Jackie Speier's bill. Mine is a fallback bill should her—so that—I feel it is appropriate that Jackie should go first since it is her bill we are reviewing today.

Mr. COHEN. And I will not argue with Congressman Maloney.

Mrs. MALONEY. Okay.

Mr. COHEN. I will recognize our first witness, as I earlier said, Representative Jackie Speier. [Laughter.]

Mrs. MALONEY. Okay.

Ms. SPEIER. Mr. Chairman, thank you.

Mr. COHEN. Representative Speier represents the 14th Congressional District of California, a member of Congress since 2013, and

she has been the lead sponsor of H.J. Res. 38, which would remove the ratification deadline.

Congressman Speier, you have the three- and eight-minute rule as well.

STATEMENTS OF THE HON. JACKIE SPEIER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA; THE HON. CAROLYN B. MALONEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

STATEMENT OF JACKIE SPEIER

Ms. SPEIER. Thank you, Mr. Chairman, and thanks to you and Chairman Nadler for this extraordinary historic opportunity for all of us to speak on the ERA.

Thirty-six years—36 years—since Congress had a hearing on this issue that affects every single woman and man in this country.

I want to thank the ERA coalition co-founders and co-presidents, Carol Jenkins and Jessica Neuwirth, Feminist Majority President Ellie Smeal, National Organization for Women President Toni Van Pelt, actors and activists, Patricia Arquette and Alyssa Milano.

This has been a lifetime campaign for many of us. A lifetime campaign. It doesn't start in 1923 with Alice Paul. Actually, we have been an afterthought in this country since the beginning of this country.

Back in 1776 when then-Congressman John Adams was going to work on the Constitution, it was his wife, Abigail Adams, who said, "Remember the women."

We want you to finally remember the women. Without constitutional protection, pay disparities will continue to be allowed in this country because of the high obstacle of showing that there is intent to discriminate in order for a woman to prevail in court.

This is real. Fifty percent of the major breadwinners in families today are women with children. It is time for us to take this issue seriously.

And to Mr. Johnson, let me say this is not a stalking horse for abortion. This is pure and simple 54 words that we want to add to the Constitution of the United States because every other industrialized country in the world already has it in their constitution except for the United States of America.

I am the co-sponsor of H.J. Res. 38, which is a bipartisan joint resolution cosponsored by 185 members of the House of Representatives including Senator Ben Cardin on the Senate side.

This resolution removes the arbitrary deadline from the preamble of the original constitutional amendment. It recognized that Congress is fully within its rights to adopt a new deadline as it has in the past or to remove it altogether.

I also want to recognize that Congresswoman Carolyn Maloney's resolution to ratify the ERA is something I endorse and we work hand in hand. Because of the absence of the ERA, it is a stain on our Constitution and our country.

Nations around the world have looked to the United States to model their constitutions and have recognized the equalty of women and men under the law. Yet, we fail to do the same.

It is, frankly, an embarrassment. An amendment that was supported by Republicans and Democrats under Presidents Nixon, Carter, and Ford have been used to divide our country and it has allowed critics to claim there is no need for the ERA.

To them, I offer the words of the late Supreme Court Justice Antonin Scalia, who said, quote, "Certainly the Constitution does not require discrimination based on sex. The only issue is whether it prohibits it. It does not."

Now, that should send chills down the spine of each and every one of us, that discrimination is not prevented against women in the Constitution of the United States.

I will just say, Mr. Chairman, I have already exceeded my time. I will just end by saying that we need the ERA so that we can join the rest of the industrialized countries in the world and not be bringing up the rear as we are presently doing.

We need the ERA so that we can achieve our full economic and social potential. We will no longer allow ourselves to be an afterthought. We need the ERA now.

[The statement of Ms. Speier follows:]

Hearing on the Equal Rights Amendment

Subcommittee on the Constitution, Civil Rights and Civil Liberties

Testimony of Congresswoman Jackie Speier (CA-14)

Thank you Judiciary Committee Chairman Jerry Nadler, Subcommittee Chair Steve Cohen, Vice Chair Jamie Raskin, and Ranking Member Mike Johnson for the opportunity to testify at this historic hearing – the first Congressional hearing of its kind in a generation.

I would also like to thank several advocates here today who have traveled across the country to celebrate this milestone — ERA Coalition Co-Founders and Co-Presidents Carol Jenkins and Jessica Neuwirth, Feminist Majority President Ellie Smeal, National Organization for Women President Toni Van Pelt, Actors and Activists Patricia Arquette and Alyssa Milano, and so many others. We would not be here if not for their steadfast devotion to women's equality.

As a Congresswoman and a mother, the Equal Rights Amendment is personal for me, and it should be personal for everyone here. Without the ERA, America will never achieve that eternal promise etched atop the marble edifice of the Supreme Court that reads, "equal justice under law."

I am the sponsor of H.J.Res. 38, a bipartisan joint resolution cosponsored by 185 Members of the House of Representatives. Senator Ben Cardin has introduced a companion resolution.

My resolution removes the deadline from the preamble of the original Constitutional Amendment that passed Congress in 1972, and we're just one state shy of the 38 states needed for ratification. It recognizes that the deadline in the original Constitutional Amendment was arbitrary, reflecting Congress' view at a specific time, and that Congress is fully within its rights to adopt a new deadline, as it has in the past, or to remove it altogether. Notably, the original deadline was not part of the text states voted on when they ratified the ERA.

I also want to recognize Congresswoman Carolyn Maloney for her leadership as a sponsor of another resolution to secure passage of the ERA. Congresswoman Maloney's joint resolution would restart the amendment ratification process. I assure you all that Congresswoman Maloney and I support one another's bills and we will not stop until we achieve ratification of the ERA one way or another.

For too long, women have been second class citizens in this country. We are paid less for our work, violated with impunity, and denied access to or charged more for our health care, not to mention goods and services. After 96 years, we're seizing our power and demanding equality.

The absence of the Equal Rights Amendment is a stain on our Constitution and our country. Nations around the world that have looked to the United States to model their own Constitutions have recognized the equality of women and men under the law, yet we fail to do the same.

An Amendment that was supported by Republicans and Democrats under Presidents Nixon, Carter, and Ford has been used to divide our country. It has allowed critics to claim there is no need for the ERA.

To them, I offer the words of the late Supreme Court Justice Antonin Scalia who said, "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It does not."

I point to the injustice suffered by Christy Brzonkala, who as a freshman reported that she was raped by two football players. When Virginia Tech let her perpetrators off the hook with a slap on the wrist, she sought justice through a federal civil suit filed under the Violence Against Women Act.

Congress included this civil suit provision because it recognized that local law enforcement and state courts sometimes failed to defend the rights of victims. In a devastating ruling, the Supreme Court invalidated this section of the Violence Against Women Act because Congress lacked the constitutional authority for the law.

Just imagine, if the ERA were enshrined in the Constitution, how many men and women like Christy would have been protected.

The ERA would grant Congress these critical tools to enforce women's equality and fight discrimination.

Right now, the legal bar is impossibly high for women to pursue justice. The deck is stacked against us, and our rights are treated as an afterthought – or worse, a stomping ground.

We have some protection thanks to a patchwork of laws, but they have loopholes and can easily be repealed or undermined. Our rights shouldn't depend on the current political agenda or whims of Congress or who is sitting in the White House. These basic and fundamental rights should and must be guaranteed.

In a few short weeks, on May 21, we'll be celebrating the 100th anniversary of House passage of the 19th Amendment granting women the right to vote. We've come so far, yet our rights are still not guaranteed in our own Constitution.

That is why we need the ERA.

We need the ERA so that we can lead the world, not lag behind.

We need the ERA so that we can achieve our full economic and social potential.

We need the ERA now.

Mr. COHEN. Thank you so much, Congresswoman, and I can't not mention remarks—a follow-up to your remarks. It took over 130 years to give women the right to vote in the Constitution and that Tennessee was the perfect 36 to take—to do that. [Laughter.]

Mr. COHEN. I now recognize the gracious Congresswoman, Congresswoman Maloney.

STATEMENT OF CAROLYN MALONEY

Mrs. MALONEY. Thank you for sharing that historical and very important point, and thank you, Chairman Nadler and Ranking Member Collins and Chairman Cohen and Ranking Member Johnson.

And most of all, I want to thank all of the advocates and champions who have been working on this issue for years and trying to pass and ratify the Equal Rights Amendment.

First, I would like to respond to Mr. Johnson. With all due respect, the Equal Rights Amendment has absolutely nothing to do with abortion. It has to do with equality of rights, most of which is economic and respect.

It has nothing to do with abortion. Saying so is divisive and a tool to try to defeat it. So please don't ever say that again.

And I really want to say——

[Applause.]

Mr. COHEN. There is a rule about clapping. You can't do it.

Mrs. MALONEY. First of all, I want to thank my really good friend and colleague, Jackie Speier, for her leadership. By having both my bill to restart the process and her bill to extend the deadline on the original process, we are covering all of our bases.

Some have called the ERA just a symbol, and keep in mind that symbols are important, like the Statue of Liberty, the American flag. Yes, it is a symbol. But women need much, much more than a symbol. We need respect, we need fairness, and we need to be in the Constitution.

Not having an ERA has real consequences for real women. We cannot enforce equal pay for equal work unless the ERA is in the Constitution banning discrimination. It is that simple.

And there are numerous, numerous court decisions that show the need for the ERA, and here is one. In 1994, Congress passed the landmark Violence Against Women Act, recognizing that our laws had not been keeping women safe and taking new steps to protect women.

But the Supreme Court ruled the law was not allowed by Congress's constitutional power to regulate commerce, even though violence against women has enormous impacts on our economy.

So a woman who was raped and everyone agreed that it had happened and everyone knew who did it, she could not sue to recover damages for what she went through. She was not protected by our Constitution.

Or take the even more horrific example—female genital mutilation. As barbaric as it is, up to 100,000 girls are potentially subject to this practice in America.

Congress passed a law making it illegal. But a federal court in Michigan overruled it, and the current Department of Justice has

failed to appeal it, apparently believing it was not Congress's place to protect American women and girls.

Our rights cannot be subjected to the political whims of legislators, judges, or occupants of the White House. Our equality is inherent and must be guaranteed. Women are long past due equal treatment under the law and we will not be satisfied until it is guaranteed in stone.

The drumbeat for the Equal Rights Amendment has never been louder. Since 2017, millions of women around the country are marching.

Two more states, Nevada and Illinois, ratified the ERA. The Me Too and Time's Up movements have shined a light on the discrimination that persists in this country and more than a hundred women were elected to Congress.

Women are not waiting anymore. We demand what is right—full equality now. We demand that it be spelled out in the Constitution and you know how to spell it—ERA Now.

All right. Thank you, and I yield back, and thank you for this extraordinary historic opportunity to address the Judiciary Committee, especially since you have so much more to do. [Laughter.]

[The statement of Ms. Maloney follows:]

CONGRESSWOMAN CAROLYN B. MALONEY
HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
"THE EQUAL RIGHTS AMENDMENT"
APRIL 30, 2019

Thank you to Chairman Nadler, Ranking Member Collins, Chairman Cohen, and Ranking Member Johnson for holding this historic hearing.

And thank you to my friend and colleague Jackie Speier. By having both my bill to restart the process and her bill to extend the deadline on the original process, we're covering all our bases.

Some have called the ERA just a symbol, and keep in mind symbols are important — like the Statue of Liberty or the American Flag. Yes, it is a symbol but women need much, much more than a symbol, we need respect, we need fairness, and we need to be in the Constitution.

Not having an ERA has real consequences for real women. We cannot enforce equal pay for equal work unless the ERA is in the Constitution banning discrimination. It's that simple.

In 1994, Congress passed the landmark Violence Against Women Act, recognizing that our laws had not been keeping women safe and taking new steps to protect women. But the Supreme Court ruled the law was not allowed by Congress's constitutional power to regulate commerce, even though violence against women has enormous impacts on our economy. So a woman who was raped -- and everyone agreed that it happened and who did it -- could not sue to recover damages for what she went through.

Or take an even more horrific example, Female Genital Mutilation. As barbaric as it is, up to 100,000 women and girls are potentially subject to this practice in America. Congress passed a law making it illegal in 1996. But a federal court in Michigan overruled it, and the current Department of Justice has failed to appeal it, apparently believing it was not Congress's place to protect American women and girls.

Our rights cannot be subject to the political whims of legislators, judges, or occupants of the White House. Our equality is inherent and must be guaranteed. Women are long past due equal treatment under the law, and we will not be satisfied until it is guaranteed in stone.

The drumbeat for the ERA has never been louder. Since January 2017, millions of women around the country marched. Two more states – Nevada and Illinois – ratified the ERA. The Me Too and Time's Up movements have shined a light on the discrimination that persists in this country. More than 100 women were elected to Congress.

Women are not waiting any more. We demand what is right. We demand that it be spelled out in the Constitution. And we know how you spell it: E-R-A.

Mr. COHEN. Thank you so much to each of our congresswomen. We thank you for your work and thank you for being our first panel.

We will now have our second panel come up and be introduced. [Pause.]

Mr. COHEN. Staff? Yeah, there you go. I can't tell the players without a program. Much better.

Our first witness will be Ms. Kathleen Sullivan. Ms. Sullivan is a partner in the New York office of Quinn Emmanuel Urquhart & Sullivan, LLP. Previously served as dean of the Stanford Law School and she taught constitutional law at both Stanford and Harvard.

She has argued 11 times before the Supreme Court and is the author of a scholarly article about women's equality. She received her JD from Harvard, her BA from Cornell, and a BA from Oxford where she was a Marshall. Served as a law clerk for the Honorable James Oakes of the Court of Appeals of the Second Circuit.

And Ms. Sullivan—Dean Sullivan, you are recognized for five minutes.

STATEMENTS OF KATHLEEN SULLIVAN, PARTNER, QUINN EMANUEL URQUHART & SULLIVAN, WASHINGTON, D.C.; HON. PAT SPEARMAN, A UNITED STATES SENATOR FROM THE STATE OF NEVADA; ELIZABETH FOLEY, PROFESSOR OF LAW, FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW; PATRICIA ARQUETTE, ACTOR AND ADVOCATE

STATEMENT OF KATHLEEN SULLIVAN

Ms. SULLIVAN. Thank you, Chairman Nadler, Chairman Cohen, Ranking Member Johnson. Thank you for allowing me to testify today in support of the Equal Rights Amendment.

Thank you. [Laughter.]

Ms. SULLIVAN. Chairman Nadler, Chairman Cohen, Ranking Member Johnson, thank you so much for the honor of allowing me to testify today in support of the Equal Rights Amendment, which would add to our Constitution the guarantee that equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex.

It would also provide that Congress has the power to enforce the amendment by appropriate legislation. As noted by Congresswoman Maloney and Congresswoman Speier in their eloquent remarks, the United States Constitution, the world's oldest written constitution, is also the only major written constitution in the world that lacks a provision declaring that men and women are equal, and now is the change to correct that omission, that stain, that embarrassment about our Constitution through the ratification by just one more state of the 1972 amendment.

Just to give some examples, the French constitution provides that the law guarantees to the woman in all spheres rights equal to those of men. The German constitution provides that men and women have equal rights and that nobody shall be prejudiced or favored because of their sex.

The constitution of India provides that the state shall not discriminate against any citizen on grounds of sex and every written

constitution promulgated since World War II contains a sex equality provision, but not ours.

Given the vital role that U.S. Constitution has played in inspiring and informing the written constitutions of other nations, this is a situation that cries out for correction.

Now, you might ask why do we need an equal rights amendment when the United States Supreme Court has interpreted the equal protection clause passed in the aftermath of the Civil War and erasing the stain of slavery from our existence and declaring equal protection above all for purposes of preventing race discrimination.

Why is it not enough that sex discrimination has been shoehorned into the equal protection clause through judicial interpretation?

And make no mistake, the decisions that were brought about in the United States Supreme Court through the brilliant advocacy of Ruth Bader Ginsburg as a young women, working together with other women and men to bring about those interpretations—make no mistake that those decisions were momentous and important.

But they are no substitute for having an equal rights amendment in the Constitution. The decisions of the Supreme Court do not have the strength, the endurance, or the efficacy of an expressed constitutional amendment.

They are the product of transient and shifting judicial majorities. We, the people, speak through our Constitution with more permanence than any court majority through its decisions as we made clear when four times in our history we passed amendments overruling decisions of the Supreme Court. This nation should proclaim fidelity to the foundational principle of sex equality that will endure for the ages to come and not turn on the vicissitudes of Supreme Court appointments.

Finally, I would like to make the point that this Congress absolutely has the power—absolutely has the power to clear away any impediment that the deadline imposed back in the 1970s might be thought to impose to ratification by just one more state—just one more state—and here is why.

And I want to adhere to three very conservative principles of constitutional interpretation in making this argument: textualism, originalism, and federalism.

First, the text of Article 5 provides that the Congress, whenever two-thirds of both houses shall deem it necessary shall propose amendments to this Constitution which 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.

Article 5, the text, places no time limits on the states' ratification process. Nothing in Article 5 says that ratification must by synchronous, contemporaneous, or bounded within any particular time frame.

To the contrary, Article 5 says valid when ratified and that is the end of the matter.

Second, our history confirms as much. The 27th Amendment, which prevents congressional pay raises until an intervening election of the House, was proposed by James Madison in the First Congress back in 1789 and yet it became our law when the 38th state ratified it in 1982.

No one questions that the 27 Amendment is an amendment to our Constitution and what is good enough for James Madison is good enough for the women of America.

Finally, in addition to the text and history, our constitutional structure supports the idea that Congress can remove any impediment to the states' ratification when the 38th states decides to join.

The Framers split the atom of sovereignty in two. The states have independent powers. Article 5 gives the states the powers to ratify and consistent with the structural principle of federalism Congress should view itself as lacking the constitutional authority to fetter the ratification process of the states and certainly as having the authority to lift its own self-imposed deadlines.

For those reasons, I respectfully urge that H.J. Resolution 38, proposed by Congresswoman Speier, is proper, constitutional, and merits swift markup and adoption by the House.

Thank you very much.

[The statement of Ms. Sullivan follows:]

Testimony of Kathleen M. Sullivan
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Hearing on the Equal Rights Amendment
April 30, 2019

Chairman Nadler and Members of the Subcommittee:

Thank you for the honor of allowing me to testify in support of the Equal Rights Amendment ("ERA"), which would add to our Constitution the guarantee that "[e]quality of rights under the law shall not be denied or abridged by the United States or any State on account of sex" and provide that Congress shall have the power to enforce the amendment "by appropriate legislation." The U.S. Constitution, the world's oldest written constitution, is also the only major written constitution in the world that lacks a provision declaring the equality of the sexes. That is a national embarrassment to the world's leading democracy. And we stand within just one State's ratification from correcting it. Both Houses of Congress promulgated the amendment in 1972 by more than the two-thirds vote required by Article V. And 37 States have now ratified the amendment, 35 States in the 1970s plus Nevada in 2017 and Illinois in 2018. Upon the ratification of the amendment by just one more State, the amendment will be eligible to be added to the Constitution without further action on the part of Congress or the States.

I would like to focus today on three points. *First*, the United States is now an outlier among all the major industrial democracies of the world in failing to have an express guarantee in its written constitution that men and women are equal under the law, a situation that our Nation should remedy as soon as possible. *Second*, the ERA should be enacted as an express constitutional provision notwithstanding existing judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment (and the implied equal protection guarantee of the Fifth Amendment Due Process Clause) as providing significant equality between the sexes. *Third*, the Congress has the

power to eliminate the deadlines it previously set for ratification of the ERA by 1979 and later 1982, and thus deadline-elimination proposals like H.J. Res. 38 are entirely proper and constitutional.

First, there is not a single other major democracy in the world with a written constitution that lacks a sex-equality provision as does the U.S. Constitution. The French Constitution provides that "the law guarantees to the woman, in all spheres, rights equal to those of the man." The German Constitution provides that "men and women have equal rights" and that "nobody shall be prejudiced or favored because of their sex." The Constitution of India provides that "the State shall not discriminate against any citizen on grounds only of … sex." And every written constitution promulgated since World War II contains such a provision. The Constitution of Canada, for example, provides that "every individual is equal before and under the law and has the right to the equal benefit and equal protection of the law without discrimination based on … sex." And the South African Constitution bars discrimination "against anyone on … grounds including…gender, sex [or] pregnancy." *See* K. Sullivan *Constitutionalizing Women's Equality*, 90 Calif. L. Rev. 735, 735 (2002). Some peer nations' constitutions not only prohibit discrimination on the basis of sex but also provide that government shall affirmatively promote equality between the sexes. *See* J. Suk, *An Equal Rights Amendment for the Twenty-First Century*, 28 Yale J. Law & Feminism 381, 399-407 (2017).

Given the vital role the U.S. Constitution has played in inspiring and informing the written constitutions of other nations, it is a national embarrassment that the other democratic nations of the world are so far ahead of ours in providing for sex equality in their constitutions. Congress has been debating closing this loophole for a century (since 1923) and did its part to close it a half-century ago (1972) by passing the ERA with overwhelming bipartisan support and sending it to

the States for ratification. The ratification of the amendment by a 38th State will complete the process and bring our Constitution at last into line with the constitutions of all our peer nations. Congress should facilitate the most expeditious path possible to this long-overdue result.

Second, the judicial interpretation of the Equal Protection Clause is no substitute for an amendment to the Constitution formally enshrining equality on the basis of sex as one of our enduring and foundational principles. To be sure, the Supreme Court has since the 1970s read into the Fourteenth Amendment's Equal Protection Clause (and its equivalent protections under the Fifth Amendment's Due Process Clause) the interpretation that the States and federal government may not discriminate on the basis of sex without a close fit to an important justification. It was not always thus; before the 1970s, the Supreme Court had upheld against constitutional challenge state laws excluding women from jury service, admission to the bar as lawyers and even employment as bartenders. *Hoyt v. Florida*, 368 U.S. 57 (1961); *Bradwell v. Illinois*, 83 U.S. 130 (1872); *Goesaert v. Cleary*, 335 U.S. 464 (1948). The Court had also upheld the exclusion of women from voting, *Minor v. Happersett*, 88 U.S. 162 (1874), an inequality that our Nation did not redress until the 1920 ratification of the Nineteenth Amendment to the Constitution, which provides that "the right of a citizen of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." But the Nineteenth Amendment's protection against sex discrimination was never extended beyond the sphere of voting.

Starting in the 1970s, the Court began to find sex discrimination presumptively irrational in violation of equal protection, striking down, for example, preferences for men over women as estate administrators, *Reed v. Reed*, 404 U.S. 71 (1971); wives over husbands in access to military service members' housing and medical benefits, *Frontiero v. Richardson*, 411 U.S. 677 (1973); and widowed mothers over widowed fathers in access to social security survivor benefits,

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). After Justice Sandra Day O'Connor joined the Court as the first woman associate justice in the Nation's history, the Court continued this trend by invalidating the exclusion of men from a Mississippi state university nursing school. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). And after Justice Ruth Bader Ginsburg joined the Court as only its second woman justice in our history, having herself litigated so many of the early and pioneering victories for sex equality as a young lawyer for the ACLU, she authored the opinion of the Court in *United States v. Virginia*, 518 U.S. 515 (1996), which held that Virginia could not exclude young women from its all-male Virginia Military Institute, even if it provided a separate but decidedly unequal military school for female cadets.

Even though these landmark decisions were achieved by brilliant advocacy and had momentous importance in helping to dislodge entrenched sex discrimination from our Nation's state and federal laws, they lack the strength, endurance, and efficacy of an express constitutional amendment. To begin with, Supreme Court decisions are necessarily the product of transient and shifting judicial majorities, and thus are dependent on the Court's makeup through the political process of presidential nomination and Senate confirmation at any given time. We the People speak through our Constitution with more permanence than any Court majority through its decisions, as was made clear at least four times in our history when we enacted constitutional amendments for the express purpose of overruling Supreme Court rulings: the Fourteenth Amendment (privileges of national citizenship), Sixteenth Amendment (income tax), Nineteenth Amendment (women's right to vote) and Twenty-Fourth (poll taxes). This Nation should proclaim its fidelity to a principle of sex equality that will endure for the ages to come, and not turn on the vicissitudes of Supreme Court appointments and decision-making.

Moreover, a specific constitutional guarantee of sex equality provides clearer guidance to the state and federal governments and to the Court that sex discrimination in particular is an impermissible form of inequality. If the Equal Protection Clause is construed as simply a ban on all arbitrary and irrational discrimination, then it might cover any form of discrimination, whether on the basis of sex, hair color or astrological sign. But by announcing that sex discrimination in particular has no place in our polity, the ERA would make clear that sex discrimination has not been just an idiosyncratic and occasional instance of irrationality, like animus toward red-heads or Scorpios, but rather a persistent and pervasive practice that has systematically undervalued women's worth and capabilities, and systematically distributed the burdens and benefits of public life unequally, based on stigmatizing stereotypes and overbroad generalizations about the proper roles of men and women.

Finally, the Equal Protection Clause is in fact not just an ahistorical prohibition on all arbitrary discrimination; it is part of a pivotal constitutional moment, comprising the enactment and ratification of the Thirteenth, Fourteenth and Fifteenth Amendments, in which the Nation declared an end to slavery and invidious discrimination on the basis of race. The Thirteenth Amendment abolished slavery; the Fifteenth Amendment prohibited voting discrimination based on race; the Fourteenth Amendment overturned the odious *Dred Scott* decision and conferred national citizenship on the newly freed slaves. Women were decidedly not the original intended beneficiaries of these amendments. To the contrary, section 2 of the Fourteenth Amendment, to the horror of contemporary women's suffragists who had themselves fought for the abolition of slavery, introduced the word "male" into the Constitution for the first time, providing for the apportionment of congressional votes among States by population but penalizing States that limited the vote of "male" inhabitants under the age of twenty-one.

There is thus some historical tension in rooting equality on the basis of sex in the foundational amendment, the Fourteenth Amendment, providing for equality on the basis of race. The histories of race discrimination and sex discrimination in our Nation bear many resemblances to one another—they both reflect the systematic devaluation of individual worth, embodied in law, on the basis of prejudice and stereotyping toward group characteristics. Women, like African-Americans, have been subject to formal disadvantages with respect to many legal rights, including voting, jury service, occupational licenses and property ownership, to name a few. But the two histories have important differences too. For example, many exclusions of women reflected a tradition of romantic paternalism that placed women on a pedestal—although the "pedestal" all too often could become a "cage." *Frontiero*, 411 U.S. at 684 (plurality opinion). But no one ever confused an auction block where human beings were bought and sold with a pedestal. Thus the interpretation of the Equal Protection Clause has often had to grapple with the ways in which the history of sex discrimination is like but not exactly like the history of discrimination on the basis of race. *See* Sullivan, *supra*, 90 Cal. L. Rev. at 742-46.

For all of these reasons—the enduring and permanent force of a constitutional amendment, the desirability of clarifying that sex discrimination in particular is presumptively irrational, and the recognition that sex discrimination has a distinctive place in the Nation's history apart from the history of slavery and race discrimination—a constitutional amendment is clearly superior to reliance solely on the Supreme Court's interpretation of the Equal Protection Clause. Moreover, the second clause of the ERA clarifies that Congress has the power to enforce the amendment by enacting federal laws prohibiting sex discrimination that has gone unaddressed by the States—a new source of potentially powerful congressional authority against state lapses in protection against domestic violence, sexual assault, and unequal employment practices.

Third, the Congress indisputably has the power to clear away any deadline that might be perceived as standing in the way of ratification of the ERA by the next and thirty-eighth State. The 1972 or 1979 Congress has no constitutional authority to bind later Congresses to their decisions that the deadline for ratification would elapse in 1979 or 1982—especially as the deadlines were imposed by joint resolution rather than in the text of the proposed amendment. Contrary to any prior deadlines, therefore, it makes no difference that 35 States ratified in the 1970s while Nevada and Illinois brought the tally to 37 in just the past two years.

To see why this is so, consider first the text of Article V, which provides that "[t]he Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, ... which ... 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." Article V places no time limits on the States' ratification process. Nothing in Article V says that ratification must be synchronous, contemporaneous, or bounded within any particular time frame. To the contrary, Article V says simply that "[an amendment is valid 'when ratified.' There is no further step." W. Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 398 (1983).

Moreover, our constitutional history confirms as much. Consider the Twenty-Seventh Amendment, which is now embodied in our Constitution's text as the law of the land. That amendment, which provides that Congress may not raise salaries for Senators and Representatives "until an election of Representatives shall have intervened," was proposed by the First Congress in 1789 as part of the original Bill of Rights authored by founding father James Madison. But this Amendment, often called the "Madison Amendment," was not ratified until over two hundred years later, after it was revived among the States for ratification in 1982 and ultimately adopted in

1992 when Michigan became the thirty-eighth State to vote to ratify. See T. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, Congressional Research Service Report 20-23 (July 18, 2018). The Twenty-Seventh Amendment confirms that Article V places no time limits on the ratification process and that Congress's twentieth-century practice of setting ratification deadlines has no foundation in the original text of the Constitution.

Finally, in addition to constitutional text and history, our constitutional structure supports the conclusion that the States may ratify the ERA at the time of their choosing rather than under any artificial deadline imposed by Congress. Our Constitution embodies a principle of federalism in which We the People conferred certain enumerated powers on the Federal Government while reserving all other pre-existing powers to the States. As Justice Kennedy once wrote, "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring). The reserved powers of the States under this dual sovereignty are reflected in the Tenth and Eleventh Amendments as well as the structure of the Constitution as a whole. Article V is a provision of the Constitution that clearly delineates separate and independent roles for Congress and the States in the Amendment process. Consistent with those distinct roles and the structural principles of federalism, Congress should view itself as lacking the constitutional authority to fetter the ratification process of the States, and certainly as having the authority to lift its own self-imposed obstacles to that process.

For all these reasons, the deadline-elimination proposal in H.J. Res. 38 is proper and constitutional, and merits swift markup and adoption by the House.

Thank you very much for allowing me to share this remarks with the Subcommittee.

Mr. COHEN. Thank you so much.

Our next witness is Elizabeth Foley. She is a professor of law at Ford International University where she teaches con law, civil procedure, and health care law. She is also counsel in the Washington, D.C. office of Baker Hostetler and she practices constitutional litigation there.

She previously taught at Michigan State University College of Law, received her J.D. summa cum laude from the University of Tennessee College of Law where she was an article editor of the Tennessee Law Review, and was a valedictorian of her class.

Why didn't you come and intern for me? [Laughter.]

Mr. COHEN. She has a B.A. in history from Emory University and an LL.M. from Harvard. She also served as law clerk to the Honorable Carolyn King of the U.S. Court of Appeals for the Fifth Circuit.

Professor Foley, you are welcomed as a volunteer.

STATEMENT OF ELIZABETH FOLEY

Ms. FOLEY. Thank you so much, Mr. Chairman.

Chairman Cohen, Chairman Nadler, Ranking Member Johnson, thank you for inviting my testimony. I think it is an important issue.

As somebody who has taught constitutional law and practiced in the field for about 25 years, I am going to focus on what I think are important procedural aspects to the constitutional amendment process.

I am not going to opine on the merits of the ERA. I am a woman and I don't have any particular expertise on that matter and you have probably better witnesses who can do so.

So we have 27 constitutional amendments, as everyone knows. The longest one for ratification was, other than the 27th Amendment, which I will talk about in just a second, was the 22nd Amendment, which deals with presidential term limits.

That amendment, the 22nd Amendment, took a whopping three years and 340 days for ratification. And the Madison amendment—the 27th Amendment—is an outlier and it was one of James Madison's original 12 proposed articles to the First Congress. Ten of them made it out as the Bill of Rights. The Madison amendment was ratified in 1992. It took 203 years to ratify it.

But that was only possible because, in keeping with Congress's tradition, at least until the 18th Amendment in 1917, the Madison amendment, like all of the amendments until the 18th, contained absolutely no expressed ratification deadline.

So its use as some sort of precedent for the ratification of the ERA today, the original 1972 ERA which was proposed out of Congress, is limited to none.

Congress did have a seven-year expressed ratification deadline for the ERA that was proposed in 1972 and, in fact, some people think that, well, you know, maybe it is because the ERA's seven-year ratification deadline is contained in its preamble rather than its text that that has some sort of legal significance.

I see absolutely no basis for that argument. In fact, that argument was made in a case called Idaho v. Freeman, which was de-

cided by the federal district court in Idaho in 1981 and was roundly rejected.

And I am not here to argue that Freeman has itself precedential value because it was vacated by the Supreme Court because its challenge to the three-year extension to the ERA ratification became moot by the time the Supreme Court got the case and therefore the Supreme Court decided to vacate that district court opinion.

However, the rationale—the analytical framework used by the district court in Freeman I think is a good one and I think any court that was asked to decide the issue today would decide it the same way, and let me explain why.

The district court in Freeman hung its hat, essentially, on a 1921 decision of the Supreme Court called Dillon v. Gloss. Dillon v. Gloss was a unanimous Supreme Court decision and it is still good today.

The Dillon court basically dealt with the 18th Amendment—the Prohibition amendment. Mr. Dillon was convicted under a federal prohibition law and he said, well, you can't convict me under that law because the 18th Amendment itself is unconstitutional.

He said the 18th Amendment is unconstitutional because it has a ratification deadline. Again, it was the first one to have one. He said, you can't do that. Congress can't impose a seven-year ratification deadline, and it did and therefore the Constitution is null and void.

The Supreme Court unanimously said, no, it is not. Supreme Court said certainly Congress has the power to impose a ratification deadline if it wants to.

Specifically, the Supreme Court in Dillon said that Congress's power to impose a ratification deadline derives from its Article 5 power to propose a mode of ratification.

And because this is part of Congress's Article 5 power to propose constitutional amendments and not Congress's Article 1 power, which is ordinary legislation, the reasonable implication from that Dillon rationale is that if Congress imposes a ratification deadline, that ratification deadline is a part of the mode of the ratification and it must be passed pursuant to Article 5 by two-thirds supermajorities and not simple majorities as is ordinary legislation.

For this reason, when the 95th Congress purported to extend the ERA ratification deadline by an additional three years, it was likely unconstitutional because it was passed by a simple majoritarian joint resolution of both chambers of Congress and signed, by the way, by President Carter.

So any attempted third bite at the apple extending the ERA's ratification deadline yet again would likely be unconstitutional.

And finally, in closing, it is notable that there has been no constitutional amendment that has ever been ratified outside of Congress's original expressed ratification deadline and there have been eight of those amendments, by the way.

The ERA would be the first. If it is ratified under another majoritarian congressional extension, the amendment would be birthed under a shadow of constitutional illegitimacy and, frankly, that is not good for those who support gender equality or seek societal consensus on that particular effort.

Indeed, if broad societal consensus exists for the ERA, why not start fresh, and then there could be no doubt.

Thank you.

[The statement of Ms. Foley follows:]

Written Statement
of
Elizabeth Price Foley
Professor of Law
Florida International University College of Law

Hearing on the Equal Rights Amendment

Committee on the Judiciary
U.S. House of Representatives

April 30, 2019

Chairman Nadler, Ranking Member Collins, and members of the Committee, thank you for the opportunity to discuss the procedures for ratification of the Equal Rights Amendment ("ERA"). I am a tenured, full Professor of Law at Florida International University College of Law, a public law school located in Miami, where I teach constitutional law. I also serve Of Counsel with the Washington, D.C. office of BakerHostetler, LLP, where I practice constitutional and appellate law.

I. Background on Ratification of the Equal Rights Amendment

An Equal Rights Amendment was first proposed in 1921 but did not receive approval of the requisite two-thirds supermajority of the House and Senate until March 22, 1972. The text of the proposed amendment reads as follows:

> **Section 1.** Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> **Section 2.** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> **Section 3.** This amendment shall take effect two years after the date of ratification.[1]

The Joint Resolution proposing the ERA contained a preamble limiting the allowed period of ratification to seven years:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall 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.*[2]

The seven-year ratification period expired on March 22, 1979. At that time, only 35 of the required 38 States (three-quarters of the fifty States) had ratified the ERA.

In 1978, sensing that the ERA was about to fail, the 95th Congress purported to "extend" the ERA's ratification deadline by approximately three years (to June 30, 1992), by passing a joint resolution by simple majorities, signed by then-President Carter.[3] No additional States ratified the ERA during this purported extension period.

Two States have purported to "ratify" the ERA after both the original 1979 ratification deadline and the purported extension in 1982. Specifically, Nevada purported to ratify the ERA in 2017,

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[1] H.J. Res. 208, 86 Stat. 1523 (1972).

[2] *Id.* (emphasis added).

[3] H.J. Res. 638, 95th Cong., 2d Sess. (1978).

and Illinois purported to do so in 2018. In addition, four States purported to rescind their ratifications, prior to the original 1979 deadline: Idaho, Kentucky, Nebraska, and Tennessee.

A fifth State, South Dakota, originally approved the ERA in 1973 but voted on March 1, 1979—21 days before the original ratification deadline—to "sunset" its ratification, declaring it "null and void" in explicit protest of Congress's unilateral three-year extension of the ERA's ratification deadline by simple majorities. Specifically, the South Dakota legislature declared, "Congress ex post facto has sought unilaterally to alter the terms and conditions in such a way as to materially affect the congressionally established time period for ratification . . . ."[4] It stated that the "purpose for establishing a clear time period for consideration of ratification by the states is to permit consideration of the substantive amendment by a reasonably contemporaneous group of legislatures" and that allowing Congress to alter the originally specified ratification deadline, by simple majority vote, will "inhibit state legislatures from acting promptly on any proposed amendment for fear of transferring the power to amend the Constitution of the United States to a small minority of the several states, and, perhaps, even a small minority of several generations . . . ."[5] South Dakota also explained that allowing Congress to unilaterally alter a previously imposed ratification deadline created a "perpetual possibility of a sudden change in the Constitution of the United States due to a shift of opinion in a small number of states."[6]

II. Can Congress Unilaterally Alter a Ratification Deadline It Originally Proposed?

As South Dakota's rescission of the ERA indicates, serious concerns are raised if Congress attempts, ex post facto, unilaterally to alter an explicit deadline for ratification of a constitutional amendment. These concerns are amplified when such ex post alteration of an express ratification deadline occurs via simple majorities of the House and Senate.

There are presently 27 amendments to the Constitution. Most of the amendments were ratified within three years of their initial proposal by Congress. For example, the first ten amendments—the Bill of Rights—were ratified within two years, 81 days. The Eleventh Amendment (sovereign immunity) was ratified in less than one year. The Twelfth Amendment (presidential/vice presidential selection) was ratified in a little over six months. Indeed, other than the Twenty-Seventh Amendment—the so-called "Madison Amendment"—the longest ratification period was the Twenty-Second Amendment (presidential term limits), which took three years, 340 days.

The outlier amendment, the Twenty-Seventh Amendment, was one of James Madison's original twelve proposed amendments, requiring an intervening election before any congressional pay raise can take effect. The Madison Amendment contained no express ratification deadline and was thought moribund until ratified by the Wyoming legislature in 1978. In May 1992, Michigan and New Jersey pushed the Madison Amendment over the three-quarters goal line, becoming the 38th and 39th states to ratify it.

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[4] 125 Cong. Rec. 4862 (Mar. 13, 1979).

[5] *Id.*

[66] *Id.*

The Madison Amendment is like every other proposed constitutional amendment prior to the Eighteenth Amendment proposed in 1917—namely, it contained *no express ratification deadline*. Like the Madison Amendment, there are four additional "older" constitutional amendments—with no ratification deadline—still technically pending for ratification: (1) another "Madison Amendment," which would regulate House apportionment;[7] (2) an amendment that would strip U.S. citizenship from anyone accepting a title of nobility or emolument from a foreign power;[8] (3) the "Corwin Amendment," which would prohibit the federal government from banning slavery;[9] and (4) the Child Labor Amendment, which would give Congress the power to regulate child labor.[10]

Every amendment proposed by Congress since 1917 (beginning with the Eighteenth Amendment) has contained an express seven-year ratification deadline. The first use of a ratification deadline came with the Eighteenth Amendment (Prohibition), which was proposed in December 1917 and ratified by the requisite three-quarters of the States within thirteen months, in January 1919. Section three of the Eighteenth Amendment expressly stated, "This article shall be inoperable unless it shall have been ratified . . . within seven years from the date of the submission hereof to the States by the Congress."[11] Similarly, Amendments Twenty through Twenty-Two contain express seven-year ratification deadlines in their text.

For Amendments Twenty-Three through Twenty-Six, however, "Congress determined that inclusion of the time limit within [the amendment's] body 'cluttered up' the proposal" and consequently, Congress "placed the limit in the preamble or authorizing resolution, rather than in the body of the amendment itself."[12]

The salient legal question is whether Congress, having specified a ratification deadline, can then alter this deadline and, if so, how? The closest Supreme Court precedent is *Dillon v. Gloss*, 256 U.S. 358 (1921), in which Dillon challenged his conviction under federal prohibition law on the basis that the Eighteenth Amendment (authorizing Prohibition) was invalid because it contained a temporal ratification limitation (seven years). Dillon argued that constitutional amendments, to be valid, had to be "open-ended," time-wise, for ratification. The Supreme Court, in a unanimous opinion, rejected Mr. Dillon's argument, concluding that a congressionally-imposed ratification

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[7] This second "Madison Amendment" has been ratified by eleven States. With Eleven state ratifications, the Apportionment Amendment was only one State shy of the three-quarters threshold for ratification in 1791. With the addition of more States, of course, the threshold for its ratification has climbed to 38 States, and it is 27 States shy at present.

[8] This amendment was proposed in 1810 and has been ratified by twelve States.

[9] The Corwin Amendment was proposed in 1861 and has been ratified by five States. Two States have purported to rescind the Corwin Amendment. Ohio rescinded it in 1864; Maryland rescinded it in 2014.

[10] The Child Labor Amendment was proposed in 1924 and has been ratified by 28 States.

[11] U.S. Const. amend. XVIII.

[12] Thomas H. Neale, Cong. Research Serv., R42979, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues* 13-14, (July 18, 2018). Another post-1917 constitutional amendment—granting D.C. statehood—contained a seven-year ratification deadline in the text of the proposed amendment itself. As of the D.C. Statehood deadline of August 21, 1985, sixteen States had ratified it.

deadline was proper as an "incident of its power to designate the mode of ratification" under Article V. *Id.* at 376. It stated, "We do not find anything in the article [V] which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary." *Id.* at 374.

The Supreme Court reasoned that the Article V process of proposal and ratification constitute a "single endeavor" for which large separation of time is undesirable; the "fair implication" of Article V is that ratification "must be sufficiently contemporaneous . . . to reflect the will of the people in all sections [of the country] at relatively the same period, which of course ratification scattered through a long series of years would not do." *Id.* at 375. It agreed with the conclusion of Judge Jameson's treatise, in which he stated that "an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that if not ratified early while that sentiment may be fairly supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress." *Id.* (citing and quoting Jameson on Constitutional Conventions (4th ed.) § 585)).

The *Dillon* Court accordingly held, "We conclude that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal." *Id.* at 375. Further, "Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation of what is a reasonable time may be avoided is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification." *Id.* at 376.

Dillon's logic is that Congress has power, under Article V, to specify a reasonable time for ratification, to quell speculation and *ad infinitum* ratification by generations long removed from the events prompting a constitutional amendment's proposal. This rationale suggests two things. First, because Congress's power to specify a ratification deadline emanates from its power under Article V, not Article I, any alteration of a ratification deadline must occur via Article V's supermajoritarian process (two-thirds of both houses of Congress), not via the simple majority process for ordinary legislation. Under this logic, the three-year extension of the original ratification deadline for the ERA, enacted by a majoritarian joint resolution of the 95th Congress, was constitutionally improper.

Second, *Dillon*'s rationale suggests that there is no substance/procedure dichotomy, whereby Congress can alter a specified ratification deadline, so long as the original ratification deadline was contained in the preamble rather than the text of the proposed amendment itself. Such an argument was made and rejected in *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), in which supporters of the ERA contended that because the ERA's seven-year ratification deadline was contained in the preamble rather than its text, Congress was free to alter the ratification deadline at will, since doing so would "not change the essential nature of the amendment" itself but was merely a "matter of detail" over which Congress has authority per *Dillon*. *Freeman*, 529 F. Supp. at 1151.

The district court's decision in *Freeman* was ultimately vacated by the Supreme Court because the second (extended) ratification deadline had expired by the time the Supreme Court convened

to hear the case, so it has no precedential value. But as the only case to analyze whether a substance/procedure dichotomy exists, its logic is nonetheless still valuable. Specifically, the *Freeman* court reasoned that the Supreme Court in *Dillon* endorsed congressional authority to establish a ratification deadline as part of its Article V power to establish a mode of ratification because it would "infuse certainty into an area which is inherently vague," *Freeman*, 529 F. Supp. at 1152. It concluded that "in order to fulfill the purposes for fixing a time limitation for ratification as outlined in *Dillon*—'so that all may know and speculation . . . be avoided'—the congressional determination of a reasonable period once made and proposed to the states cannot be altered. If Congress determines that a particular amendment requires ongoing assessment as to its viability or monitoring of the time period, it can do so, not be defeating the certainty implied by the *Dillon* case, but by not setting a timer period at the outset . . . ." *Id.* Moreover, as part of Congress's Article V power to set the mode of constitutional amendment ratification, the *Freeman* court reasoned that Congress could not change the specified date of ratification "any ore than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa. Once the proposal is made, Congress is not at liberty to change it." *Id.* at 1153.

Congress's choice to insert a ratification deadline into a proposed amendment's text (as in the Eighteenth, Twentieth, Twenty-First and Twenty-Second Amendments) or in its preamble (as in the Twenty-Third, Twenty-Fourth, Twenty-Fifth and Twenty-Sixth Amendments) should make no difference. Either way, Congress has exercised its Article V power, by supermajoritarian process, to specify a mode of ratification. When Congress specifies the mode of ratification, States justifiably rely on Congress's specification. A congressionally specified time period for ratification—whether in the text or preamble—signals to States that time is of the essence, that they had better act within the specified period if they wish to assent to the proposed amendment. If Congress, through the ordinary, majoritarian legislative process, attempts to extend a ratification deadline, the extension should be of no legal effect.

An ex post ratification extension upsets settled expectations of the States, and claims for Congress a power it has not been given—namely, the power to *perpetually alter the terms* upon which it proposes constitutional amendments. Allowing alteration of an original ratification deadline—particularly by simple majoritarian legislative process—is disrespectful of States' role in the constitutional amendment process, allowing Congress to keep extending its proposal anytime it is politically "upset" that an amendment did not receive the requisite approval of three-quarters of the States by the self-imposed deadline it set. While Congress can "set the rules," so to speak, on the mode of ratification, its authority does not extend to rewrite those rules—particularly not by simple majoritarian processes—whenever it wants. Having already specified a seven-year ratification deadline in the original ERA proposal—and purporting to extend the deadline for three additional years—allowing Congress a third (or fourth, fifth, or hundredth) bite at the ratification apple would radically alter (and undermine) the supermajoritarian framework of Article V.

Nothing in the Twenty-Seventh Amendment is to the contrary. While the Madison Amendment was ratified over 202 years after its original proposal, it contained no ratification deadline.

Congress is not required to impose a ratification deadline when it establishes a mode for ratification, and indeed for much of our history (until the proposal of the Eighteenth Amendment in 1917), Congress did not specify a ratification deadline. There may well be situations where, in Congress's judgment, specification of a ratification deadline is not desirable. If Congress wants to re-propose an Equal Rights Amendment without a ratification deadline, it can certainly do so, provided the proposal receives the necessary two-thirds supermajority specified by Article V.

III. Can States Rescind Their Ratification of Constitutional Amendments?

It is unclear if States may rescind their ratification of constitutional amendments. The closest Supreme Court precedent—although arguably addressing a qualitatively different issue—is *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, a group of Kansas legislators sought a writ of mandamus to halt their State's ratification of the Child Labor Amendment. The Child Labor Amendment was proposed by Congress in 1924; it contained no ratification deadline. In 1925, Kansas rejected the Amendment but 12 years later, in 1937, the Kansas legislature narrowly ratified it, with twenty of forty Kansas State Senators voting to support it. The State Senate's tie vote was broken by the Lieutenant Governor. The state legislative-plaintiffs challenged the amendment's ratification on two grounds: (1) the Lieutenant Governor had no authority to break the tie on a constitutional amendment; and (2) the amendment's ratification, 13 years after its original proposal by Congress, was not within a "reasonable time," as required by *Dillon*.

A majority of the *Coleman* Court (six Justices) held that what is "reasonable time" for ratification is a non-justiciable political question, belonging solely to Congress. *Coleman*, 307 U.S. at 454. It reaffirmed, however, that pursuant to *Dillon*, Congress may specify a time period for ratification. *Id.* at 452. Because Congress had not specified a time limit for ratification of the Child Labor Amendment, however, the *Coleman* Court believed that an open-ended judicial inquiry into whether Kansas had ratified the amendment within a "reasonable" time (13 years) would be inappropriate. Thus, Congress alone has the power to specify a "reasonable" time period for ratification and if it fails to do so, the courts will not impose one. In the *Coleman* majority's words, there "were cogent reasons for the decision in *Dillon v. Gloss* . . . that the Congress had the power to fix a reasonable time for ratification. But it does not follow that, whenever Congress has *not exercised that power*, the Court should take it upon itself the responsibility of deciding what constitutes a reasonable time . . . . That question was not involved in *Dillon v. Gloss* . . . and, in accordance with familiar principle, what was there said must be read in the light of the point decided." *Id.* at 452-53 (emphasis added).

Coleman thus did not overrule *Dillon* and indeed, it reaffirmed its core holding that Congress has the power to specify a ratification period to prevent confusion and established rules, and thus expectations, regarding the mode of ratification. Some argue that a separate, four-Justice plurality opinion in *Coleman*, penned by Justice Black, is more persuasive than Coleman's more limited majority opinion. It is well settled, of course, that majority opinions have precedential effect and plurality concurrences do not.

Proponents of the "three State strategy" to ratify the ERA prefer Justice Black's plurality concurrence precisely because it is broader in scope, asserting that *all* questions relating to ratification of constitutional amendments are non-justiciable under the political question

doctrine. Indeed, Justice Black's plurality expressed disapproval of *Dillon*, arguing that it should be overruled. *Coleman*, 307 U.S. at 459 (Black, J., concurring). Unfortunately for these proponents, *Dillon* has not been overruled; it is still binding Supreme Court precedent and indeed, it was unanimous. While Black's broad concurrence garnered four votes of the Court, three additional Justices in the *Coleman* majority—Chief Justice Hughes and Justices Reed and Stone—did not join Black's plurality. In addition, two more Justices—Butler and McReynolds—dissented, asserting that pursuant to *Dillon*, the Court should address the merits of whether Kansas's ratification occurred within a reasonable time. *Id.* at 470-47 (Butler, J., dissenting). In total, therefore, a majority of the *Coleman* Court—five Justices (Hughes, Reed, Stone, Butler and McReynolds)—reaffirmed *Dillon* and its core notion that pursuant to Article V, Congress may specify a (judicially enforceable) ratification deadline.

Because *Coleman* held that whether ratification occurs within a "reasonable time" (when no deadline is specified by Congress) is a non-justiciable political question, some believe it supports the proposition that a State's purported rescission of a constitutional amendment is likewise non-justiciable. Certainly, the Black concurrence supports this view. But it is a stretch to read *Coleman*'s majority opinion so broadly: After all, *Coleman* did not involve a ratification-then-rescission situation, but the opposite one of rejection-then-ratification. Because Article V speaks solely of "ratification," but not rejection or rescission, the Kansas legislature's rejection of the Child Labor Amendment in 1925 was a legal nullity. By contrast, when a State *first ratifies, then rejects/rescinds* a constitutional amendment, the legal question is arguably different, since the question is whether the later rescission has any effect on the earlier ratification.

Presumably, a rescission occurring after the requisite three-quarters threshold has been reached would be null and void. Once having been certified by the U.S. Archivist as a valid part of the Constitution, no State can legally rescind. But what happens if a State rescinds its ratification *before* the necessary three-quarters threshold has been met? Again, this is an interesting question, but there is no clear answer at present. It is therefore unclear whether the five States' rescissions of the ERA would, if litigated, be considered legally valid.

Some historical rescission precedents exist, but there has been no definitive resolution by courts of the validity of rescissions. The Fourteenth Amendment, for example, was proposed by Congress after the Civil War in 1866. The Union States had all ratified the amendment by 1868 but the former Confederate States had not, except Tennessee. It was unclear, however, whether the former Confederate States "counted" in the denominator for calculating the three-fourths requirement. Senator Charles Sumner of Massachusetts believed they did not, introducing a joint resolution proclaiming that twenty-two (Union) states had ratified the Fourteenth Amendments and it was a valid part of the Constitution. Cong. Globe, 40th Cong., 2d Sess. 453 (1868). Immediately thereafter, Ohio (a Union State) voted to rescind its ratification, followed one month later by New Jersey (another Union State). Worried that the Amendment may not be validly ratified, Congress passed a law conditioning former Confederate States representation in Congress on their States' ratification of the Fourteenth Amendment.[13] Several former Confederate States then took quick action to ratify the Amendment, reversing their earlier rejection thereof. The U.S. Secretary of State, William Seward, then certified that the Fourteenth

[13] 14 Stat. 428, 429, 39th Cong., 2d Sess. (1867).

Amendment had been duly ratified, but expressed a reservation as to whether Ohio and New Jersey should be counted: "It is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual . . . ." 15 Stat. 706-07. Seward cautiously stated that "if the resolutions of Ohio and New Jersey . . . are to be deemed as remaining in full force and effect, notwithstanding the subsequent [rescission] resolutions of the legislature of those States . . . then the aforesaid Amendment has been ratified . . . ." *Id.*

Within a week of Seward's tentative certification, Georgia ratified the Fourteenth Amendment and Seward issued another, unequivocal certification of the Amendment's ratification. 15 Stat. 708-11 (1868). The history of the Fourteenth Amendment's ratification, therefore, provides no meaningful evidence as to whether a State's rescission of ratification is legally effective. Secretary of State Seward was explicitly equivocal as to whether the rescission of Ohio and New Jersey was effective. Ultimately, however, enough former Confederate States ratified the Fourteenth Amendment to offset these rescissions and remove any doubt about satisfaction of the three-fourths threshold.

The history of the Fifteenth Amendment arguably bolsters the view that rescissions are effective. New York rescinded its earlier ratifications of the anti-slavery Amendment. Congressional resolutions proclaiming adoption of the Fifteenth Amendment included New York but did not receive congressional majorities. While the Secretary of State certified the Amendment's ratification, listing New York among the ratifying States, it noted New York's rescission and more importantly, the certification was not filed until enough States had ratified that New York's ratification was not necessary. Cong. Globe, 41st Cong., 2d Sess. 2290 (1869).

Despite the equivocal history and lack of judicial precedent, there are persuasive reasons for acknowledging the validity of a State's rescission. Ratification of constitutional amendments is, by definition, made intentionally difficult by Article V. Both the two-thirds and three-fourths requirements of Article V are designed to ensure that the Constitution is not amended except by broad societal consensus—in the words of Alexander Hamilton in *Federalist No. 85*, the States must be "united in the desire of a particular amendment" to achieve ratification. To ensure broad societal consensus, a State's rescission must matter. To ignore a timely rescission is to ignore reality in favor of some desired outcome—favoring ends over means.

Such an outcome-oriented approach is particularly pernicious in the context of constitutional amendments, which, by definition, involve deeply important issues. Denying States' an ability to change their minds, in a timely fashion (i.e., prior to reaching the three-quarters threshold), would create societal schisms and deepen political resentments that would tear at the fabric of the republic. When Congress proposes a constitutional amendment for State ratification, States must be free to accept or reject the proposal until such time as the necessary societal consensus—three-quarters—is achieved. Until such three-quarters acceptance occurs, however, States should be free to change their minds, particularly when Congress does not specify a ratification period, and the passage of time may alter societal needs and values. What was desirable to a State in 1870 or 1970 may no longer be desirable in 2019, or 2370. But even when there is a relatively short ratification deadline specified by Congress (e.g., seven years), political winds may change relatively quickly, and there is no logical reason why States should be irreversibly locked into a position on an amendment until broad, unequivocal societal consensus has been reached.

Allowing for rescission admittedly could lengthen the time for ratification of some constitutional amendments or prevent the ratification of others. But as history has shown, all constitutional amendments—except the Madison Amendment—have been swiftly ratified, in fewer than four years. Such swift, broad societal consensus gives confidence in the Constitution and the rule of law generally. When proposed constitutional amendments experience belabored, difficult ratification processes—necessitating so-called "extensions" and disregard of States' timely rescissions—this is a clear signal that societal consensus has not been achieved. Rather than defying this clear signal, Congress should heed it.

Mr. COHEN. Thank you.

Our next witness is Senator Pat Spearman, who represents north Las Vegas in the Nevada Senate, to which she was first elected in 2012. She currently serves as co-majority whip. In 2017, Senator Spearman led the revived effort to ratify the Equal Rights Amendment with Nevada becoming the first state in 35 years to ratify the amendment.

She received her Master of divinity degree from the Seminary of the Southwest and her B.A. from Norfolk State University—Norfolk.

Senator Spearman, you are recognized for five minutes.

STATEMENT OF PAT SPEARMAN

Ms. SPEARMAN. Thank you, and good morning, Chairman Nadler and Chairman Cohen, Ranking Member Johnson.

For the record, I am Pat Spearman. I represent Senate District One in the great state of Nevada. It is an honor to be there today to discuss the Equal Rights Amendment.

On March 22nd, 2017, 45 years after the ERA was submitted to Congress, Nevada became the first state to ratify the ERA after expiration of the June 30th deadline. The state of Illinois followed with ratification on May the 30th. It was my great privilege to sponsor Senate Joint Resolution 2, which supported Nevada's ratification in 2017.

When this resolution was discussed, one of the questions always asked is the ERA necessary, and I continue to see evidence of the need for the ERA every day.

In a 1997 article in the William and Mary Journal of Women and Law, they concluded that the need for a federal equal rights amendment remains as compelling today as it was in 1978 when the now Supreme Court Justice Ruth Bader Ginsburg wrote in the Harvard Women's Law Journal, "With the Equal Rights Amendment, we may expect Congress and the state legislators to undertake in earnest systematically and pervasively the law revised so long deferred and in the event of legislative default the courts will have an unassailable basis to apply the bedrock principle all men and women are created equal."

Pay equity, or maybe I should say pay inequity, is still a significant concern. Although the gender pay gap is narrowing, according to the Pew Research Center, women of the United States earn just 80 percent of what their male counterparts earn.

Women of color, black women typically, make only 60 percent and Latinas make only 50 percent of what white non-Hispanic male counterparts make.

A common theme of workforce issues for women is the lack of paid leave and affordable child care. In Nevada, the legislature is currently considering a measure that would require a private employer with 50 or more employees to provide paid leave to each employee.

Just last week, the Nevada Senate passed Senate Bill 166 to ensure equal pay for equal work and penalize employers who practice pay discrimination.

The Nevada Assembly will hear the bill soon and I anticipate the bill will pass as well. Governor Sisolak said in his State of the

State Address he intends to make pay equity the law in the Nevada and our state will have a pay equity law.

Moreover, when it comes to crimes against women, we continue to suffer from victim blaming such as shame, stigma, and the ingraining of guilt upon the female victim.

The Civil Rights Act of 1964 prohibits employment discrimination based on race, sex, color, national origin, or religion when sexual harassment became codified in U.S. law based upon sexual harassment cases in the 1970s and the 1980s.

The EEOC saw 13 percent increase of workers alleging sexual harassment from fiscal year 2017 to fiscal year 2018. To begin the journey of addressing sexual discrimination and harassment, in Nevada we now have a governor's task force on sexual harassment, discrimination law, and policy to reduce harassment in the executive branch.

February 4th, 2019, the Nevada legislature became the first female majority legislature in the country. Women now hold 51 percent of the 63 legislative seats and nationally the number of legislative seats also increased.

We celebrate the fact that Congress has 23 percent more women. But the struggle continues and the work is not done.

Mr. Chair, and members of the subcommittee, when the ERA first gained popularity in the late 1960s and 1970s, it was heard as a clarion call for change, just as a change continues for racial equality, fairness, and justice some 154 years after adoption of the 13th Amendment.

The work for change today has become a clarion call to act responsibly in a manner that ensures equity for all of its citizens.

Mr. Chairman and members of the subcommittee, I am before you today because I believe from the bottom of my heart in the foundations of the ERA for all people.

In restricting the time limit for ratification of the ERA, it can be found in the resolving clause, as you have already heard. But now is the time to show the global neighborhood that we as Americans, we as Americans, to show the global neighborhood that when it comes to equality we lead for all.

Equality for justice has never been given, never. Each generation has always had to fight for the equal justice and the equal rights that they so deserve.

Vietnam veterans persisted to get health care recognition. HIV/AIDS persisted to ensure that human dignity and members of the LGBTQ community persisted to gain marriage equality.

Persistence, faith, and hope fuel the indomitable spirit of this movement and we must honor the sacrifices of our mothers and our grandmothers. We must commit to the preservation of justice and equality for our posterity.

Mr. Chairman and members of the subcommittee, we got tired but we did not faint. We became weary but we did not stop. History demands that we take a stand on this most important journey toward full equality.

We stand on the right side of history. We must persist in the name of all that is good. The road is long and it has been full of twist and turns. But we must continue to get the Equal Rights Amendment as part of our Constitution.

Thank you for your time and attention.
[The statement of Ms. Spearman follows:]

Equal Rights Amendment

REMARKS BY SENATOR PATRICIA (PAT) SPEARMAN

UNITED STATES HOUSE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

WASHINGTON, D.C.

APRIL 30, 2019

Good afternoon Chairman Nadler and members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties. For the record, I am Pat Spearman, State Senator representing Senate District 1 in the great State of Nevada. It is an honor to be here today to discuss the Equal Rights Amendment (ERA).

In 1972 Congress passed the ERA and sent it to the states for ratification. At that time, Congress, set a seven-year time limit for ratification in the resolving clause of the amendment. This was later extended to June of 1982. Thirty-five of the necessary 38 states ratified the ERA between 1972 and 1977.

On March 22, 2017, 45 years after the ERA was submitted to Congress, Nevada became the first state to ratify the ERA after the expiration of the
June 30, 1982, deadline. The State of Illinois followed with ratification on
May 30, 2018. Thirty-seven states have now ratified the ERA.

It was my great privilege to sponsor State Senate Joint Resolution 2, which supported Nevada's ratification in 2017. When this resolution was discussed, one of the questions posed was, "Is the ERA still necessary?" I continue to see evidence of the need for the ERA every day.

A 1997 article in the *William & Mary Journal of Women and the Law*, concludes that "while women enjoy more rights today than they did when the ERA was first introduced in 1923 or when it passed out of Congress in 1972, hard-won laws against sex discrimination do not rest on any unequivocal constitutional foundation; they can be inconsistently enforced or even repealed." The article further concludes that "the need for a federal Equal Rights Amendment remains as compelling as it was in 1978, when now Supreme Court Justice Ruth Bader Ginsburg wrote in the *Harvard Women's Law Journal*: 'With the Equal Rights Amendment, we may expect Congress and the state legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred. And in the event of legislative default, the courts will have an unassailable basis for

applying the bedrock principle: All men and all women are created equal.'"[1]

THIS IS WHY WE NEED THE ERA

Pay equity—or should I say, pay inequity—is still a significant concern. Although the gender pay gap is narrowing, according to the Pew Research Center, women in the United States earn just 85 percent of what their male counterparts earn.[2] When looking at women of color, black women typically make only 60 percent and Latinas make 50 percent of what white, non-Hispanic male counterparts make.[3] A common theme of work force issues for women is the lack of paid leave and affordable child care, which are critical to women joining the labor force and narrowing the gender wage gap. Pay inequity often means women, who are the income earners, work more than one job, have less time to spend helping their children have academic success, and more women retire below the national poverty level than men. In Nevada, the Legislature is currently considering a measure that would require a private employer, with 50 or more employees, to provide paid leave to each employee.[4] Just

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[1] Allison L. Held, Sheryl L. Herndon, and Danielle M. Stager, The Equal Rights Amendment: Why the Era Remains Legally Viable and Properly before the States, Volume 3, Issue I, Article 5, William & Mary Journal of Race, Gender, and Social Justice, https://scholarship.law.wm.edu/wmjowl/vol3/iss1/5/.
[2] Pew Research Center, The Narrowing, but Persistent, Gender Gap in Pay, March 22, 2019, https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/.
[3] National Women's Law Center, The Wage Gap: The Who, How, Why, and What to Do, https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/.
[4] 2019 Nevada Legislature, Senate Bill 312, https://www.leg.state.nv.us/Session/80th2019/Reports/history.cfm?ID=703.

last week, the Nevada Senate passed Senate Bill 166 to ensure equal pay for equal work and penalize employers who practice pay discrimination based on gender. The Nevada Assembly will hear the bill soon, and I anticipate they will pass the bill as well. Governor Sisolak said in his "State of the State address, he intends to make pay equity the law in Nevada. Our state WILL have a "Pay Equity" law before mid-June of this year.

Another area that represents gender inequality concerns pay in sports. College and professional sports often provide unequal funding and compensation for women. How is it that the U.S. Women's National Team received a bonus of only $2 million when it won the 2015 Women's World Cup, and when the 2014 U.S. men's team finished in 11th place, it collected $9 million? In a recent move, 28 members of the world champion U.S. women's soccer team filed a gender discrimination lawsuit citing "institutionalized gender discrimination."[5] Ratification of the ERA continues to be relevant.

Moreover, when it comes to crimes against women, we continue to suffer from victim-blaming, such as shame, stigma, and the ingraining of guilt upon the female victim. The Civil Rights Act of 1964 prohibits employment discrimination based on race, sex, color, national origin,

[5] The New York Times, U.S. Women's Soccer Team Sues U.S. Soccer for Gender Discrimination, March 8, 2019, https://www.nytimes.com/2019/03/08/sports/womens-soccer-team-lawsuit-gender-discrimination.html?module=inline.

or religion. Sexual harassment became codified in U.S. law based upon sexual harassment cases in the 1970s and 1980s. In 1980, the Equal Employment Opportunity Commission (EEOC) issued regulations defining sexual harassment as a form of sex discrimination prohibited by the Civil Rights Act. In the last few years, we have clearly heard the voices of women that sexual harassment in the work place happens frequently and often silently. The #MeToo movement has supported a significant increase in sex-based discrimination filings. The EEOC saw a 13.6 percent increase in workers alleging sexual harassment from Fiscal Year 2017 to Fiscal Year 2018.[6] To begin the journey of addressing sexual discrimination and harassment in Nevada, we now have a Governor's Task Force on Sexual Harassment Discrimination Law and Policy to reduce harassment in the executive branch.[7] In addition, the Nevada Legislature is reviewing legislation relating to this form of discrimination. Clearly, we still struggle with discrimination and victim-blaming of women, and the ERA will advance our commitment to end this unjust treatment.

February 4, 2019, the Nevada Legislature became the FIRST FEMALE majority legislature in the country. Women hold nearly 51 percent of the state's

[6] Bloomberg Law Daily Labor Report, Rise in Sexual Harassment Claims Has EEOC Looking for Answers, February 21, 2019, https://news.bloomberglaw.com/daily-labor-report/rise-in-sexual-harassment-claims-has-eeoc-looking-for-answers.

[7] Nevada Executive Department, Executive Order 2019-02 Order To Collect Sexual Harassment And Discrimination Policies From Marijuana And Gaming Privileged License Holders And State Vendors, http://gov.nv.gov/News/Executive_Orders/2019/2019-02_Order_To_Collect_Sexual_Harassment_And_Discrimination_Policies_From_Marijuana_And_Gaming_Privileged_License_Holders_And_State_Vendor/.

63 legislative seats. Nationally, the number of women in legislative seats is also on the rise. In 2019, women-held seats will grow to at least 28.6 percent in state legislatures, up from 25.4 percent.[8] In addition to the legislative majority in Nevada, women will also make up more than 40 percent of state legislators in Colorado, Oregon, and Washington. Although we celebrate this historic milestone, we know the job is not yet done. Women make up nearly 51 percent of the U.S. population, but the percentage of women in elected office, falls far short of equal representation.

We celebrate the fact that in this Congress 23 percent are women, and this is one of the most diverse in American History! Yes, we are making progress, but the job is not done. While improvements are occurring, our nation still struggles with inequality under the law and the ratification of the ERA continues to be necessary.

Mr. Chair and members of the Subcommittee, when the ERA first gained popularity in the late-1960s and 1970s, it was heard as a clarion call for change. Just as the call for change continues for racial equality, fairness, and justice some 154 years after the adoption of the 13th Amendment, this call has not diminished for the ERA. The cry for change today has become a clarion call to act in a responsible manner that ensures equality for all citizens.

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[8] CNBC, Nevada Makes History as the First State with a Majority Female Legislature, December 20, 2018, https://www.cnbc.com/2018/12/20/nevada-becomes-the-first-state-with-a-female-majority-legislature--.html.

Fifty years ago, as the equal rights movement gained momentum, President Lyndon B. Johnson said these words:

> *"We have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter, and to write it in the books of law."*[9]

In 1995, then First Lady, Hillary Clinton, spoke at the United Nations Fourth World Conference on Women in Beijing and said, "Women's Rights Are Human Rights."

In her 1970 speech to Congress, Representative Shirly Chisholm built the argument FOR the Equal Rights Amendment by declaring the current state of in equality for women. She said, [the absence of the ERA] "... provides a legal basis for attack on the most subtle, most pervasive, and most institutionalized form of prejudice that exists. Discrimination against women, solely on the basis of their sex, is so widespread that is seems to many persons normal, natural and right.

Mr. Chairman and members of the Subcommittee, I am before you today because I believe, from the bottom of my heart, in the foundations of the ERA and what it stands for—for ALL people. A

[9] United States Senate, Landmark Legislation: The Civil Rights Act of 1964, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm.

quote by Gloria Steinem expresses the meaning of equal rights for ALL when she said, "A gender-equal society would be one where the word 'gender' does not exist: where everyone can be themselves."[10] When it comes to the ratification of the ERA, we ALL must **PERSIST** for equality.

The ratification of the ERA has been delayed long enough. We need a
38th state to ratify the ERA and provide the means for Congress to move forward with an amendment to the *Constitution of the United States.*
The restricting time limit for ratification of the ERA can be found in the resolving clause and is not part of the amendment that was proposed by Congress. I believe that having passed a time extension for the ERA on October 20, 1978, Congress demonstrated that a time limit in the resolving clause may be disregarded if it is not part of the proposed amendment. If an amendment to the *Constitution of the United States* has been proposed by a two-thirds vote of both houses of Congress and ratified by three-fourths of the state legislatures, I believe that the validity of the state ratifications occurring after a time limit in the resolving clause will prevail.

[10] Bustle, 17 Inspiring Quotes About Women's Equality for Women's Equality Day, Because We've Made A Lot of Progress, Even If We Aren't There Yet, https://www.bustle.com/articles/106640-17-inspiring-quotes-about-womens-equality-for-womens-equality-day-because-weve-made-a-lot-of.

The time is NOW to show the global neighborhood that we, as Americans, lead when it comes to equality for all. At every decision point in history, the quest for equality has met with stiff and recalcitrant opposition. Equal justice has NEVER been given. During antebellum times, abolitionists **PERSISTED** to end the heinous practice of slavery, and Negros in the south **PERSISTED** to end Jim Crow. African Americans also **PERSISTED** to get the 1964 Civil Rights Act passed. In addition, Cesar Chavez and migrant workers **PERSISTED** to improve working conditions; Vietnam Veterans **PERSISTED** to get health care, recognition of their service, and appreciation for their sacrifice; HIV/AIDS activists **PERSISTED** to ensure that human dignity was not diminished for those infected and affected by such a terrible disease; and members of the LGBTQ community **PERSISTED** to gain marriage equality.

Persistence, faith, and hope fuel the indomitable spirit of this movement. We must honor the sacrifices of our mothers and grandmothers, and we must commit to the preservation of justice and equality for our posterity. Galatians 6:9 says, "Be not weary in well doing, you will reap the harvest if you do not faint."

Mr. Chair and members of the Subcommittee, we got tired, but we did not faint, we became weary, but we did not stop. History demands that we take a stand on this most important journey toward full equality. We stand on the right side of history or will your second, third, and fourth generations question the decision to NOT support the

Equal Rights Amendment. We must persist in the name of all that is good. The road is long and has been full of twists and turns, but we must continue on this road until the ERA becomes a part of the *Constitution of the United States*.

Thank you for your time and attention.

Senator (Dr.) Pat Spearman
Majority Co-Whip
Nevada State Senate
Senate District 1

Mr. COHEN. Thank you, Senator. [Applause.]

Mr. COHEN. Cool it. Cool it. Can't do that. Can't do that.

Finally, Patricia Arquette is an Academy Award-winning actress with a long and distinguished acting career dating back to the 1980s, also one of Hollywood's leading advocates for the Equal Rights Amendment and a passionate activist for women's equality. I believe you might have even mentioned the ERA when you received an award over the past. That is pretty strong.

You are recognized for five minutes.

STATEMENT OF PATRICIA ARQUETTE

Ms. ARQUETTE. Thank you, Chairman Nadler, Chairman Cohen, Ranking Members Johnson and Collins and Congresswomen Speier and Maloney for your tireless work on the ERA, and to the members of the committee.

I come here not as a constitutional lawyer but as a citizen, as an American woman, to advocate for what I feel is critical for our country.

I come with the good will and faith that when we examine the reality of women in America today and remember the historic injustices women have faced in our country, we will all feel compelled to do what we must to ensure that women are afforded every legal right and equal protection in our country.

Women have waited 232 years to be enshrined as full and equal citizens. Why? Because in 1787 women were left out of the Constitution intentionally.

While the Constitution says nothing about deadlines for amendments, Congress put a deadline on the Equal Rights Amendment when it was passed in 1972.

I am here to appeal to you to remove the 1982 deadlines placed on Congress for the ratification of the ERA.

Just because women didn't achieve full equality in America by 1978 or by 1982 doesn't mean they shouldn't have it today. There is a groundswell in this country. Women are being elected in record numbers.

Women are rising up by the millions and saying they will not be sexually assaulted, they will not be paid less, they will not be treated as subhuman, and they will have their voices heard.

Some people think women do have constitutional protections because of the 14th Amendment. But when asked about this, Supreme Court Justice Antonin Scalia said, certainly the Constitution doesn't require discrimination on the basis of sex; the question is whether it prohibits it. It doesn't.

So a recent Supreme Court justice interpreted the Constitution as saying it did not prohibit discrimination on the basis of sex. So whether you agree with him or not, the fact remains this is how a recent Supreme Court justice interpreted women's rights in our Constitution, and this is why we need to amend the Constitution and leave no room to question of women have fully constitutional equality because women's protections cannot be left to interpretation alone.

So let us look at the treatment of women in America today. These are present-day truths. These are not antiquated horrors we

have to search for in history books. These are things that are happening to both Democratic and Republican women.

In America in 2019 there are estimated to be hundreds of thousands of untested evidentiary rape kits across the nation. Only half our states mandate the timely testing of evidence contained in these rape kits.

Many victims are being billed for the collection of their own forensic evidence. Countless emergency rooms and hospitals don't even have trained staff to collect evidence in rape kits even though it estimated that one-quarter of all women in America will be raped in their lifetime.

In some states in America today, women can be forced to co-parent with their convicted rapists and incarcerated women, up until three months ago, could be forced to give birth while shackled to beds.

We have the only rising mortality rate in the developed world. American women, especially African American, Latina, and Native American women, are dying of pregnancy-related complications here on the—the wealthiest nation on Earth.

And we know the gender pay gap is having devastating consequences for women and their families, especially women of color. We know 98 percent of all jobs women are paid less.

According to the Census Bureau, 4 million women over 65 years old are living in poverty. But if they had equal pay more than 2.5 million children with working single mothers would be lifted out of poverty.

These are just a few examples of how systemic bias against women is expressed in America. Why? Because women don't have the same value as men in our country. That was true in 1787. It was true in 1982. It is true in 2019.

So I hope by now we are all ready to make women's equality a bedrock American value and enshrine it in the U.S. Constitution. I hope we are ready for all our mothers, daughters, sisters, and friends to have full equal rights.

Why didn't women achieve full constitutional equality in 1787 or 1982? Because the country wasn't ready. Well, I hope you are ready now because have been waiting 232 years for equality in this country and it has failed them.

Legislators have blocked the passage of the Equal Rights Amendment for decades. But we are done waiting.

Thank you.

[Applause.]

[The statement of Ms. Arquette follows:]

PATRICIA ARQUETTE JUDICIARY COMMITTEE HEARING ON THE ERA

OPENING STATEMENT

Thank you Chairman Nadler, Chairman Cohen, Ranking Members Johnson, and Collins, and Congresswomen Speier and Maloney for your tireless work on the ERA and to the members of the committee. I come here not as a constitutional lawyer but as a citizen. As an American woman to advocate for what I feel is critical for our country. I come with good will and the faith that when we examine the reality of- American women today and remember the historic injustices women have faced in our country, we will all feel compelled to do what we must to ensure that women are afforded every legal right and equal protection in our country. Women have waited for 232 years to be enshrined as full and equal citizens – Why? Because in 1787 Women were left out of the Constitution – intentionally.

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In America in 2019 there are estimated hundreds of thousands of untested rape kits. Only half of our states mandate the timely testing of the evidence contained in these rape kits.-Many victims are- billed for the collection of this evidence. Countless emergency rooms and hospitals don't even have trained staff to collect evidence in rape kits. Even though it's estimated ¼ of women in America will be raped in their lifetime. In some states In America *today* women can be forced to co-parent with their convicted rapists. And incarcerated pregnant women can be forced to give birth while shackled to beds.

We have the only rising maternal mortality rate in the developed world. American women, especially African American, Latina, and Native American Women, are dying of pregnancy-related complications here, in the wealthiest Nation on Earth -

We know that the gender pay gap is having devastating consequences for women and their families especially for women of color. We know that in 98 percent of all jobs women are paid less. According to the Census Bureau, 4 million Women over 65 years old are living in poverty But if we had equal pay, more than 2.5 million children with a working single mother would be lifted out of poverty

These are just a few examples of how systemic bias against women is expressed in America. Why? Because women do not hold the same value as men in this country. That was true in 1787, it was true in 1982, and it's true in 2019.

I hope by now we are all ready to make women's equality a bedrock American value by enshrining it in the U.S, Constitution. I hope we are ready for our mothers, daughters, sisters, and friends to have full equal rights. Why didn't women achieve full Constitutional equality in 1787, or in 1982? Because the country wasn't ready?

Well I hope you are ready now.

Women have been waiting 232 years for equality and this country has failed them. Legislators have blocked the passage of The Equal Rights Amendment for decades-

We are done waiting.

Thank you.

Mr. COHEN. Thank you very much, Ms. Arquette.

We will now proceed under the five-minute rules which we have for asking questions and each member of the panel will be questioned.

I would first like to start with Ms. Arquette. You are a star, famous, celebrated. And yet, in your career I am sure you have faced some type of sexism, the same that ordinary women face every day.

What are some of the gender-based obstacles that you had to face in your own career?

Ms. ARQUETTE. I have been sexually assaulted. I have had to turn down work because I had employers that were not willing to be reasonable as people. They wanted me to sign papers saying I would be naked and do whatever they wanted.

I am an actor. I am dealing with a director. I have no say as an employee or as a citizen, as a human being. I have called the police when I was sexually assaulted by a stranger on the road and had the police not even come, and I was a kid. I have had so many experiences in this country of sexual assault.

But it is not really just about me. Woman after woman—okay. Listen, don't we all expect when one-quarter of all women will be raped in their lifetime isn't it reasonable to expect that an emergency room would know how to collect evidence from a rape kit? Isn't that reasonable?

And yet, women are going when they have been raped from hospital to hospital and being told—sometime they will go to four hospitals right after they have been raped and they are told they don't know how to collect the evidence. They have to go to another place.

By the time they get their rape kit taken—and this is from—Joyful Heart gave me this information—by the time they get their rape kit taken the date rape drug is gone. It is no longer in their system.

And we know only 3 percent of rapists ever spend a day in jail. This is systemic. This is across our country. We need every tool to root out bias, both racial bias that women of color are experiencing, and also we have to root out sexist bias.

Look, we have women also in Alabama who are dying of treatable cervical cancer because they are poor black women. There is one gynecologist for five counties. We have African-American women dying—we are the only country with a rising maternal death rate in the developing world and 700 black women died.

What is going on? What is happening here? These are preventable things. But time after time we are seeing all these layers of bias, and until we have the Equal Rights Amendment and with the—all of these other Title 9 and all of these things we will never be able to root out this and will never be able to change this for American women.

Mr. COHEN. Thank you so much.

Ms. Sullivan, let me ask you some rapid fire, if you do have time. Some opponents of the ERA have argued it would have a terrible effect like eliminating women's sports teams or abolishing separate bathrooms.

Can you tell me what your thoughts are on those arguments?

Ms. SULLIVAN. The ERA would have no such effect. We have had interpretation of the equal protection clause that allows the un-

equal treatment of men and women when it is important to rectify past disadvantage, for example, and we have had ERAs in 22 states—adopted by 22 states and we haven't seen the elimination of same sex sports teams or same sex bathrooms in any of those states. So that is a myth.

Mr. COHEN. Thank you.

Professor Foley has argued that the states which have rescinded their ratification should not be counted in the assessment of whether we have reached the 38-state limit. In your view, should states be able to rescind their ratification?

Ms. SULLIVAN. In my view, they should not. Article 5 provides for ratification. It does not provide for rescission, and we have never recognized a state rescission of its prior vote for an amendment.

In fact, the 14th Amendment that contains the equal protection clause was ratified even though Ohio and New York had purported to rescind their votes for it. That creates powerful precedent that rescissions are null and void and that is what the attorney general of five states told the states who tried to rescind after the 1972 passage of the ERA. Rescissions do not count. Once ratified, it is a one-way ratchet.

Mr. COHEN. And some Republicans have brought up the issue of abortion or a woman's right to choose. You mentioned all the industrialized nations of the world have amendments on ERA.

How have they affected their countries and just, in general, can you discuss what effect ERA would have on reproductive rights?

Ms. SULLIVAN. The ERA is a totally separate issue from abortion and reproductive rights. It will help encourage the equality of women, which does involve reproductive rights. But in those countries with ERAs and in those states with ERAs the passage of the ERA has not changed the law of abortion in those countries.

The Supreme Court has already protected the right of access to abortion as a matter of reproductive choice just likes it protects other intimate choices like the choice to use birth control, and that debate happened without the ERA. So the ERA is about equality and any debate about abortion and reproductive rights will continue after its passage as it has in other states and other countries that have adopted it.

Mr. COHEN. Thank you. And now I would just like to go to Professor Foley for a little history lesson.

I am sure as a University of Tennessee law student you learned about the perfect 36 in Tennessee and the ratification of the women's right to vote.

Ms. FOLEY. Yeah.

Mr. COHEN. Can you tell us the story about Harry Burn, a Republican legislator? Do you know that story?

Ms. FOLEY. No, I don't.

Mr. COHEN. Well, you should.

Ms. FOLEY. Okay.

Mr. COHEN. So should everybody else in America. It came down to 1920. Thirty-five states had passed, ratified. Twelve had said no. One state left—Tennessee. Major battle.

Senate, which I was a member not at the time but for 24 years, passed it, like 25 to 7. The House was tied. It was almost the last day. A Republican male, a young man named Harry Burn, got a

note from his mother, "Harry, do the right thing," and Harry did the right thing and Harry Burn, a Republican, voted yes, passed the amendment, the perfect 36, and women had the right to vote.

Thank you very much, Harry Burn. [Applause.]

Mr. COHEN. I now recognize Mr. Johnson, who walks in Harry Burn's shoes. [Laughter.]

Mr. JOHNSON of Louisiana. And my mother would have given me the same advice and I would have voted for it.

First, regarding Ms. Sullivan and my colleague, Representative Maloney's, bold contention that the ERA, quote, "has nothing to do with abortion" and that my saying so is divisive, I respectfully present to you all and will ask consent to include in the record of this hearing these documents, that show that pro-abortion groups are, clearly, saying now that adopting the ERA would mean the end of laws that protect the sanctity of every human life and I will give you three examples.

In a new article published by the National Organization for Women entitled, "Is the Equal Rights Amendment Relevant in the 21st Century?" Abortion is discussed on pages 3, 4, 5 and 6, and they say, quote, "An ERA properly interpreted would negate the hundreds of laws that have been passed restricting access to abortion care and contraception, denial of legal and appropriate legal and appropriate care for women and only women as sex discrimination, and a powerful ERA should recognize and prohibit that most harmful of discriminatory actions," unquote.

Consider a January 2019 complaint by the Women's Law Project and Planned Parenthood and Allegheny Reproductive Health Center v. Pennsylvania Department of Health and Human Services. It is a lawsuit that argues the state ban on government-funded elective abortions violates the state's ERA and that any denial of this claim including past Supreme Court construction, quote, "is contrary to a modern understanding of the ERA."

Look, the fact is that now there is essential agreement between pro-life and pro-abortion groups that the language of the 1972 ERA is likely to result in powerful reinforcement and expansion of abortion rights.

NARAL/Pro-Choice America in a March 13th, 2019, national alert—this is last month—asserted that, quote, "The ERA would reinforce the constitutional right to abortion and it would require judges to strike down anti-abortion laws," unquote.

So would just say respectfully all these groups are not being divisive. They are simply acknowledging the facts.

Here is my questions, real quick, for Professor Foley. President Jimmy Carter wrote to the House Judiciary Chairman Peter Rodino on July 12th, 1978, and he stated, and I quote, "I am hopeful that ERA will be ratified before the present deadline expires," unquote. That original expiration date, as we have all heard, was March 22nd, 1979.

Indeed, the ERA proponents knew that they could not secure ratifications from 38 states by March 22nd, 1979, so they lobbied Congress for more time, which resulted in the congressional majority vote for a 39-month extension.

But even that deadline wasn't met, and on November 16th, 1983, the New York Times matter of factly reported that the ERA, and

I quote, "went through laborious debates in the legislatures of all 50 states.

That proposal died when its time limit for ratification expired in June 1982, still three states short of the necessary approval of 38 legislatures," unquote.

Congressional Quarterly reported the proposed Equal Rights Amendment to the Constitution officially died June 30th, 1982, three states short of the 38 needed to ratify it.

Here is the question. Have there been any developments since 1982 that would render any of those contemporaneous statements of the ERA's expiration somehow inaccurate?

Ms. FOLEY. Short answer, no. Longer answer—I mean, the point from Supreme Court precedent, I think, to keep in mind procedurally about constitutional amendments is that you are in charge, right.

Congress is in charge and you are in charge because of Article 5, not because of Article 1. And so what that means is that you don't have to impose a ratification deadline if you don't want to.

But if you do, it sticks, and it is justiciable. And so the problem with ERA is that you have put a seven-year deadline in there and to change that would require a new proposal with supermajorities of both houses of Congress.

So as much as you may want the ERA to pass, I don't think you have the constitutional authority to do so any more than you could, for example, pass a proposed amendment without a constitutional ratification deadline and then decide a few years later to suddenly impose a ratification deadline right before the requisite number of states had ratified the three-quarters had been—threshold had been satisfied in order to stop the ratification.

I don't think you can go in either direction and I think that is what the courts would hold.

Mr. JOHNSON of Louisiana. I so appreciate you pointing out the distinction between Article 5 and Article 1 because I think there is a lot of misunderstanding about where this power—from where it derives and that this has never happened before where an amendment was adopted past its deadline. That is really important for you to point it out. I appreciate that.

Another quick question. Some claim the ERA has wide popular support but if that were so why is there a reluctance on the part of the majority of this Congress to simply reissue the ERA to the states without any ratification deadline, do you think, and what does that reluctance say about the actual prospects of popular support for the ERA?

Ms. FOLEY. Well, it is a great question. I think that it is just easier, right, to just go with the three-state strategy and see if it sticks after years and years of litigation.

I don't think it will stick so I think, unfortunately, that it would actually set back the clock for those who support gender equality.

I think, you know, it would make things worse. If you really want to do this the right way to do it is clear. It is to go ahead and re-propose by two-thirds by both houses of Congress and submit it to the states for three-fourths ratification.

Now, if you can't get the two-thirds from both houses of Congress today, well, that may reflect the political reality of today. But that

is why there is a supermajority threshold for the proposal of constitutional amendments. They require supermajorities. They require societal consensus.

One of the reasons why we may not have societal consensus today in 2019 when we had it in 1972 is that things have changed. In 1972, for example, that was one year before the Supreme Court decided Roe v. Wade.

The Supreme Court had not firmly entrenched its equal protection analysis. I believe the big case really was the VMI case in 1996 penned by Ginsburg where she basically imposed an intermediate standard of review for gender-based classifications under the equal protection clause.

That means that all gender-based classifications—state-based classifications receive a presumption of unconstitutionality today. We didn't have that back in 1972. So I think the fact that the Supreme Court has changed its equal protection jurisprudence including recognizing a woman's right to terminate her pregnancy prior to the point of fetal viability has changed things.

Mr. JOHNSON of Louisiana. Thank you. I am out of time.

I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

I now recognize Mr. Nadler from the vibrant west side. [Laughter.]

Mr. NADLER. Thank you, Mr. Chairman.

Professor Sullivan, Professor Foley argues against our right to rescind the ratification deadline and she quotes the Dillon case, which, I would point out, is a district court case. It was mooted—it is not a district court case?

Ms. FOLEY. Dillon v. Gloss is a Supreme Court case decided in 1921. It is, I believe, Idaho v. Freeman, if you want to——

Mr. NADLER. Freeman. Okay. You quote that case and, basically, you are saying that—you are making the Article 5/Article 1 distinction because Article 5—Congress's power to impose a deadline derives from its power to proposed amendments to the Constitution under Article 5.

Therefore, to change that, you would need the same supermajority that you had to start with because it is Article 5, not Article 1. Article 1 is the general legislative powers.

So we do not have the ability to extend the ratification deadline except with a two-thirds. I would ask Dr. Sullivan why is that wrong?

Ms. SULLIVAN. It is wrong and you absolutely can change the deadline. Am I the only textualist here? I would like to go back to the text of Article 5.

Mr. JOHNSON of Louisiana. I am on record. I am a textualist.

Mr. NADLER. Justice Scalia is not here.

Ms. SULLIVAN. Article 5 does not provide Congress with any power to decide when an amendment has been ratified by the states. It simply says when three-quarters of the states ratify the amendment as enacted.

So it is unclear whether you have the constitutional power as against the authority of the states under Article 5 to tell them when their ratification deadline is up.

But if you have that power, you surely have the power to change, alter, rescind, overrule your deadline and you got that from the Supreme Court in a case that my friend, Professor Foley didn't mention—Coleman v. Miller, which involved the Child Labor Act Amendment and which said that the issue of whether Congress can control deadline is a nonjusticiable issue within the exclusive and unreviewable authority of Congress.

So it is not clear you have the power to set a deadline. It is a 20th century practice. It is not in the framing. It wasn't something James Madison thought we needed, and we didn't need it for his amendment.

But if you had the power to set one you certainly have the power to change it.

Mr. NADLER. So the case law does not firmly establish the right to set a deadline in the first place.

Ms. SULLIVAN. Correct. Well, the case law says that—Dillon v. Gloss, to the extent it holds anything clear, from my position, Dillon v. Gloss said that when the 38th state ratified—it wasn't 38 then because we didn't have Alaska and Hawaii—when three-quarters of the states have ratified, it is passed.

That is why Dillon had to go to jail for sending a case of wine in San Francisco because when the 38th state ratified before Congress ever said whether it was good or not, that prohibition law was enacted.

So actually Dillon v. Gloss stands for the position that the state—when 38 states ratify we are done. One and done.

Mr. NADLER. Because Congress lacks the power to limit states' sovereignty by putting—because the states have the power to ratify under the Constitution and it would be a limitation on states' sovereignty to limit their power by a deadline?

Ms. SULLIVAN. That is exactly right, your Honor. That is a very plausible argument and usually conservatives like states' rights. I don't know why they don't like states' rights here.

[Applause.]

Mr. NADLER. I must say, I have observed over the course of a rather lengthy political career that conservatives and sometimes liberal too—liberals who like states' rights when it serves their purposes and they don't like states' rights——

Ms. Sullivan. Blue states' rights.

Mr. NADLER. Well, in any event—in any event, and so we don't have the power to set that ratification in the first place, but if we did we would have the same power from the same source to rescind that right, too?

Ms. SULLIVAN. That is exactly right. You don't really have it through Article 5 because Article 5 doesn't speak to any congressional promulgation.

You only have it if you have it at all through Article 5 plus the necessary and proper clause of Article 1 Section 8. If you have it under the necessary and proper clause, you certainly have the power to change it.

Mr. NADLER. That is a very powerful argument.

Ms. Arquette, thank you for your leadership and activism on this subject. Can you talk about why you think the push to pass the

ERA is resonating with so many men and women at this point in American history?

Ms. ARQUETTE. Well, one of the things is, as we have heard earlier, the gender pay gap and how half of the women working in America are the primary breadwinners.

We know what the wage impact is and for Latina women over a lifetime that is over $1,135,000, for black women that is $946,000, and for white women that is around $400,000.

And it doesn't change, actually. Oddly enough, the gender pay gap remains. We have it in every state. We have it in every country on Earth, this gender pay gap, and we need every possible way to eradicate that, to look at bias. Some wonderful things have happened recently—that some leaders of industry have come forward and done gender pay gaps to remedy the situation and they found, yes, there they were—they were. Everything that everyone talked about it is there.

So we need to advance our country because women are going to retire in poverty, or twice as likely as men or one-third more likely than men to retire in poverty. It takes them longer to pay off their houses, their car payments, to put their kids through college.

It is really having devastating effects on women.

Mr. NADLER. Thank you very much. My time has expired.

Mr. COHEN. Thank you, sir.

And I now recognize the gentleman from Virginia who has so far had outstanding service on this committee, Mr. Cline.

Mr. CLINE. Thank you, Mr. Chairman, and I want to thank the witnesses for being here and for all the attendees who are here and for Congresswoman Speier and Congresswoman Maloney for all of your work over the years to ensure equality for women.

Women deserve to live, work, and thrive in America free from discrimination and inequality. This document, which I carry around with me, is very important to every American and should ensure equal rights for every American.

I first want to ask Professor Foley if, in light of the answers that were given, if you have anything else to add, briefly.

Ms. FOLEY. Yeah. I did. If I could respond about Coleman. I didn't have time to talk about Coleman but I think it is worth talking about.

It was a case that went to the Supreme Court. It was decided in 1939. It involved the Child Labor Amendment, which is one of those amendments that never got ratified.

The Child Labor Amendment did not have a ratification deadline, which was typical of its day and so what happened was that Kansas—the state of Kansas originally rejected it about a year after it was proposed, and then 13 years later after it was proposed Kansas changed its mind and ratified it.

And so the question before the court—a bunch of Kansas state legislators who were mad that Kansas changed its mind took the case all the way to the Supreme Court and they said, you can't do that because, number one, it is an improper ratification because a lieutenant governor broke a time in the Senate and that was wrong, and number two, the fact that it was ratified so long after the original proposal 13 years after the original proposal—means

that it was not a valid ratification because it wasn't within a reasonable time of ratification.

So the Supreme Court decided in a majority opinion that the issue of the 13 years that it took Kansas to ratify was nonjusticiable, and it was nonjusticiable because the Congress that proposed the Child Labor Amendment had chosen not to provide a ratification deadline.

So think about it, right. You pass a proposed constitutional amendment. You send it to the states. It has no ratification deadline. One of the states, 13 years later, decides to ratify it.

They take it to the Supreme Court and the Supreme Court is asked to decide if the 13 years is too late, right, and the Supreme Court said, no, it is not too late because you didn't provide a ratification deadline.

The 13 years versus 20 years versus 203 years, as in the case of the Madison agreement, that is nonjusticiable. We are not going to touch that.

But that has nothing to do with the inverse situation where you do provide a ratification deadline and it is not satisfied.

So Coleman has no precedential value on that question, which is why I didn't put it in my primary remarks, and I think because Dillon is good law and it is a unanimous decision and it says, you are in charge and you can specify a mode of ratification pursuant to your Article 5 authority, that if you do provide a deadline it has to be adhered to.

Mr. CLINE. Thank you, and I also was reviewing the Supreme Court decision in Dillon v. Gloss and one of the passages in the decision, I am quoting, "of the power of Congress keeping within reasonable limits to fix a definite period for the ratification we entertain no doubt."

Dr. Sullivan, do you entertain doubt?

Ms. SULLIVAN. I do have doubt about Coleman.

Thank you, Congressman. I do have doubt about Dillon v. Gloss. I think it doesn't take into account the federalism revolution we had on the Supreme Court under the leadership of Chief Justice Rehnquist.

Mr. CLINE. Okay. Reclaiming my time. Don't you agree that that would require an additional decision by the Supreme Court to reverse that decision to allow for it?

Ms. SULLIVAN. Yes, it would. But I don't think Dillon controls—I think Dillon supports your power to change your procedures.

Mr. CLINE. Correct. So Congress does have the power to extend the deadline but that extending—some action by Congress would be necessary to give states that extra time. Is that correct?

Ms. SULLIVAN. Well, I don't think it is necessary but I certainly think it is sufficient and I think you have the power to do it, notwithstanding Dillon.

Mr. CLINE. So, in your mind, that passage of that decision and the deadlines passed by Congress could be ignored by a 38th state in the next year?

Ms. SULLIVAN. I think that is a potential decision that could be found by a Supreme Court in the future. But you don't need to face that because Coleman v. Miller did, as my colleague said, give you unreviewable authority to regulate your own deadline procedures

and I think you can do it by a majority vote. You don't need two-thirds.

Mr. CLINE. Professor Foley, you disagree?

Ms. FOLEY. Yeah, I do, because the people who cite Coleman v. Miller for this idea that everything Congress does associated with constitutional amendments is nonjusticiable are way over reading Coleman v. Miller.

In fact, that position, that everything Congress does is nonjusticiable when it comes to Article 5, comes from a plurality opinion that was penned by Justice Black. It got four votes.

That is less than five. That is not a majority. And in fact, that is the position they took—that everything Congress does when it comes to constitutional amendments is nonjusticiable.

Now, think about it. Three members of the majority—there were seven members of the majority in Coleman—did not sign on to Black's concurrence. So there is three.

Two dissenters ruled that it was justiciable. They wanted to address the issue. So you add three plus two from Coleman. You actually get five justices from Coleman writing a very narrow opinion, saying the only thing that was nonjusticiable in Coleman was whether Kansas's ratification 13 years after proposal was a reasonable period of time when Congress had not specified a time limit. That is it.

Mr. CLINE. Thank you. My time has expired.

Mr. COHEN. Thank you, Mr. Cline.

We now recognize Professor Raskin.

Mr. RASKIN. Mr. Chairman, thank you. Thanks to all of our witnesses.

So there have been 17 amendments since the Bill of Rights and the vast majority of them have expanded equality, political participation, and democracy in America.

So the 13th Amendment abolished slavery. The 14th Amendment gave us equal protection and due process. The 15th Amendment struck down race discrimination in voting.

The 17th Amendment shifted the mode of election of U.S. senators from the legislatures to the people. The 19th Amendment 99 years ago gave us women's suffrage. The 23rd Amendment gave people here in D.C. the right to participate in presidential elections.

The 24th Amendment abolished poll taxes in federal elections. The 26th Amendment lowered the voting age.

Do you think—maybe start with you, Professor Sullivan—that the Equal Rights Amendment is in the mainstream of the trajectory of American constitutional development?

Ms. SULLIVAN. Absolutely yes.

Mr. RASKIN. And is it something that is kind of frivolous and extra or is it something that is necessary and central to our development as a country?

Ms. SULLIVAN. Necessary, central, foundational. It is 100 years since we had the 19th Amendment placed in the Constitution. Before that, the Supreme Court had said there is no equal right of women to vote.

It is high time, after 100 years, that the 19th Amendment, which was never expanded beyond its voting boundaries, the principle be

recognized for all purposes—against all public discrimination by passage of the ERA.

Mr. RASKIN. Dr. Spearman, why did Nevada, after all of these years, decide that the Equal Rights Amendment was something that it needed to do?

Ms. SPEARMAN. Thank you for that question. Let me start by saying—obviously, I am African American. I am a woman. I am a veteran. I am an ordained minister and I am a proud member of the LGBTQ community.

The discussion about equality I have been it all of my life—all of my life—and it has always been contentious. And so for me to carry the ERA and get it passed, get it ratified in 2017 it was simply the right thing to do.

Every time we come to equality, we always parse words. Every time we are talking about someone has the same right as someone else, we are not talking about special rights here. We are talking about equal rights.

And as I said before, the trajectory is moving in the right direction and it is moving in the right direction because every time I have been in a discussion about equality, whether it is about racism, whether it is about sexism, whether it is about homophobia, every time we always parse words about whether or not someone has the right to equality.

We ratified it because it was the right thing to do.

Mr. RASKIN. Thank you.

Ms. Arquette, let me come to you. You gave some eloquent testimony about rape kits and discrimination against women in different places.

What do you say to those who assert that the Equal Rights Amendment is too far removed from the daily struggles that women have against sexual harassment, against sexual assault, against states failing to deliver the rape kits and so on?

Is the ERA something that is actually pie in the sky that is removed from the daily struggles of women?

Ms. ARQUETTE. Well, I have to say to them that the Equal Rights Amendment, I think, would give us another tool to examine unconscious bias, I think, and sometimes, you know, obvious bias that we know in our country.

It is like whack-a-mole, okay. All of a sudden you bash down one thing—like child marriage. The last few years some very fierce activists across the country have been advocating and working with legislators to change some laws in some states so that we no longer had adult males impregnating girls and marrying them.

This is recent. This is very recent, okay, in the United States of America. But it is like whack-a-mole. I just found out—I do women's rights work. This is what I do.

I just found out a couple weeks ago that women in most countries—I mean, not most countries—most states here in America, when you go to a hospital for your tonsils and you go under, if you are at a teaching hospital they can bring in medical residents who do internal vaginal exams on you while you are unconscious without your consent. Most states in America. Okay.

So I want the Equal Rights Amendment. I want VAWA. I want every protection under the law to start rooting out systemic bias.

Mr. RASKIN. And the ERA comes within these other statutory protections as part of a movement for general transformation in this society.

Ms. ARQUETTE. And we need that transformation.

Mr. RASKIN. Well, I thank you for your testimony.

Professor Foley, let me come to you. You seemed to question in your last remark the controlling authority and solidity of Coleman v. Miller, which I always taught as a key precedent for the proposition that the whole constitutional-amending process is a political question, is nonjusticiable.

Do you know of any Supreme Court cases where the Supreme Court has intervened to decide either that—that either a procedure was unlawful or that a constitutional amendment was unconstitutional?

Ms. FOLEY. No. But, of course, we have never had that opportunity arise. The closest we came was with the three-year extension of the ERA and that district court decision in Idaho v. Freeman. But because it got mooted, the three-year deadline expired and no additional states had ratified. We just don't have——

Mr. RASKIN. I just want to get the logic of your position. Are you saying that if the deadline were to be extended that this should be the first constitutional amendment in our history to be struck down as unconstitutional?

Ms. FOLEY. Yeah, I think it could be.

Mr. RASKIN. But do you think it should be?

Ms. FOLEY. That is a different question, isn't it? As——

Mr. RASKIN. That is the one I am asking, yes.

Ms. FOLEY. Well, I mean, I am not a policy person and I am not here as someone to talk about whether the ERA is a good idea or a bad idea——

Mr. RASKIN. I thought it is a constitutional question. In other words——

Ms. FOLEY. No.

Mr. RASKIN. I thought you were opining——

Ms. FOLEY. Oh, I thought you were asking me, like, should it because it is a great idea.

Mr. RASKIN. I am sorry?

Ms. FOLEY. I thought you were asking me should it be struck down because ERA is a great idea.

Mr. RASKIN. You seem to be invoking some of the Supreme Court justices who did not think that these were nonjusticiable political questions.

And I guess what I am asking you is are you saying that the Supreme Court in the event that we were to extend the deadline should intervene to strike it down or if states were to adopt the Equal Rights Amendment to say that it is not a constitutional amendment and it is not part of the Constitution?

Ms. FOLEY. Yes. I think that when it gets litigated, if you decide to extend the ratification deadline or if it just gets ratified, you know, again by one more state it will be struck down as an unconstitutional amendment process.

So yes.

Mr. RASKIN. Thank you for clarifying that.

Mr. COHEN. Ms. Scanlon. Ms. Scanlon from Pennsylvania, one of the great new women members to our Congress.

Welcome.

Ms. SCANLON. Thank you so much.

I am so excited to be here. I mean, this is one of those a-ha moments for a new member in Congress. I want to show you this. It is a book called "Girls Are Equal, Too" by Dale Carlson.

My mother gave me this book over 40 years ago because she wanted me to think about gender roles and how they impacted even pre-teens like myself at the time, and for that, having just joined the most diverse Congress in history, I am extremely grateful.

I also want to share with you this pin that I am wearing. I wore it to the State of the Union earlier this year. It is a pin that was given to Alice Paul and other women who had chained themselves to the White House fence demanding the right to vote.

It represents a jailhouse door. It was given to them when they were released from jail after a series of hunger strikes, et cetera, and after they won the right to vote.

Now, Alice Paul, of course, wrote the Equal Rights Amendment first introduced in 1923, nearly a century ago. She also happens to have earned her Bachelor's degree from Swarthmore College, which is in my district.

So I am extremely proud of that connection to Alice Paul and looking forward to carrying forward her work in this Congress.

I would like to kind of pull back a little bit and maybe talk about the impact of the ERA—the potential impact of the ERA on girls, the girls of today.

Ms. Sullivan, could you speak a little bit to the fact you noted in your testimony that every other major democracy with a written constitution guarantees equal rights for men and women.

What effect do you think the U.S.'s outlier status has on the U.S.—on the world stage and the impact on the young women of today who are going to be our leaders in the future?

Ms. SULLIVAN. Well, thank you.

I think the fact that we don't have a provision for sex equality is shocking in 2019 and it is shocking comparatively when we look at the rest of the world.

All of the rest of the industrial democracies of the world, every nation that adopted a written constitution, many of them based on ours in the aftermath of World War II, they all have sex equality provisions.

Why don't we? And it speaks very loudly. The title of your book is wonderful. Your mother's advice was wonderful. The Constitution speaks to our most basic commitments. It says out loud in the one voice we have as we the people who is included as equal among the people.

And the absence of a statement that women are the equal of men in our Constitution is something that is unfathomable and something that should be fixed.

Ms. SCANLON. Thank you.

Ms. Arquette, when you won the Academy Award not so long ago, you gave a very powerful acceptance speech about the need to

address pay inequality for women in the U.S. and the need for the Equal Rights Amendment.

Have you seen any real-world effects as a result of that speech?

Ms. ARQUETTE. Thank you for that question.

Yes, I have seen some real-world effects. I recognized a problem. I was winning this award for a woman who was struggling to feed her two kids as the primary caretaker and breadwinner, and so I gave the speech and people started to talk about it.

One thing that happened was Cindy Robbins and Layla Seika at Salesforce went in the next morning to their boss, Marc Benioff and they said, hey, are we being paid the same? And he said, yeah, I am sure we are—you guys are. And they said are you sure you are sure? And he said, well, I think we are—let us do a gender audit.

And what he found—what they found was no, turned out they were paying mostly women $2 million, yes, less every year. Now, compound that, if that is your salary and you are having this huge chunk of money kept out. So they remediated that. They fixed that for all of their employees, and then the next year they did a gender wage of race also. They added race, and then they found, again, they had another gap and they fixed that.

Then Marc Benioff went out to the head of Apple, Intel, The Gap. All these people signed on. They started doing gender audits and they started people—paying people fairly.

But not only that, Senator Hannah-Beth Jackson of California saw it. She said—two days later she presented her equal pay bill on the floor. It passed. She had been trying to pass it for 36 years, and since then 41 states have passed equal pay bills. People have come up to me and they said, thank you—my boss gave me a check for thousands of dollars. I can't believe it.

What I am talking about is magic. When you make the intention—when you say to the world, women are equal in America—the system has never corrected itself. Call it out. It will start to correct itself. We will start to fix things we have been having to deal with since the beginning of our country.

Ms. SCANLON. Thank you.

Mr. COHEN. Thank you, Ms. Scanlon.

And I now recognize a member from Pennsylvania who is also a great new woman member, Ms. Dean.

Ms. DEAN. Thank you, Mr. Chairman, and thank you for holding this historic hearing. Like my colleague, Representative Scanlon, I come from Pennsylvania where we had no women in Congress as of the last Congress and we now have four women in Congress. So good things can happen in Pennsylvania and elsewhere.

[Applause.]

Ms. DEAN. And like my friend, Representative Scanlon, I too feel like we are at an extraordinary moment. I can't believe I have the privilege of sitting here and raising again the ERA and the valuable requirement and need to do it.

But that is met by also a paradoxical moment. How in God's name have we not done this yet and why would anyone want to stand in the way?

So floating in my head is what is anybody afraid of? What is there to be fearful of if we make this enshrined in our Constitution

that women hold the same right? And I was thinking about this as a mother.

I am a mother to three grown white men. I don't worry about whether they are going to be treated equally. I have that privilege. But I have a seven-year-old granddaughter and I absolutely worry if she will see that everything is open to her, that she is equal under the law and protected under the law.

And so, Ms. Sullivan, I wanted to go back to you. I am thinking about why are—what are—why are we here and why can't we just get this done.

Back to the notion of symbolic or necessary. A lot of people just say, oh my gosh, it is just a symbol—oh my gosh, I can't believe you are still arguing about ERA.

Can you go again about the essential nature of this?

Ms. SULLIVAN. It is necessary, it is essential, and it is not just symbolic but let me say symbols are important.

Ms. DEAN. Yes.

Ms. SULLIVAN. Our Constitution is a very important symbolic commitment to equality that speaks volumes. As Patricia Arquette says, it has a trickle-down effect into the rest of the private sector as well when we declare our public equality.

But why it is needed is we never have had sex discrimination treated the same as other forms of discrimination. Under interpretations of equal protection, it might be allowed in ways that the ERA would help to cement.

Second reason why it is necessary, and I want to focus on you, the Congress, Section 2 of the Equal Rights Amendment gives to you, the Congress, the power to enforce the amendment by appropriate legislation.

Up until now, the Supreme Court has interpreted your power under the enforcement clause of the 14th Amendment and under the commerce clause to be quite limited in addressing sexual assault, sexual violence, and other unequal treatment of women.

You would gain power to once and for all help to rectify patterns of discrimination that the states have failed to rectify and that is a very important, and I would argue, essential aspect of the ERA.

Ms. DEAN. Thank you. And on the issue of, oh, this will just grant unfettered rights to abortion, I think it is, obviously, a specious argument, a false argument.

But I do come from the experience of being six and a half years a state legislator in the Pennsylvania House. So I would like to flip that abortion argument on its head and say wouldn't the ERA actually help us—wouldn't it actually tamp down the false lousy legislative proposals that we see session after session in many of our state legislatures that are, clearly, anti-abortion, they are, clearly, unconstitutional but we face them every single year, isn't it possible if we enshrine in our Constitution equal rights, then those equal rights under the law including Roe v. Wade and others would be further protected—not expanded, protected?

Ms. SULLIVAN. Are you directing that to——

Ms. DEAN. Yes. I am sorry, Ms. Sullivan. Yes. Thank you.

Ms. SULLIVAN. Yes. The equality of men and women—reproductive rights are a very important aspect of the equality of men and women.

People feel divided about abortion in this country because people of good will on both sides have passionate commitments about the difficulty of the decision and no woman who ever has an abortion treats it as anything other than a difficult decision.

But the ERA would enshrine the principle of equality. It would leave for another day the interpretation of whether some limits might be allowed as they are now or whether some limits go too far and impose an undue burden, as we have now.

I do think that it distracts from the debate about equality to try to make those debates the focus of our attention now. It won't be activists in pamphlets or lawsuits who determine the meaning of the Equal Rights Amendment.

It will be the Supreme Court, and the Supreme Court has had a balanced approach until to date. Conservative justices reaffirmed Roe v. Wade, the core of Roe v. Wade, when they sat on the court, and we will continue to have that debate.

But it is no reason not to adopt the ERA now.

Ms. DEAN. Thank you, Mr. Chairman. I thank all the testifiers for coming before us.

Mr. COHEN. And I thank the two ladies from Pennsylvania, who stayed within their time limit, showing great restraint.

And now I recognize the two great ladies from Texas, starting with Ms. Garcia.

Oh, I am sorry. Excuse me.

Mr. Jordan, do you want to—you are recognized for five minutes.

Mr. JORDAN. Well, I—Mr. Chairman, I thank you, and I would like to yield to the ranking member from Louisiana.

Mr. JOHNSON of Louisiana. Thank you, Mr. Jordan. Thank you, Mr. Chairman.

Just real quickly on the procedure, and I am really grateful. We have benefitted in this subcommittee by some great back and forth dialogue. We have agreed it has been some of the most productive because we can talk with really intelligent people about these tough questions and this one does regard procedure.

But I, of course, agree with Ms. Foley. But to show my bona fides as a textualist, okay, I actually do have the text of the Constitution and Article 5, and it says that—the phrase that Ms. Foley referenced, the mode of ratification may be proposed by the Congress, was referenced in Dillon because they were, of course, quoting Article 5.

So at least—I mean, a textualist can look at that in good faith and say well, that speaks to the Congress having the ability to set a time limit, to do it in a certain way, and if they did it that way then it would—it would take an equal effort to overturn it.

So let me ask each—Ms. Sullivan, Dr. Spearman, and Ms. Arquette—your personal opinion about an unrelated question. Some people are arguing in the Supreme Court this term, as we all know, that the word sex in the federal civil rights laws includes self-professed gender identity.

Is it your understanding that the term sex in the ERA also includes self-professed gender identity and, if so or it not, why is that? Maybe just to each of you.

Ms. SULLIVAN. The ERA will prohibit discrimination on the basis of sex. If there is discrimination on the basis of gender in the treat-

ment of gay or lesbian or transgender people, then that will count as unconstitutional under the ERA just as the Supreme Court is about to decide whether it counts as unconstitutional under the equal protection clause.

Mr. JOHNSON of Louisiana. What is your opinion on that, though?

Ms. SULLIVAN. I think the proper textual reading of the term on account of sex does include discrimination on the basis of sexual orientation or transgender identity, and that is just a textual reading of the term on the basis of sex.

Mr. JOHNSON of Louisiana. Okay. Dr. Spearman, do you agree with that?

Ms. SPEARMAN. Yes, I do. I think that when you talk about on the basis of sex, gender identity is a new way of saying this is who I am.

But I want to go a little bit further because one of the other hats that I wear is that of an ordained minister and I belief that if—and I happen to be Christian—and I believe that if the founder of my faith were here today he would probably say something like this: It really doesn't matter because, remember, I said whosoever will let them.

Mr. JOHNSON of Louisiana. Well, we both believe in redemption. I am a fellow Christian, but there is different interpretations on the Scripture. We will save that for another day. I would love to have a talk with you and talk about it.

Ms. Arquette, do you agree?

Ms. ARQUETTE. Well, I am going to answer that in the only way that I know how. My sister, Alexis, is a transgender woman. I spent my whole life sharing a bathroom with her and the only dangerous thing about it was who was going to use the last of the toilet paper.

And my sister—literally, I heard stories after she died of how she broke down bathroom doors to save people, to save people from danger.

So I would—I love my sister. I want trans people to have equal rights under the law, and the highest group of kids who are getting raped in college are trans students.

Mr. JOHNSON of Louisiana. I agree, but—reclaiming my time because we are almost out—but would the ERA include—the term sex in the ERA does that include gender identity? In your view, should it?

Ms. ARQUETTE. I would like it to, but I know that is going to be argued in court. I would like trans people, LGBT people, everyone—everyone to have equal rights under the law.

Mr. JOHNSON of Louisiana. Thank you for the answer.

Professor Foley, do you think there may be a reluctance on the part of the majority in this Congress to simply reissue the ERA to the states without any ratification deadline because they know that if that were done there would follow a torrent of litigation to answer all the dicey legal questions you presented in your testimony and that we have talked about today?

Ms. FOLEY. Yeah. I mean, I think it would happen. It, clearly, would happen and I am pretty confident about how it would come out when it ultimately reaches the Supreme Court.

If the ERA is ratified by another state and they purport that that ratification is valid or if this Congress extends the ratification deadline by simple majoritarian processes and the ratification of the 29th state occurs them—the 38th state—we are going to have a problem on our hands.

I think the Supreme Court is going to say that is not a valid constitutional amendment and, by the way, that is not good for the country, I would assume. Nobody really wants a situation where you get all the energy involved in passing a constitutional amendment.

It is an important issue. You go to all that time and trouble and it gets reversed by the Supreme Court. It is not good for the ERA. It is not good for those who support gender equality. It is not good for the country to take the country through that process.

If you think this is an important enough issue, you need to do the process right to have it stick.

Mr. JOHNSON of Louisiana. And wouldn't it set back the prospects for the ratification of future amendments if states knew that Congress could just subsequently alter the terms of ratification?

Ms. FOLEY. Yeah. I mean, I think we get ourselves into a giant quagmire and we may never get ourselves out.

Mr. JOHNSON of Louisiana. Thank you. I am out of time.

Mr. COHEN. So is Mr. Jordan. [Laughter.]

Mr. COHEN. Thank you. I recognize Ms. Garcia, an outstanding member from Houston, and we will be in her district on Friday trying to get—having a hearing on the voting rights.

Ms. GARCIA. Thank you, Mr. Chairman, and you know, for me, I sort of go back to back to when I was in college and remember still, you know, being the bright-eyed bushy-tailed student who believed they could change the world and one of the things I was going to help go do in Austin, Texas, our state capital, was to make sure that all those legislators passed the ERA in Texas.

So I was there for that hearing and who would have thought then that I would be here now today at this hearing and that we still haven't gotten the darn thing passed.

So, for me, it is sort of a little déjà vu feeling to be here. But I am so glad that I am, and because the Pennsylvania ladies bragged, I will too, because not only am I here, I am also here with my friend and colleague, Veronica Escobar, who, together are the first two Latinas to ever be elected to the United States Congress from Texas.

[Applause.]

Ms. GARCIA. So we not only have witnessed history, we are making history. But, unfortunately, history has not treated us well as women because even though, as my colleague and the author of the bill talked about, Abigail Adams' note of—to remember the ladies, obviously, they did not, and that is why we are here today to correct that, to make sure that the whole world knows, as some of the witnesses have stated, that in this country we do treat women equally.

Ms. Sullivan, I wanted to start with you, and before I get to the question I just—I am also troubled because I have been involved in the feminist movement for many years, beginning as a law student and as a student. This whole nonsense of this impacting re-

productive rights and this whole idea that the right to an abortion, it may be impacted by the ERA.

I mean, you know, I still remember the—as a law student reading Roe v. Wade and Planned Parenthood and Casey cases and so many after that. The ERA and what we are talking about here today was never mentioned in any of those cases, was it?

Ms. SULLIVAN. It was not.

Ms. GARCIA. And that would be because it is actually from really in the right to privacy under the Constitution that those cases were decided. So anything we do with this bill or any future bill on the ERA has nothing to do with the right to privacy?

Ms. SULLIVAN. That is correct.

Ms. GARCIA. And do you recall how many times the Constitution uses the word woman?

Ms. SULLIVAN. That would be zero.

Ms. GARCIA. Zero. [Laughter.]

Ms. GARCIA. Well, that is another reason for correcting things today, isn't it?

Ms. SULLIVAN. Yes, it is.

Ms. GARCIA. Well, and there is an argument to be made, and I noted that some have said that this whole idea of the deadline, there is no deadline in the actual text of the bill that passed for the ERA, is there?

Ms. SULLIVAN. There is no deadline in the text of the amendment.

Ms. GARCIA. Correct.

Ms. SULLIVAN. And that is all that Article 5 speaks to, and there is no—therefore, you can change the deadline because it is only in the preamble.

Ms. GARCIA. Right. So is that the best answer to the arguments that Congress cannot just change it is in fact there is nothing to change because it is not in the text?

Ms. SULLIVAN. It is not in the text of the amendment and to the extent you have the power to put it in the preamble and control your own procedures, what Congress makes for its own procedures Congress can unmake.

And I disagree with my friend, Professor Foley, that we would have a lot of litigation on it because the current law is it is nonjusticiable, and for good reason. We don't want the court to decide whether amendments are valid are not because amendments are the only way we control the court.

You don't want foxes to guard henhouses. You don't want the court to guard the process by which its own decisions can be overruled. And so I don't think it would be tied up in court. I think you have the power and a court can't strike it down if you exercise it.

Ms. GARCIA. Right. And didn't one case actually say that it was the power of Congress to do that?

Ms. SULLIVAN. Absolutely.

Ms. GARCIA. Absolutely. Well, I am so glad to hear you say that because it seems to me that the main arguments that I keep hearing this morning, the relationship to abortion and that you can't change it—that really wasn't in text just seemed to go away, and I, for one have been waiting a long time since I was that bright-eyed bushy-tailed student.

I may not be as bright-eyed and bushy-tailed today as a member of Congress but I can tell you that I am going to work like heck to make sure that this gets done.

So thank you for being here today. Thank you, Mr. Chairman.

[Applause.]

Mr. COHEN. Thank you, and Ms. Escobar is recognized presently. She is another star of our freshman class.

Ms. ESCOBAR. Thank you, Chairman. So proud to be here with this room filled with history makers and advocates. I want to thank all of the witnesses who have come before us to testify.

I would like to thank my colleagues, Congresswomen Speier and Maloney, for being such dogged advocates for what is right, what is good, what is just, and what is about time.

I would like to ask the senator a question because, Senator, you worked so hard. I loved your description of how hard you worked in your state to get this done, and one of my colleagues, Congressman Johnson, asked a witness a little while ago to opine on whether there is popular support or not.

I would like for you to opine, based on your experience in getting this passed in your state, why would anyone be against an equal rights amendment?

Ms. SPEARMAN. Thank you, Congresswoman.

You know, it struck me as we were here the very fact that we are debating equal rights for women is, in itself, rather abominable considering we are considered the free nation of the world.

So let me just say this. Was it difficult? Yes, it was, because we heard very similar arguments in Nevada. There were people who were afraid for some reason that it would expand abortion rights. There were people what were afraid that it would bring about some type of controversy over bathrooms.

But the simple matter it just wore down to this. The people of Nevada respect, enjoy, and support equality. And so when it came down to the vote, some thought it was partisan.

But at the end of the day, we knew it was about equality. That is all it is about. It is about equality, and I have no idea why in God's name this is such a big hurdle to get over. It is about equality.

But then—oh, wait a minute, hold on, because I have lived my life in all majority populations and so when it comes to equality at every step of the game I have heard these same arguments. You know, if you—if you do this, then that will mean that black people can drink out of water fountains.

If you do that—you know, all of these arguments always come up when we talk about equality. That is the only time it comes up. The people of Nevada stood with me. My colleagues in the Senate stood with me.

My colleagues in the Assembly stood with me. And you know what? We even had a Republican governor and even though he didn't have to sign it he even put out a statement that he was for equality.

So the people of Nevada recognized it is not about putting your hand in the air and seeing which way the wind blows. The people of Nevada recognize it is about equality, period.

Ms. ESCOBAR. Thank you so much, Senator.

[Applause.]

Ms. ESCOBAR. And to your point, so much of this is rooted in fear, unfortunately, and Ms. Arquette, you and I—I had the privilege of having a great conversation with you recently and thank you, by the way, for sharing such personal stories with the public as a way to getting all of us to open up our eyes and feel some compassion.

You have made the point over and over again about the economic value of equal rights, equal pay, in particular, and I appreciate that you have always pointed out minority women are paid significantly far below even white women.

And so I would like for you to expand a little bit, please, if you wouldn't mind, because that conversation was so powerful, about the economic benefit to equal pay and equal rights.

Ms. ARQUETTE. Well, I think it is pretty crazy. If you are a Latina woman and you are making $0.54 compared to your white male colleague with the same position, you are basically paying a 46 percent tax—gender tax—and I don't think I could find one man out there where I could say, "Hey, how about you just take a 46 percent gender tax? Is that cool?" [Laughter.]

Ms. ARQUETTE. Nobody would accept that. I mean, there is a reason why we have millions more women in poverty when they are old. It follows you your whole life. It impacts you your whole life, and it cross over itself.

Listen, if you are paying a black woman $0.61 on the dollar, so now she is paying the, what, 49—39 percent gender tax. So she may have to take on an extra job now.

So say this woman is a single mom. Now she has to have two jobs to make the same amount of money she would have made that her male colleague made, and she is a single mom with two jobs.

Here is one way it impacts you. Black women are less likely to get breast cancer but more likely to die from it, and why is that? When you have two jobs and you are a single mom—not that all black women are single moms or struggling with two jobs—but I am just saying in this case, to take your time off to take care of your sick kid, you don't have time to take off to get a breast—you know, breast exam—a wellness exam.

So this is killing women. It really is killing women. When we have Native American women and black women dying in childbirth, when we have women not able to get cervical pap smears for completely treatable cancer, because HPV—human papillomavirus—80 million Americans have it.

So when we don't—when we are closing clinics and we are not giving women access to health care, we are giving them a death sentence. We are going to let people have cancer.

Ms. ESCOBAR. Thank you.

Ms. GARCIA [presiding]. Thank you, Congresswoman.

Next, we will hear from Mr. Gohmert from Texas.

Mr. GOHMERT. Thank you, and I don't know of anybody on either side of the aisle that feels like women should be making less than men. I don't know that we need a equal rights amendment to justify or even to—well, it should be to justify inequality in wages. It ought to be equal, period.

But having heard at this hearing that sex in the equal rights amendment includes gender identity, which we know absolutely is not an immutable difference. It is a difference that sometimes someone feels one way, even has a sex change operation, later feels another way.

Happens frequently. I have friends that have been from one side to another. It does create issues, and as someone who has sat repeatedly as a judge in sexual assault cases and I have heard the testimony and I have read the medical data that women are much more likely to suffer—who have been a victim of sexual assault are many times more likely to suffer from PTSD than male soldiers are, and there is different theories for why that is, and that a woman in a private area like, say—example, a restroom are confronted by what absolutely appears to be a man by all external appearances is caused to suffer that trauma all over again, I can't fathom wanting to see something passes that forces women over and over against their will in private areas to face men from all biological ways of determining, and suffering those traumas again.

So I have grave concerns about that. Without an ERA, women will, hopefully, not be forced into that. With an ERA, from what we have heard today, they will be forced into that.

And having lived through the debates over Obamacare and having seen the data indicating that when a certain size tumor is found in the U.K. and the United States, before Obamacare the U.S. person, whether poor or wealthy, had a 20 percent chance better of surviving than someone in the U.K., and then somebody that comes from a home of women, I don't want to see somebody die among my family simply because we adopted some kind of socialized medicine.

And as someone who fled Cuba said earlier this morning in a meeting, you know, he went—he went—forewent the opportunity to have free education and free healthcare to risk—and risk life to get to a place where there wasn't free health care and free education.

Professor Foley, some claim the ERA has wide popular support. If that is so, can you explain why people are pushing this method of reopening the ERA instead of just saying let us re-offer it—let us get a new time of termination and start all over again? Why is that, if it is so popular?

Ms. FOLEY. Yeah. I mean, it is a good question. I mean, I don't know the answer. I can speculate. My guess is—and my guess is based on what the proponents are saying today—and I see two themes, okay, and this is from a person, again, who—you know, if you ask me in the abstract if I were a member of Congress if I would support a proposed ERA in the right procedural way, the answer would be yes. I am a woman, okay.

But would I support it knowing that these sort of sub rosa agendas are being articulated by its proponents today, that would cause me to hesitate.

Those two sub rosa goals seem to be, number one, I think trying to entrench abortion and give it a new constitutional status because there is concern that the new Supreme Court, which is leaning more to the right, is going to roll back some of the protections for abortion.

So that concern exists. I think it is probably valid, given the fact that the Supreme Court has become more conservative, and I think what they would like to do is sort of have an ERA in there so that it would breathe new life into the right to abortion.

Maybe not now with the current conservative court but, certainly, laying the seeds for the future that regulations of abortion, late-term abortions, things right now that are passing constitutional muster maybe later on wouldn't on the basis of that amendment. That is one possibility, and you say them articulate that themselves. So it is what it is.

Second thing is I find it a little bit ironic as a woman that one of the other big sort of sets of proponents of the amendment is the LGBTQ community.

I understand why they want it and I think you heard from the three members of the panel that they think that if the ERA was passed that the—on the basis of sex would include transgender and LGBT rights.

So and I find that a little bit ironic because, remember, we have been historically talking about women's rights and now I think we are moving a little bit beyond that.

So I think that those are the two things I think that give members of Congress concern.

Mr. GOHMERT. Thank you. I yield back.

Ms. GARCIA. Next is my colleague and friend from Houston, Congresswoman Sheila Jackson Lee.

Ms. JACKSON LEE. Thank you, Madam Chair, and my long down-out-the-end position on this committee is my desire to be on this committee and take whatever seat I could get because I knew the crucialness of this work.

And I want to thank Chairman Cohen and as well I want to thank full committee chair Mr. Nadler and I want to thank Mr. Johnson, the ranking member, for recognizing that women cannot wait.

In my long litany of questions, let me try to be as pointed and brief as I possibly can. But this brings back memories of the debate of the 13th Amendment and opposition can be found for anything.

Who would imagine that there would be this vigorous debate in this fight as evidenced by history and the work of President Lincoln to get this nation to stand against slavery and the debate why we should do it.

And so I want to be able to answer the question that was asked by my good friend from Texas. We begin this all over again. This will implode the 35 states we already have because now more are tuned to the arguments there will be a mountain of opposition, false premises, the false premise of abortion, even though the 9th Amendment and various cases have indicated a woman's right to choose, and we might not even get to the 35 that we already have.

So let me thank Congresswoman Speier, whose language is very clear, stating that notwithstanding any time limit contained in the original ERA, the ERA shall be valid to all intents and purposes when ratified by the legislature of three-fourths of the states. Very simple.

And my good friend, Carolyn Maloney, who I have stood by all these years, equality of rights under law shall not be denied or abridged. Simple language that speaks to the necessity of justice.

Let me remind my good friend, Carolyn Maloney, as I go to my questions very quickly that we went to Afghanistan and we helped them write their constitution.

Many women from this country went and they wrote in that constitution, that war-torn nation, though we have many more miles to travel, the rights of women and we are still fighting for it in the United States.

I want to go to Professor Sullivan again and tell me—we have the 14th Amendment—and my time is short—why do we need an ERA? I want it to be, again, restated. That is, of course, the equal process—equal rights under the law. Why do we need the ERA?

Ms. SULLIVAN. The 14th Amendment protects all of us equally. But the ERA would protect specifically against sex discrimination.

Sex discrimination has its own history and its history is parallel to in many ways and different in other ways from the history of race discrimination in our country.

Nobody ever—sometimes people said women were placed on a pedestal that became a cage when we were protected out of being lawyers or bartenders or sitting on juries or voting. But nobody ever confused a pedestal with an auction block on which people were sold as chattel.

So it does honor to our history. The origins of the 14th Amendment expressed our most basic commitment that race discrimination was to ever be ended in America.

But we must also state that sex discrimination is to forever be ended in America and we must state it explicitly and not just do it by analogy to erase discrimination.

Ms. JACKSON LEE. Let me ask—thank you so very much, Senator Spearman, and thank you for your leadership. I will convey your regards to my dear friend, a council member in Houston.

And then to Ms. Patricia Arquette, I want to get my questions on the record so that you can ask and they can be answered.

But to Senator Spearman, I imagine you received any manner of threats and accusations as well as distorted opposition.

Give us just a snippet—you may have done so already—again about the possibility of opening this up again, as my good friend from Florida, Professor, and I hope that in this hearing we have convinced her that the idea of any reopening would be a dastardly act as it relates to moving toward our ultimate agenda.

And to Ms. Arquette, thank you for your passionate statement. I am a breast cancer survivor. I am well aware of the plight of African-American women and all women and, frankly, the Equal Rights Amendment.

I would like to hear from you as to isn't it about time for us to achieve that place of equality? Senator, please.

Ms. SPEARMAN. Thank you, Ms. Jackson Lee.

The opposition that we had in Nevada was very, very similar to the opposition that I heard when I was in high school. The only difference was it has just a little bit more seasoning.

There were people who were continuing to say that this would have something to do with women in combat and women were al-

ready in combat. There were people that said—one lady even came to the stand and said, if we pass the ERA—if we pass the ERA then that will allow women to marry the Eiffel Tower. I lie to you not. Go back and check the record. Women to marry the Eiffel Tower.

And so passing the ERA—when we get this close—when we get this close, the only thing to fear is fear itself. That is the only thing to fear. And as I said before, you know, I find it laughable if it weren't so tragic.

People who are born in privilege always debate whether or not those of us who were not deserve equality. And so what we are talking about here——

[Applause.]

Ms. SPEARMAN. What we are talking about here is the fact that equality is not debatable. We are born with it. The only thing we are asking of the ERA is to acknowledge the fact that women are born equal to men.

And if you are born in privilege you have no idea what I am talking about.

Ms. JACKSON LEE. Thank you so very much Mr. Chairman——

[Applause.]

Ms. JACKSON LEE. Would you ask unanimous consent for Ms. Arquette to at least finish my answer? I will not ask her a question. I have already done so. But I also thanked you in your absence. I just want to make sure you know how much I appreciate this hearing.

Would you—may I please? Thank you.

Mr. COHEN [presiding]. Thank you. And while I would like to be a director and say "Cut" I ask you to just be brief in your response.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Ms. ARQUETTE. Let us face it. People didn't want to give women equal rights in the 1870s when there were no abortion laws. They didn't want to give women equal rights in the 1980s when we already had abortion laws, and you don't want to give them to us now in 2019 when we already have abortion laws protecting us.

So you just really don't want to give us equal rights. That is really what it comes down to. There are these fears and do you know how scary it is to be a woman in the United States of America?

You are scared someone might go to the bathroom? Women are being raped everywhere. Kids are being raped on school buses. People are being raped in institutions of God—houses of God.

Stop. We can no longer be held back. We need equal rights.

[Applause.]

Mr. COHEN. That is a wrap.

[Laughter.]

Mr. COHEN. I now move to enter into the record a letter from the American Association of the University of Women and a letter and related materials from Helene Swanson on behalf of the organization of Katrina's Dream.

Without objection, that will be done.

[The information follows:]

MR. COHEN FOR THE OFFICIAL RECORD

April 29, 2019

Representative Steve Cohen
Chair
Subcommittee on the Constitution, Civil Rights and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Representative Mike Johnson
Ranking Member
Subcommittee on the Constitution, Civil Rights and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee:

On behalf of the more than 170,000 members and supporters of the American Association of University Women (AAUW), I thank you for the opportunity to submit this letter for the record for the Subcommittee's hearing on the Equal Rights Amendment. While women have made significant gains towards equality throughout history, the Constitution has yet to specifically guarantee that men and women have equal rights under the law. The Equal Rights Amendment (ERA) would, once and for all, guarantee constitutional equality between men and women. It is time Congress took action to ensure a path towards ratification of the ERA and to establish equal rights under the law that cannot be denied or abridged on the basis of sex.

The ERA was first introduced in Congress in 1923 and was re-introduced every year until its passage in 1972. The proposed constitutional amendment required, and achieved, approval by two-thirds of the U.S. House of Representatives and U.S. Senate. After passing out of Congress, the ERA needed to be ratified by three-fourths of all states in order to be included as an amendment to the Constitution. Congress placed a seven-year deadline on the ratification process. By 1977, 35 of the necessary 38 states approved the ERA. As the deadline neared, advocates successfully pushed Congress to extend it until 1982. But, even with the extended deadline, the ERA still fell three states short for ratification.

However, in the years after the 1982 deadline, several states have revisited the ERA and taken action to include women in the Constitution, reigniting strategic discussions about the legal path towards ratification. In 2017, Nevada became the 36th state to ratify the ERA. One year later, Illinois followed suit and became the 37th state, leaving us just one short of the three-fourths requirement. Last month, Virginia came close to being the 38th and final state needed to ratify the amendment. Legal scholars have suggested that if, and when, the requisite 38 states approve the ERA, there is precedent for accepting it and including it in the Constitution.[1] For example, the Madison Amendment was introduced 203 years before its addition to the Constitution—it was proposed in 1789, but not ratified until May 7, 1992.[2] This example has led scholars to argue that the ERA remains legally viable.[3] Thus, if a 38th state ratifies the ERA, there are persuasive grounds for that action creating a pathway towards including it in the Constitution.

If necessary, Congress also has the power to take action to ensure the ratification of the ERA. Currently, there are two solutions before the U.S. Senate and U.S. House of Representatives that would support the process toward ratification of the ERA. S.J. Res. 6[4]/H.J. Res. 38,[5] often referred to as the "three-state strategy," is a bipartisan resolution eliminating the ratification deadline from the 1972 ERA bill. If passed, the existing 35 state ratifications would still be in effect, and only three additional states would be needed to successfully ratify the ERA.

Another resolution, S.J. Res. 15[6]/H.J. Res. 35[7], typically referred to as the "start-over amendment," mirrors the language of the 1972 ERA. If passed by a two-thirds vote of both chambers of Congress, this amendment would follow the process set forth by the amendment passed in 1972 and restart the ratification process, requiring the approval of three-fourths of all states.

Women continue to make progress toward equality through the courts and through passage of state and federal legislation, all of which has significantly improved women's lives. The ERA, however, would clarify, once and for all, that sex discrimination—in, for example, employment, health care, insurance, Social Security, education, and many other aspects of daily life—is a violation of our constitutional rights. By guaranteeing constitutional equality, ratification of the Equal Rights Amendment will give women new avenues of legal recourse when they face sex discrimination.

Women in the United States have waited long enough for the ratification of the ERA, and Congress has the power to help realize this goal. We must take action to ensure constitutional equality for all.

I want to thank the Subcommittee for holding this important hearing on the Equal Rights Amendment and for entering this statement into the record. Cosponsorship and votes associated with these bills and amendments may be scored in the AAUW Action Fund *Congressional Voting Record for the 116th Congress.* Please do not hesitate to contact me at 202/785-7720 or Pam Yuen, Senior Government Relations Coordinator, at 202/785-7712, if you have any questions.

Sincerely,

Deborah J. Vagins
Senior Vice President, Public Policy and Research

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[1] Allison L. Held, Sheryl L. Herndon, and Danielle M. Stager. "The Equal Rights Amendment: Why the Era Remains Legally Viable and Properly Before the States" 3, no. 1 (1997). https://scholarship.law.wm.edu/wmjowl/vol3/iss1/5/.
[2] *Id.*
[3] *Id.*
[4] A joint resolution removing the deadline for the ratification of the equal rights amendment, S.J.Res.6, 116th Cong. (2019).
[5] Removing the deadline for the ratification of the equal rights amendment, H.J.Res.38, 116th Cong. (2019).
[6] A joint resolution proposing an amendment to the Constitution of the United States relative to equal rights for men and women, S.J.Res.15, 116th Cong. (2019).
[7] Proposing an amendment to the Constitution of the United States relative to equal rights for men and women, H.J.Res.35, 116th Cong. (2019).

Let's Pass the Equal Rights Amendment Educational and Advocacy Pack

Let's Pass the Equal Rights Amendment
Educational and Advocacy Pack
Hélène de Boissière Swanson, Founder Katrina's Dream
PO Box 32003, Washington, DC 20007
April 30, 2019

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"If I could choose an amendment to add to the Constitution, it would be the Equal Rights Amendment. I think we have achieved that through legislation, but legislation can be repealed, it can be altered.

So I would like my granddaughters, when they pick up the Constitution, to see that notion – that women and men are persons of equal stature – I'd like them to see that is a basic principle of our society."

Supreme Court Justice Ruth Bader Ginsburg

Introduction

Since 1923, when the "Lucretia Mott Amendment" crafted by Crystal Eastman and Alice Paul and then later became known as the Equal Rights Amendment (ERA), it has been introduced into every session of Congress to this present day. On March 22, 1973, the United States Congress adopted a resolution to amend the U.S. Constitution to provide equal rights for men and women. The 1972 United States Senate voted on H.J. Res. 2008 was 84 to eight. The House had already approved of the resolution in 1971 by a vote of 354 to 24. In order for the proposed Equal Rights Amendment to become part of our constitution it required that three fourths of the states, a total of 38, must ratify the amendment.

At the beginning of 1979, 35 states had rapidly ratified the amendment. Then process stalled out. Following the passage in 1992 of the "Madison Amendment", which took no less than 203 years to be ratified, the introduction of the "Three State Strategy" legislation in our U.S. Congress has resultant in significant resurgence on both the state and federal level and in society. Both S.J. Res. 5 and H.J. Res. 52 remove the Congressionally imposed deadline for ratification of the Equal Rights Amendment, so that if the bill passes Congress, the states will have no deadline as they did in 1982.

On March 22, 2017, 45 years to the day after Congress passed the ERA, Nevada became the 36th state to ratify the ERA in the 21st Century. On May 30, 2018, Illinois followed suit becoming the 37th state to ratify. Leaving only one more state to ratify.

ERA bills have also been introduced in the legislatures across the country Arizona, Florida, Georgia, Missouri, North Carolina, Utah, and Virginia. Leaving only one more state to ratify.

Women and human rights proponents argue that the Equal Rights Amendment is needed because discrimination on the "the basis of sex" is firmly imbedded in our legal system. It is their position that any system of dual rights and responsibilities lead to one group's dominance. Ones' sex and or gender identification is not a permissible factor in determining women and human rights that such classification denies individual rights.

ERA proponents state that at present, state and federal legislation has not eliminated sexual discrimination in many aspects of life and varies from state to state costing million in tax dollars to address the systemic issues arising from inequality under the law of the sexes. A constitutional amendment would provide the necessary mandate for legislation in litigation. The Equal Rights Amendment is both a symbolic and a practical instrument for change.

II SUPPORTING DOCUMENTS

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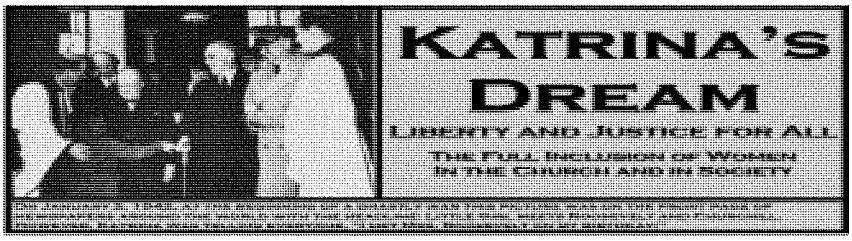


April 30, 2019

Honorable Senators of the U.S. Senate
Honorable Representatives of the U.S. House of Representatives
United States Capitol
East Capitol St NE & First St SE
Washington, DC 20004

Dear Honorable U.S. Senators and Representatives:

I write to you our most honorable statespersons of the United States of America with the expressed purposed of asking for your support in the removing of the deadline imposed on the Equal Rights Amendment some odd 45 plus years ago. I am asking that you vote Yes to move it out of committee expediently and again Yes when the resolutions come to the floor for a vote.

On August 2005, on the eve of a Hurricane bearing the name Katrina, The Rev. Katrina Martha Van Alstyne Welles Swanson died. It was Women's Equality Day. Katrina was one of the Philadelphia Eleven, the first group of women to be ordained and retroactively recognized as the first women priest in the Episcopal Church. Katrina knew that the county she loved would one day treat all people with dignity with respect and that all would be equal. That America that would welcome her all people with Equal Rights. In the months following her death the Welles, Swanson, de Boissiere, andvon Rudl families came together to promote her dying request, the passage of Equal Rights Amendment and Katrina's Dream was founded.

There are a large number of Americans, both the living and the dead, for whom I speak. *A cloud of witnesses* who have been waiting for the Equal Rights Amendment to be ratified by one more state and become a part of our U.S. Constitution.

It is my great honor to ask that you remove the deadline so that all are equal.

Love and Light in Christ,

Hélène de Boissière - Swanson

Hélène de Boissière Swanson, Founder
Katrina's Dream

Board of Directors
Bishop Musonda Trevor Selwyn Mwamba † Rev. Robert Tytus Coolidge † William Ross MacKaye † Hélène de Boissière - Swanson
P.O. Box 32003 † Washington, DC † 20007

WOMEN IN THE CHURCH AND IN SOCIETY

PART I : KATRINA'S STORY
THE REV. KATRINA MARTHA VAN ALSTYNE WELLES SWANSON

On January 2, 1942, after the bombing of Pearl Harbor the United States of America joined as an Allied Power in a ghastly war, this picture was on the front page of newspapers around the world with the caption: Little Girl Meets Roosevelt & Churchill.

However, Katrina was telling everyone, **"I met Mrs. Roosevelt on my birthday!"** Mrs. Roosevelt is just behind Churchill. This young feminist picked the winner out of the pack she met on January first! However, as the daughter, grand-daughter, and great grand daughter of traditional minded Anglo-Catholic priests and bishops, she accepted the fact that if she had been a boy she would have become a priest. But as a woman she planned to be a social worker.

Working in Botswana, Africa, Katrina, her husband George, and their sons Olof and William often stayed with Mrs. Lekgaba, a business woman and church leader when the Swansons visited Sabinas. Mrs. Lekgaba came from a clerical family like Katrina: Her father and brother were priests in Rhodesia. She ran a fleet of large British lorries which moved passengers and goods throughout her district on the edge of the Kalahari Desert. Although she was the de facto pastor and leader of the Anglican congregation in her town, the Anglican Church would not allow women to lead any public worship. They had to hire abusive, alcoholic men to lead their prayer services.

After returning home, Katrina began to see that God must want women to be priests, as well as men.
She called her father to make an appointment. "When does my daughter need an appointment to see me?" "I need an appointment for this.

She told him that she believed she had a vocation to priesthood. Katrina had no idea how he would receive the news. He had been a leader among traditional clergy and laity who defeated the proposed merger with the Presbyterian Church in the 1940's. His grandfather, the first Bishop Edward Randolph Welles, had encouraged the building of cathedrals across the country, welcomed Episcopal monks and nuns, and helped write the Chicago Lambeth Quadrilateral defining traditional Episcopal and Anglican requirements for any future church unions. Her father surprised her by saying he had approved of women's ordination since reading "Women and Holy Orders" by Charles Raven in 1928. Katrina and George republished Raven's book in 1975.

One of the "Philadelphia Eleven," Katrina and her father helped organize the 1974 irregular ordination of the first eleven women priests in the Episcopal Church USA. Katrina's seventeen year bi-lingual ministry as rector of St. John's Parish in Union City, New Jersey, was an uphill struggle filled with love. She celebrated the Eucharist bilingually in Spanish and English and founded and led a bilingual afterschool program for over a hundred children ages 5 to 18. She served on the board of a hospital and a homeless shelter. Katrina retired to Manset, Maine in 1996.

After being diagnosed with inoperable colonic cancer Katrina was cared for by Hospice at home in Manset during her sixteen month illness. She looked forward to the other side of death.
Her college roommate, Jean Maryborn, said, "For years you have taught us how to live. Now you are teaching us how to die."
She told friends of the eight books that "have influenced the way I live my life." They are:
"A Town Like Alice" by Nevil Shute, "Black Elk Speaks" by John Neihardt, "Man's Search for Meaning" by Victor Frankl, "The Healing Light" by Agnes Sanford, "The Hiding Place" by Corrie ten Boom, "The House of Prayer" by Florence Converse, "The Power and the Glory" by Graham Greene, and "The White Witch" by Elizabeth Goudge.

In the year before her death Katrina and her daughter-in-law, Hélène Patricia nee Carpenter de Boissière-Swanson, spoke often about the absence of women's rights under U.S. law. Like Alice Paul, Katrina and Hélène knew women's rights would only be realized in U.S. law by amending the U.S. Constitution.

Katrina died peacefully while a hurricane bearing her name was showing Americans how much liberty and justice poor folk had in New Orleans and in America. She had learned this years before. When the Equal Rights Amendment failed to pass, Katrina realized that she was a second class citizen like every other woman in America.

Her 17 years as an inner city Episcopal priest taught her that poverty limited how much liberty and justice one could get. In the Pledge of Allegiance Katrina always said, "With Liberty and Justice for Some. Justice was important in her family. Her great great uncle had been run out of antebellum Vicksburg for preaching abolition. Her grandfather founded an inner city mission in Cincinnati and was later run out of Chelsea, Oklahoma for giving Holy Communion to a Black priest at the altar rail.

Hélène de Boissière-Swanson, William Gaines Swanson, Rev. George Gaines Swanson, and Rev. Robert T. Coolidge founded KatrinasDream.org to carry on the ministry of Katrina Swanson: the full inclusion of both women clergy and lay leaders in the church, the rights of women upheld by the law, and other social justice issues.

In the years following Katrina's death, the organization Katrina's Dream has celebrated a yearly service at churches across the country. These included a service celebrated by Canon Noelle Hall at St. Martin's Church in Canterbury, England during the 2008 Lambeth Conference using a service created by Katrina when she celebrated at St. Saviour's Episcopal Church, Bar Harbor, Maine, on August 8, 2004.

WOMEN IN THE CHURCH AND IN SOCIETY

PART II : KATRINA'S DREAM
EMPOWERING WOMEN AROUND THE WORLD

EQUAL RIGHTS AMENDMENT

The U.S. Constitution does not guarantee equal rights for women. The only right guaranteed women in the United States have is the right to vote. The **Equal Rights Amendment** states:

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

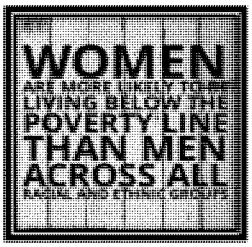
It is a simple statement that would define the meaning of "We the people" to include the majority of the population — women.

HERSTORY

Seneca Falls nourished abolitionism and feminism in the 1840s. Abolitionist Abby Kelly spoke against slavery at an outdoor rally there in 1843. One of her followers was later convicted of *"disorderly and unchristian conduct"* for arguing with the local Presbyterian minister about abolition. Elizabeth Cady Stanton and Lucretia Coffin Mott helped organize the first Women's Rights Convention in 1848. Frederick Douglas' impassioned support helped the convention pass the Women's Declaration of Sentiments which proclaimed: *"All men and women are created equal."*
In 1923 the National Women's Rights party celebrated the 75th anniversary of the 1848 convention. Alice Paul, imprisoned, beaten and force fed for protesting President Wilson's for not supporting women's rights proposed the Equal Rights Amendment at the 1923 meeting in Seneca Falls. Since 1923, activists have been trying to pass the **Equal Rights Amendment** (E.R.A.). U.S. Congress first approved the E.R.A. and sent it to the states for ratification in 1972. Within a year, 30 states had ratified. By the end of the seven-year deadline though, only 35 states ratified — three states short.

WITHOUT THE ERA

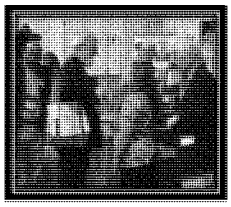
Women fighting for equal pay have no consistent judicial standard for deciding legal cases, with women earning 78 cents for every dollar earned by a man, with African American women and Latinas making even less, 64 cents and 53 cents. The racial gender pay gap remains stalled. According to The Shriver Report (2014), 1 in 3 American women, 42 million women, plus 28 million children, either live in poverty or are right on the brink of it. (The report defines the "brink of poverty" as making $47,000 a year for a family of four.) Two-thirds of American women are either the primary or co-breadwinners of their families. One out of every four women is a victim of domestic violence and one out of every five has been or will be raped. The E.R.A. would help ensure fair consideration in court cases concerning the wage gap and also in cases about domestic violence, rape, forced prostitution and sexual slavery. Finally. The gaps in poverty rates between men and women is wider than anywhere else in the western world with 75 percent of elderly Americans living in poverty which are women.



STEPS TAKEN

The Swanson Family founded Katrina's Dream in memory of her late mother-in-law, Katrina Swanson. Katrina was one of the eleven first women priests who were irregularly ordained in 1974. When the E.R.A. was voted down in the United States Katrina would say the Pledge of Allegiance, *"with Liberty and Justice for SOME!"* When questioned, *"Why 'some'?"*, Katrina would say, *"Because the E.R.A. was voted down retired women are more likely to live in poverty than men."*

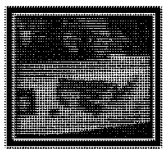
[label pin design created by William Swanson for the 2008 Lambeth Conference, Canterbury, England]



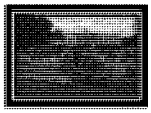
In July 2007, a team was sent to the Lambeth Conference in Canterbury England where they distributed label pins bearing the saying, "God is Beyond Gender" to show their support for the LBGT community and women's rights. William and Helene Swanson received a blessing from Archbishop the Canterbury Rowen Williams for the ministry of Katrina's Dream. Rowen Williams sought out and engaged Helene Swanson regarding her work on women's issues at the Katrina's Dream Exhibitor's Booth at the 76th General Convention in Anaheim, California. There Katrina's Dream was instrumental in the passage of **Resolution 2009**-D042, which called for The Protestant Episcopal Church of the United States of America's to renew its historic support of passage of the Equal Rights Amendment to the U.S. Constitution.
On March 8, 2011, citing support and including Katrina's Dream Letter of Endorsement, Congresswoman Tammy Baldwin (D-WI) chose International Women's Day to introduce legislation / Resolution HJ 47- the "Three State Strategy" to speed ratification of the Equal Rights Amendment (ERA) to the Constitution.

On July 19, 2012, Helene made her first pilgrimage walking 500+ mile_from the Women's Rights National Historical Park in Seneca Falls, NY, on July 19, 2012. The morning of the pilgrimage Helene, William Swanson and the Rev. Robert T. Coolidge took time to have morning prayer at Trinity Episcopal Church. She arrived in Washington DC on August 26, 2012, the 92nd anniversary of the 19th Amendment – the right for women to vote, the only right guaranteed women by the United States Constitution. Swanson walked from parish to parish, as an expression of her faith, to bring attention to the need for an Equal Rights Amendment for the full inclusion of women in society and for LBGTQ Rights.

Helene Swanson, made her second pilgrimage, a 7,000 mile/10,000 kilometer pilgrimage, across the United States promoting the passage of the Equal Rights Amendment (ERA). Helene started her journey on International Women's Day Bridgewalk at the Golden Gate Bridge in San Francisco, CA on March 8, 2014. She slept roadside, at the occasional good Samaritan's home, and in churches along her route. Helene made her way across Nevada, Arizona, Utah, Oklahoma, Missouri, Illinois, Arkansas, Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia all 15 of the 15 non-ratifying states. While on her pilgrimage on March 8, 2015, Helene made an excursion to attend the United Nation's 59th Commission on the Status of Women/Beijing Platform 20. She met up with Lynnaia Main, Global Mission Officer of the Episcopal Church and participated in the United Nations International Women's Day – March and Rally at Times Square, New York City, New York.



Following a prayer service celebrated by Bishop Joe Morris Doss, Swanson and a large group of people held a Women's Equality Day Rally on August 26, 2015 walking the last four miles of her pilgrimage in solidarity to the Upper Senate Park, National Mall, Washington DC to promote Women's Rights. In the days that followed they held a Call To Action Lobby Day where they met with this nation's leaders to demand the passage of the federal Equal Rights Amendment. Both Molly Fishman of US Representative Jackie Spier's office and William Van Horn from Senator's Bill Cardin's Office read a letters in support of the Equal Rights Amendment.



On March 22, 2017 the Nevada Legislative Assembly became the first state to ratify the Equal Rights Amendment in the 21st Century, Helene Swanson's pilgrimage was cited in the Nevada Legislative Record as being the spark that light the fire for the resurrection of the Equal Rights Amendment and rebirth of the Women's Rights Movement. The following year Katrina's Dream and a number of other organizations rallied and supported efforts and Illinois ratified on May 30, 2018, leaving just one more state to go!

Katrina's Dream along with One Rural Women and Public Eye Reports hold THE CALL, a Sunday nationwide program where activist, advocates, elected officials, enthusiasts, lobbyists, and organizations come together to meditate, educate and promote the passage of the E.R.A. The concept behind the program is to provide a space where **folks** build friendships and networks, support wanderings, share wisdom, identify complexities, listen to frustrations, and celebrate

Mr. COHEN. This concludes——

Ms. JACKSON LEE. Mr. Chairman?

Mr. COHEN. Yes, ma'am.

Ms. JACKSON LEE. May I submit into the record and ask unanimous consent to send into the record a document "ERA—Equal Rights Amendment: Frequently Asked Questions?" I would ask unanimous consent to put it in, which lists the 15 states that did not ratify.

Mr. COHEN. Without objection, it shall be done.

[The information follows:]

MS. JACKSON LEE FOR THE OFFICIAL RECORD

EQUAL RIGHTS AMENDMENT FREQUENTLY ASKED QUESTION

The proposed Equal Rights Amendment (ERA) to the United States Constitution is a political and cultural inkblot, onto which many people project their greatest hopes or deepest fears about the changing status of women. Since it was first introduced in Congress in 1923, the ERA has been an issue with both rabid support and fervid opposition. Interpretations of its intent and potential impact have been varied and sometimes contradictory.

FREQUENTLY ASKED QUESTIONS:

1. What is the complete text of the Equal Rights Amendment?
2. Why is an Equal Rights Amendment to the U.S. Constitution necessary?
3. What is the political history of the ERA?
4. Which 15 states did not ratify the ERA by June 30, 1982?
5. Why are these states being asked to ratify the ERA even though the 1982 deadline has passed?
6. Can a state withdraw, or rescind, its ratification of a constitutional amendment that is still in the process of being ratified?
7. Do some states have state ERAs or other guarantees of equal rights on the basis of sex?
8. Since the 14th Amendment guarantees all citizens equal protection of the laws, why do we still need the ERA?
9. Why has the ERA sometimes been referred to as the Women's Equality Amendment?
10. Aren't there adequate legal protections against sex discrimination in the Equal Pay Act, the Pregnancy Discrimination Act, Titles VII and IX of the 1964 Civil Rights Act, court decisions based on the 14th Amendment's equal protection principle, and other laws and court cases?
11. How has the ERA been related to reproductive rights?
12. How has the ERA been related to discrimination based on sexual orientation and the issue of same-sex marriage?
13. How has the ERA been related to single-sex institutions?
14. How has the ERA been related to women in the military?
15. Would the ERA adversely affect existing benefits and protections that women now receive (e.g., alimony, child custody, Social Security payments, etc.)?
16. Does the ERA shift power from the states to the federal government?
17. What level of public support exists for a constitutional guarantee of equal rights for women and men?

1. What is the complete text of the Equal Rights Amendment?

The original ERA, first proposed in 1923, was known as the "Lucretia Mott Amendment." It stated:

"Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation."

In 1943, the original version was rewritten to the following wording (now called the "Alice Paul Amendment"):

> Section 1: Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.
> Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
> Section 3: This amendment shall take effect two years after the date of ratification.

2. Why is an Equal Rights Amendment to the U.S. Constitution necessary?

The Equal Rights Amendment would provide a fundamental legal remedy against sex discrimination for both women and men. It would guarantee that the rights affirmed by the U.S. Constitution are held equally by all citizens without regard to their sex.

The ERA would clarify the legal status of sex discrimination for the courts, where decisions still deal inconsistently with such claims. For the first time, sex would be considered a suspect classification, as race currently is. 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 – a necessary relation to a compelling state interest – to be upheld as constitutional.

To those who would try to write, enforce, or adjudicate laws inequitably, the ERA would send a strong preemptive warning: the Constitution has no tolerance for sex discrimination under the law.

3. What is the political history of the ERA?

The Equal Rights Amendment was written in 1923 by Alice Paul, a leader of the woman suffrage movement and a women's rights activist with three law degrees. It was introduced in Congress in the same year and subsequently reintroduced in every session of Congress for half a century.

In 1943 Paul rewrote the text to its current wording, modeled on the language of the 19th Amendment ("The right of citizens of the United States to vote

shall not be denied or abridged by the United States or by any State on account of sex"). The 19th Amendment is thus far the Constitution's only explicitly affirmed guarantee of equal rights for women, the right to vote.

On March 22, 1972, the 1943 version of the ERA finally passed the Senate and the House of Representatives by the required two-thirds majority and was sent to the states for ratification. An original seven-year deadline was later extended by Congress to June 30, 1982. When this deadline expired, only 35 of the necessary 38 states (the constitutionally required three-fourths) had ratified the amendment. The ERA is therefore not yet a part of the U.S. Constitution.

In accordance with the traditional ratification process outlined in Article V of the Constitution, the Equal Rights Amendment has been reintroduced in every session of Congress since 1982. The only procedural action taken on it, a House floor vote in 1983, failed by six votes.

In the 116th Congress (2019-2020), the traditional ERA ratification bill is H.J. Res. 35 (lead sponsors, Representatives Carolyn Maloney, D-NY, and Tom Reed, R-NY):

> Section 1: Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
> Section 2: Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.
> Section 3: This amendment shall take effect two years after the date of ratification.

Beginning with the 113th Congress (2014-2015), the text of the traditional ERA bill in the House of Representatives has included wording not present in the 1972 bill passed by Congress. Section 1 specifically names women in the Constitution for the first time, and the addition of "and the several States" in Section 2 affirms that enforcement of the constitutional prohibition of sex discrimination is a function of both federal and state levels of government.

In the 116th Congress, bills to override any deadline and affirm ratification when 38 states have ratified are S.J. Res. 6 (Senators Benjamin Cardin, D-MD, and Lisa Murkowski, R-AK) and H.J. Res. 38 (Representative Jackie Speier, D-CA). These bills are related to a non-traditional route to ERA ratification, a novel and unprecedented "three-state strategy," which has been advanced since 1994. (See Question 5 for more details.) In that year, Representative Robert Andrews (D-NJ) introduced a bill stating that when an additional three states ratify the ERA, the House of Representatives shall take any necessary

action to verify that ratification has been achieved. In 2011, he joined Representative Tammy Baldwin (D-WI) in support of her bill to remove the ERA's ratification deadline and make it part of the Constitution when three more states ratify. The Senate companion bill to that legislation was introduced by Sen. Benjamin Cardin (D-MD).

In pursuit of this strategy, ERA supporters have since 1995 advocated for passage of ERA ratification bills in the 15 "unratified" states. (See the list in Question 5.) As of 2019, such bills have been introduced in one or more legislative sessions in 14 of these states, with only Alabama never having filed such a bill.

On March 22, 2017, after more than two decades of advocacy based on the three-state strategy, Nevada became the 36th state to ratify the ERA, 45 years to the day after Congress passed the amendment and sent it to the states for ratification. In May 2018, Illinois became the 37th state to ratify the ERA.

4. Which 15 states did not ratify the ERA by June 30, 1982?

The 15 states whose legislatures did not ratify the Equal Rights Amendment by the 1982 deadline are: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.

5. Why are these states being asked to ratify the ERA even though the 1982 deadline has passed?

Political activity regarding ERA ratification is the result of a "three-state strategy" that was developed after the 1992 ratification of the 27th (Madison) Amendment to the Constitution more than 203 years after its 1789 passage by Congress. Acceptance of that ratification period as sufficiently contemporaneous has led to the legal argument that Congress has the power to maintain the legal viability of the ERA's existing 35 state ratifications. The time limit on ERA ratification is open to change, as Congress demonstrated in extending the original deadline, and precedent with the 14th and 15th Amendments shows that legislative votes retracting ratifications have never been recognized as valid. (See Question 6.) Thus the 35 ratifications achieved before 1982 may be viable, and state ratifications that occur after 1982 may be accepted as valid.

The legal analysis for this strategy is explained in "The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States" (Allison Held et al., William & Mary Journal of Women and the Law, Spring 1997). The Library of Congress's Congressional Research Service (CRS) discussed this law article in its 1996, 2014, and 2017 reports on the status of ERA ratification. CRS analysts concluded that acceptance of the Madison

Amendment does have implications for the three-state strategy, and the issue is more a political question than a constitutional one.

Since 1995, ERA supporters have advocated for passage of ERA ratification bills in the 15 unratified states. On March 22, 2017, 45 years to the day after Congress passed the amendment and sent it to the states for ratification, Nevada became the 36th state to ratify the ERA, and in May 2018, Illinois became the 37th state to ratify it. With only one more state needed to reach the required 38, legislatures in a number of unratified states have ERA ratification bills already introduced in the current session. Even after the 38th state ratifies, the remaining states continue to have the opportunity to ratify the amendment.

6. Can a state rescind or otherwise withdraw its ratification of a constitutional amendment that is still in the process of being ratified?

Five states – Idaho, Kentucky, Nebraska, Tennessee, and South Dakota – have attempted to withdraw their approval of the Equal Rights Amendment. However, according to precedent and statutory language, a state rescission or other withdrawal of ratification of a constitutional amendment is not accepted as valid.

During the ratification process for the 14th Amendment, New Jersey and Ohio voted yes and then rescinded their ratifications, but they were both included in the published list of states approving the amendment in 1868. New York retracted its ratification of the 15th Amendment before the last necessary state ratified in 1870, but it was listed as a ratifying state. Tennessee, the final state needed to ratify the 19th Amendment guaranteeing women's right to vote, approved the amendment by one vote on August 18, 1920. The Tennessee House then "non-concurred" on August 31, but the Secretary of State had already announced the amendment's inclusion in the Constitution on August 26 (now celebrated as Women's Equality Day).

In The Story of the Constitution (1937), the United States Constitution Sesquicentennial Commission explained that "an amendment was in effect on the day when the legislature of the last necessary State ratified. Such ratification is entirely apart from State regulations respecting the passage of laws or resolutions.... Approval or veto of such ratification by the Governor is of no account either as respects the date or the legality of the sanction. The rule that ratification once made may not be withdrawn has been applied in all cases; though a legislature that has rejected may later approve, and this change has been made in the consideration of several amendments."
Archivist of the United States David Ferriero wrote on October 25, 2012 to Representative Carolyn Maloney (NY), lead sponsor of the ERA in the House of Representatives, in response to her query about the validity of rescissions:

> "NARA's [National Archives and Records Administration's] website page "The Constitutional Amendment Process" . . .states that a proposed Amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states, indicating that Congressional action is not needed to certify that the Amendment has been added to the Constitution. It also states that [the U.S. Archivist's] certification of the legal sufficiency of ratification documents is final and conclusive, and that a later rescission of a state's ratification is not accepted as valid."

These statements are derived from 1 U.S.C. 106b . . . : "Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States. . . . [O]nce NARA receives at least 38 state ratifications of a proposed Constitutional Amendment, NARA publishes the amendment along with a certification of the ratifications and it becomes part of the Constitution without further action by Congress. Once the process in 1 U.S.C. 106b is completed the Amendment becomes part of the Constitution and cannot be rescinded. Another Constitutional Amendment would be needed to abolish the new Amendment.

7. Do some states have state ERAs or other guarantees of equal rights on the basis of sex?

Only a federal Equal Rights Amendment can provide U.S. citizens with the highest and broadest level of legal protection against sex discrimination. However, the constitutions of 25 states – Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming – provide either inclusive or partial guarantees of equal rights on the basis of sex.

As a point of historical comparison, by the time the 19th Amendment guaranteeing women's right to vote was added to the Constitution in 1920, one-quarter of the states had enacted state-level guarantees of that right.

States guarantee equal rights on the basis of sex in various ways. Some (e.g., Utah, Wyoming0 entered the Union in the 1890s with constitutions that affirm equal rights for male and female citizens. Some (e.g., Colorado, Hawaii) amended their constitutions in the 1970s with language virtually identical to the federal ERA. Some (e.g., New Jersey, Florida) have language in their state constitution that implicitly or explicitly includes both males and females in

their affirmation of rights. Some states place certain restrictions on their equal rights guarantees: e.g., California specifies equal employment and education rights, Louisiana prohibits "arbitrary and unreasonable' sex discrimination, and Rhode Island excludes application to abortion rights.

Ironically, four states with state-level equal rights amendments or guarantees (Florida, Louisiana, Utah, and Virginia) have not yet ratified the federal ERA. State-level equal rights jurisprudence over many decades has produced a solid body of evidence about the prospective impact of a federal ERA and has refuted unfounded claims of ERA opponents. Further information on state ERAs is available in "State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination" (Linda J. Wharton, Esq., Rutgers Law Journal, Volume 36, Issue 4, 2006).

8. Since the 14th Amendment guarantees all citizens equal protection of the laws, why do we still need the ERA?

The 14th Amendment was ratified in 1868, after the Civil War, to deal with race discrimination. In referring to the electorate, it added the word "male" to the Constitution for the first time. Even with the 14th Amendment in the Constitution, women had to fight a long and hard political battle over more than 70 years to have their right to vote guaranteed through the 19th Amendment in 1920.

It was not until 1971, in *Reed v. Reed*, that the Supreme Court applied the 14th Amendment for the first time to prohibit sex discrimination. However, in Reed and subsequent decisions (e.g., *Craig v. Boren, 1976; United States v. Commonwealth of Virginia, 1996),* the Court declined to elevate sex discrimination claims to the strict scrutiny standard of review that the 14th Amendment requires for the suspect classifications of race, religion, and national origin. Discrimination based on those categories must bear a necessary relation to a compelling state interest in order to be upheld as constitutional.

The Court now applies heightened (so-called "skeptical") scrutiny in cases of sex discrimination and requires extremely persuasive evidence to uphold a government action that differentiates on the basis of sex. However, the intermediate standard of review for such claims requires only that such classifications must substantially advance an important governmental objective. The ERA would require courts to go beyond the current application of the 14th Amendment by adding sex to the list of suspect classifications protected by the highest level of strict judicial scrutiny.

In an interview reported in the January 2011 California Lawyer, the late Supreme Court Justice Antonin Scalia disregarded 40 years of 14th-Amendment precedent when he stated that the Constitution does not protect

against sex discrimination. This remark has been cited as clear evidence of the need for an Equal Rights Amendment to guarantee that all judges, regardless of their judicial or political philosophy, will interpret the Constitution to prohibit sex discrimination.

9. Why has the ERA sometimes been referred to as the Women's Equality Amendment?

The ERA is sometimes called the Women's Equality Amendment to emphasize that women have historically been guaranteed fewer rights than men, and that equality can be achieved by raising women's legal rights to the same level of constitutional protection as men's. As its sex-neutral language makes clear, however, the ERA's guarantee of equal rights would protect both women as a class and men as a class against sex discrimination under the law.

10. Aren't there adequate legal protections against sex discrimination in the Equal Pay Act, the Pregnancy Discrimination Act, Titles VII and IX of the 1964 Civil Rights Act, court decisions based on the 14th Amendment's equal protection principle, and other laws and court cases?

Without the ERA in the Constitution, the statutes and case law that have produced major advances in women's rights since the middle of the last century are vulnerable to being ignored, weakened, or even reversed. Congress can amend or repeal anti-discrimination laws by a simple majority, the Administration can negligently enforce such laws, and the Supreme Court can use the intermediate standard of review to permit certain regressive forms of sex discrimination.

Ratification of the ERA would also improve the United States' global credibility with respect to sex discrimination. Many other countries affirm legal equality of the sexes in their governing documents, however imperfectly implemented. Ironically, some of those constitutions – in Japan and Afghanistan, for example – were written under the direction of the United States government.

The ERA is necessary to make our Constitution conform with the promise engraved over the entrance to the Supreme Court – "Equal Justice Under Law."

11. How has the ERA been related to reproductive rights?

The repeated claim of opponents that the ERA would require government to allow "abortion on demand" is a clear misrepresentation of existing federal and state laws and court decisions.

In federal courts, including the Supreme Court, a number of restrictive laws dealing with contraception and abortion have been invalidated since the mid–

20th century based on the constitutional principles of right of privacy and due process. The principles of equal protection or equal rights have not yet been applied to such cases at the federal level.

State equal rights amendments have been cited in a few state court decisions (e.g., in Connecticut and New Mexico) regarding a very specific issue – whether a state that provides funding to low-income Medicaid-eligible women for childbirth expenses should also be required to fund medically necessary abortions for women in that government program. Those courts ruled that the state must fund both of those pregnancy-related procedures if it funds either one, in order to prevent the government from using fiscal pressure to exert a chilling influence on a woman's exercise of her constitutional right to make medical decisions about her pregnancy. The New Jersey Supreme Court issued a similar decision based on the right of privacy and equal protection, with no reference to its state constitution's equal rights guarantee.

The presence or absence of a state ERA or equal protection guarantee does not necessarily correlate with a state's legal climate for reproductive rights. For example, despite Pennsylvania's state ERA, the state Supreme Court decided that restrictions on Medicaid funding of abortions were constitutional. The U.S. Supreme Court in separate litigation (Planned Parenthood v. Casey, 1992) upheld Pennsylvania's restrictions on abortion under the federal due process clause.

State court decisions on reproductive rights are not conclusive evidence of how federal courts would decide such cases. For example, while some state courts have required Medicaid funding of medically necessary abortions, the U.S. Supreme Court has upheld the constitutionality of the federal "Hyde Amendment," which has for decades prohibited the federal government from funding most or all Medicaid abortions, including many that are medically necessary.

Recent Supreme Court decisions on reproductive rights (e.g., *Burwell v. Hobby Lobby Stores, Inc.,* 2014) have raised concerns about the vulnerability of women's choices regarding contraception as well as abortion. The existence of an Equal Rights Amendment in the Constitution would almost certainly influence such deliberations in the future.

12. How has the ERA been related to discrimination based on sexual orientation and the issue of same-sex marriage?

Opponents of the ERA have long claimed that it would require government to uphold same-sex marriage and other so-called "gay rights," but discrimination on the basis of sexual orientation has not traditionally been treated legally by courts as a form of sex-based discrimination protected by an equal rights guarantee.

Even without an ERA in the Constitution, laws and court decisions have rapidly evolved over the past two decades toward legalizing same-sex marriage and overturning discrimination on the basis of sexuality, based primarily on equal protection and individual liberty principles. At the state level, where most laws dealing with marriage are passed and adjudicated, laws, court decisions, and voter referendums have increasingly supported the principle of equal marriage rights for same-sex couples, with or without the existence of a state ERA.

In *U.S. v. Windsor* (2013), the Supreme Court declared unconstitutional a 1996 federal Defense of Marriage Act (DOMA), which prohibited the federal government from recognizing same-sex marriages and denied federal benefits to spouses in such marriages. The 5-4 majority ruled that DOMA violated the Constitution's equal liberty and equal protection guarantees.

In June 2015, by a 5-4 decision in *Obergefell v. Hodges*, the Supreme Court conclusively recognized a constitutional right to same-sex marriage and required the states to permit same-sex couples to exercise that right. The decision rested primarily on the Constitution's due-process and equal protection clauses, not on equal rights legal analysis.

13. How has the ERA been related to single-sex institutions?

Even without an ERA in the Constitution, Supreme Court decisions have for decades increasingly limited the constitutionality of public single-sex institutions.

In 1982, the Court found in Mississippi University for Women v. Hogan that Mississippi's policy of refusing to admit males to its all-female School of Nursing was unconstitutional. Justice Sandra Day O'Connor wrote for the majority that a gender-based classification is compensatory only if members of the benefited sex have actually suffered a disadvantage related to it.

In the Court's 1996 United States v. Commonwealth of Virginia decision, which prohibited the use of public funds for then all-male Virginia Military Institute unless it admitted women, the majority opinion written by Justice Ruth Bader Ginsburg stated that sex-based classifications may be used to compensate the disadvantaged class "for particular economic disabilities [they have] suffered," to promote equal employment opportunity, and to advance full development of the talent and capacities of all citizens. Such classifications may not be used, however, to create or perpetuate the legal, social, and economic inferiority of the traditionally disadvantaged class, in this case women.

Thus, single-sex institutions whose aim is to perpetuate the historic dominance of one sex over the other are already unconstitutional, while single-sex institutions that work to overcome past discrimination are constitutional now and, if the courts choose, could remain so under an ERA.

14. How has the ERA been related to women in the military?

Approximately 15% of U.S. military personnel are women. Women have participated in every war our country has fought, beginning with the American Revolution, and they have held top-level positions in all branches of the military, as well as in government administration of defense and national security. They are fighting and dying in combat, and the armed services could not operate effectively without their participation.

However, without an ERA, women's equal access to military career ladders and their protection against sex discrimination in their chosen profession are not guaranteed.

The issue of the draft is often raised as an argument against the ERA. In fact, the lack of an ERA in the Constitution does not protect women against involuntary military service. Congress already has the power to draft women as well as men, and the Senate debated the possibility of drafting nurses in preparation for a possible invasion of Japan in World War II.

Traditionally and at present, only males are required to register with the Selective Service System. After removing troops from Vietnam in 1973, the United States shifted to an all-volunteer military and has not since that time drafted registered men into active service. In 1981, in *Rostker v. Goldberg*, the Supreme Court upheld the constitutionality of a male-only draft registration. In recent years, however, Department of Defense planning memos and Congressional bills dealing with the draft or national service have included both men and women in the system.

The Department of Defense's 2015 decision to open all combat positions to women has resurrected the public debate about whether a future draft would include women. It is virtually certain that a reactivated male-only draft system would be legally challenged as a form of sex discrimination, and it would most likely be found unconstitutional, with or without an ERA in the Constitution. Draftees would continue to be examined for "mental, physical, and moral fitness" and other grounds for exemption (e.g., student status, parental status) before being deferred, exempted, or inducted into military service. Since there is no imminent prospect of reinstituting the draft and no way to know what its requirements would be if it were reactivated, a discussion about the ERA's relation to it is primarily theoretical.

However, the immediate practical value of putting the ERA into the Constitution would be to guarantee equal treatment for the women who

voluntarily serve in the military and to provide them with the "equal justice under law" that they are risking and even sacrificing their lives to defend.

15. Would the ERA adversely affect existing benefits and protections that women now receive (e.g., alimony, child custody, Social Security payments, etc.)?

Most family law is written, administered, and adjudicated at the state level. Court decisions in states with ERAs show that the benefits that opponents claim women would lose are not in fact lost. They remain constitutional if they are provided in a sex-neutral manner based on function rather than on an assumption of stereotyped sex roles. That same principle would apply to laws and benefits (e.g., Social Security) at the federal level.

Based on the text of the ERA, legislators would have two years after the amendment is ratified to change sex-based classifications in laws that might be vulnerable to challenge as unconstitutional. Those laws can be brought into conformity with the ERA by substituting sex-neutral categories (e.g., "primary caregiver" instead of "mother") to achieve their objectives.

Courts have for many years been moving in the direction of sex-neutral standards in family court decisions, and legislatures have been writing laws with increased attention to sex-neutral language and intent. It is unlikely that the ERA would have a significant impact on those trends.

16. Does the ERA shift power from the states to the federal government?

Opponents have called Section 2 of the ERA ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article") a "federal power grab." In fact, that clause, sometimes including enforcement by the states as well, appears in eight other amendments, beginning with the 13th Amendment in 1865.

The ERA would not transfer jurisdiction of any laws from the states to the federal government. It would simply be one more legal principle among many others in the U.S. Constitution by which the courts evaluate the constitutionality of governmental actions.

17. What level of public support exists for a constitutional guarantee of equal rights for women and men?

The remarkably high level of public support for a constitutional guarantee of equal rights on the basis of sex continues to rise.

According to a 2016 poll commissioned by the national ERA Coalition, 94% of Americans support an amendment to the Constitution to guarantee equal rights for men and women. This support reached as high as 99% among 18-to-

24-year-olds, African Americans, Asian Americans, and Hispanic Americans. However, 80% of those polled thought the Constitution already guarantees equal rights to males and females.

In April 2012, a poll for Daily Kos/Service Employees International Union (SEIU) asked, "Do you think the Constitution should guarantee equal rights for men and women, or not?" The responses were 91% yes, 4% no, and 5% not sure.

An Opinion Research Corporation poll commissioned in 2001 by the ERA Campaign Network of Princeton, NJ showed that nearly all U.S. adults – 96% – believed that male and female citizens should have equal rights. The vast majority – 88% – also believed that the U.S. Constitution should make it clear that these rights are supposed to be equal. However, nearly three-quarters of the respondents – 72% – mistakenly believed that the Constitution already includes such a guarantee.

By asking these questions without mentioning the words "Equal Rights Amendment," the surveys filtered out the negative effect of widespread misrepresentations and misperceptions of the ERA. These responses show that citizens of the United States overwhelmingly, almost unanimously, support a constitutional guarantee of equal rights on the basis of sex.

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Mr. COHEN. And this has been an historic hearing. I have reflected—when I started my political career which was about 1970, ERA was an issue. It is still an issue.

The moral arc of the universe turns towards justice. Slow, but it goes in the direction of justice, Dr. King. So many great witnesses. I thank each of you. I thank our two congress people for bringing the legislation and for being part of this.

But the panel was phenomenal, all four of you. I thank you for your testimony. And I just have to reflect again on Heidi Schreck. I attended that play. It is a great play and everybody should see it.

It was very emotional to me to see the ERA mentioned and how women for so many years have not been a part of the Constitution and have suffered because of it and the need to change our laws.

So with all that, this concludes our hearing.

[Whereupon, at 12:14 p.m., the subcommittee was adjourned.]

APPENDIX

11 DUPONT CIRCLE NW
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WASHINGTON, DC 20036
202-588-5180
NWLC.ORG

The Honorable Steve Cohen
Chair, House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Mike Johnson
Ranking Member, House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties
U.S. House of Representatives
Washington, D.C. 20510

Re: Equal Rights Amendment

The National Women's Law Center (NWLC) submits this statement for the record to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties in support of H.J. Resolution 38—Removing the Deadline for the Ratification of the Equal Rights Amendment.[1] NWLC thanks the Subcommittee for convening the first hearing on the Equal Rights Amendment (ERA) in 36 years and helping move the United States closer to having an explicit guarantee of equal rights without discrimination on the basis of sex in our Constitution.

Since 1972, NWLC has fought for gender justice in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. NWLC uses the law in all its forms to break down the barriers that harm all of us—especially those who face multiple forms of discrimination, including women of color, LGBTQ people, and low-income women and families.

NWLC urges Congress to extend the 1982 ratification deadline for the ERA. Nothing in the text of the ERA or the Constitution limits Congress to the original 1979 ratification deadline.[2] Indeed, Congress has already exercised this authority when it extended the ratification deadline from 1979 to 1982.

The United States was founded on the basic ideas of equality, freedom, and opportunity. Yet, except for the Nineteenth Amendment's prohibition on denying the right to vote on the basis of sex, nothing in our Constitution provides explicit protections against sex discrimination. The ERA would fix this omission by enshrining a prohibition against sex discrimination by the government and a commitment to gender equality in our nation's foundational document.

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[1] NWLC also notes its support for H.J. Resolution 35, which would propose a new constitutional amendment declaring that women shall have equal rights in the United States.
[2] Congress placed the original ratification deadline in the Proposing Clause, not the body of the text.

Although for many decades the courts have recognized that the Equal Protection Clause of the Constitution's Fourteenth Amendment[3] bars most forms of intentional sex discrimination by public actors, the lack of any explicit sex equality guarantee leaves this core principle potentially vulnerable to shifts in the Supreme Court and in lower courts. The ERA would affirm gender equality as a core principle of our nation, expand Congress's power to pass legislation addressing sex discrimination, and provide a new tool in the larger fights against sex discrimination, including in challenges to pregnancy discrimination, discrimination on the basis of gender stereotypes, sexual orientation discrimination, gender identity discrimination, and gender-based violence.

The ERA would ensure that a robust national standard would be applied when evaluating the constitutionality of any local, state or national government action that discriminates based on sex. The ERA would ensure that all women in the United States, no matter where they live, are guaranteed equality of rights under the law. Currently, twenty-five states have adopted ERAs in their own constitutions.[4] Women living in the remaining states should have the same level of protections.

The ERA would require that laws and government policies that discriminate against women be subject to the most rigorous level of judicial review. The courts currently interpret the Equal Protection guarantee in the U.S. Constitution to require less rigorous review of sex-based laws and policies than of discrimination based on race or national origin, meaning sex-based laws and policies are more easily sustained. Discrimination against women should be subject to the most exacting scrutiny as well. There is a long history of discrimination based on sex, just as there is on the basis of race and national origin, that served to impose legally inferior status on women; sex, like race and national origin, is a characteristic that is unrelated to ability; and government classifications that are based on gender stereotypes stigmatize and harm women historically and today. Under the ERA, the government would be required to carry the heaviest possible burden to justify sex discrimination against women, or LGTBQ individuals, who are similarly harmed by laws that rely on and perpetuate gender stereotypes and gendered expectation.

The ERA would also strengthen protections for reproductive rights, including the right to abortion. The Supreme Court's formulation of the right to abortion already includes an understanding that equality for women means access to reproductive health care services. As the U.S. Supreme Court has said, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[5] The ERA would further enshrine this principle.

Sex equality under the law means that everyone has the freedom to make their own decisions about their bodies, their lives, and their futures, regardless of their gender. It means equal opportunities to be economically secure and live a good life. Enshrining sex equality in our nation's foundational document moves us one step closer to equality for all.

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[3] The Equal Protection Clause applies directly to actions by state and local governments, and equal protection principles have long been interpreted to apply to actions by the federal government as well under the Due Process Clause of the Fifth Amendment.

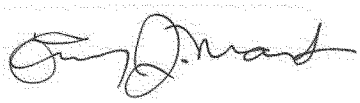
[4] *Ratification Info State by State*, EQUALRIGHTSAMENDMENT.ORG, https://www.equalrightsamendment.org/era-ratification-map.

[5] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

Thank you for the opportunity to submit this letter. If you have additional questions or need additional information, please contact Kelli Garcia at 202-319-3031 or kgarcia@nwlc.org.

Sincerely,

Gretchen Borchelt
Vice President
Reproductive Rights & Health



Emily Martin
Vice President
Education & Workplace Justice

STATEMENT FOR THE RECORD BY
SENATOR BENJAMIN L. CARDIN
APRIL 30, 2019

House Judiciary Committee
Subcommittee on the Constitution, Civil Rights & Civil Liberties
Hearing: "Equal Rights Amendment"

Let me begin by thanking the committee and subcommittee for holding a hearing on this important matter, and allowing me to submit this statement for the record.

Nearly 100 years after women fought for and earned the right to vote, most Americans are shocked to realize that the U.S. Constitution does not already guarantee women the same rights and protections as men. It's long past time for us to correct this injustice and recognize the equality of women under the law. What better way to set a positive tone for a new Congress than to take clear steps to fix a long-standing slight to America's women.

It may come as a surprise to many that in a country to which the world looks as being an example of liberty and justice, our Constitution does not guarantee women the same rights and protections as men. That is why the ERA is imperative as we urge Congress and the remaining States to finish what we started nearly 50 years ago to ensure equality under the law for all women.

In the early 20th century, women were disenfranchised and had little or no legal, financial, or social opportunities to pursue. Property ownership, jobs, and economic equality were privileges women did not have. Today, a century later, more women have entered the workforce than ever before. Women are filling leadership roles at unprecedented levels, and we are finally on the verge of ratifying the ERA. This change has boosted our economy, strengthened our families, and brought our society to new heights of innovation, enlightenment, and opportunity. We see that change is not only possible, it is essential to realizing our greatest potential as a nation.

I want to begin by addressing why we still need the ERA to be ratified as part of the Constitution. As the late Justice Antonin Scalia said, "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't."

The Fourteenth Amendment of the Constitution guarantees "equal protection of the laws," and the Supreme Court, so far, has held that most sex or gender classifications are subject to only "intermediate scrutiny" when analyzing laws that may have a discriminatory impact. Ratification of the Equal Rights Amendment (ERA) by state legislatures would provide the courts with clearer guidance in holding gender or sex classifications to the "strict scrutiny" standard, as is used in cases involving racial or religious discrimination. Under that standard, laws must be "narrowly tailored" to achieve a "compelling government interest," using the "least restrictive means" of doing so.

ERA ratification would allow Congress to enforce the amendment by appropriate legislation, and prohibit sex discrimination under the law, which would include statutes and regulations. Such a higher standard would give Congress a firmer constitutional basis to pass legislation that provides relief for women who are victims of gender-based violence, including cases arising under the Violence Against Women Act. The ERA would help Congress and the states combat employment discrimination. The text of the ERA is quite simple: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." I would note that the text guarantees "equality of rights" on account of sex, and would therefore provide additional legal protections to both men and women.

Congress should now take action to complete ratification of the ERA by removing the final barrier in front of the states. That is why this January I introduced, with Senator Murkowski from Alaska, a resolution (S.J. Res. 6), which would immediately remove the ratification deadline and reopen consideration of the ERA for ratification by the states. With the ratification by one more state, we can finally guarantee full and equal protections to women in the Constitution. I am proud to work with Senator Murkowski on a bipartisan basis to move this essential legislation over the finish line, along with Representative Jackie Speier, who has introduced the House companion legislation (H.J. Res. 38).

Thirty-seven states, of the 38 needed, have already ratified the amendment, which was first proposed in 1972. Illinois was the last state to ratify the ERA in May 2018. Nevada ratified the ERA in March 2017. Only one more state is needed among the following states: Alabama, Arizona, Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Utah, or Virginia.

Note that nearly half of the states already have a version of the ERA written into their state constitutions. Gender-based equality represents the present-day views of the vast majority of people across the United States, and is the spirit that underpins the ERA.

Article V of the Constitution contains no time limits for ratification of amendments, and the states finally ratified the Twenty-Seventh Amendment in 1992 regarding Congressional pay raises more than 200 years after Congress proposed it in 1789 as part of the original Bill of Rights. The ERA time limit was contained in a joint resolution, not the actual text of the amendment, and Congress has already once voted to extend the ERA ratification deadline. Congressional action to remove the ERA deadline would help remove remaining legal ambiguities regarding the states' ratification process.

Supreme Court Justice Ruth Bader Ginsburg laid out the rationale for the ERA in simple terms: "Every constitution written since the end of World War II includes a provision that men and women are citizens of equal stature. Ours does not." Let's take action and step up to our responsibilities here in Congress by removing the artificial deadline for ERA ratification, allowing the states to finally complete the constitutional amendment ratification process. The ERA would give Congress another tool to combat sex discrimination as we celebrate the 100th anniversary of womens' suffrage, as we pursue the continuing fight for women's equality recently exemplified by the #MeToo movement.

Women should not be held back or provided less opportunity, respect or protections under the law because of their gender. This is not a partisan issue but one of universal human rights. Gender equality should be an explicit, basic principle of our society.

April 30, 2019

Chairman Cohen, Ranking Member Johnson and Members of the Subcommittee
Subcommittee on the Constitution, Civil Rights and Civil Liberties
U.S. House Committee on the Judiciary
2141 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cohen, Ranking Member Johnson and members of the U.S. House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties,

We thank you for the opportunity to submit testimony for the record for the House Subcommittee on the Constitution, Civil Rights and Civil Liberties' April 30, 2019 hearing entitled *The Equal Rights Amendment.* The ERA Coalition additionally thanks you for this historic opportunity, the first hearing in Congress in 36 years to present the case for the Equal Rights Amendment - the case for equality for this country's 160 million women. Women have been seeking this fair fix to the Constitution for nearly a century.

In June of 2018, the Coalition worked with Congresswomen Carolyn Maloney and Jackie Speier to organize a Shadow Hearing on the ERA. Witnesses Alyssa Milano, Jessica Lenahan (the plaintiff in Gonzalez v. Castle Rock) and ERA Coalition board member Carol Robles Roman riveted the country with their testimony. It was there that Chairman Nadler promised a "real" hearing, should the Democrats retake control of the House. And here we are, promise kept. Thank you.

The Coalition is comprised of more than one hundred organizations and leaders across the country—national organizations like the American Association of University Women (AAUW), the Black Women's Roundtable, Equality Now, the Feminist Majority, the National Congress of Black Women (NCBW), the National Organization for Women (NOW), the YWCA, —and smaller groups of unwavering dedication, working at the local, grassroots level for decades.

Through our members, we represent millions of women who are watching from near and afar what we do here today. Many are here with us in this room. They have come from states like Arizona, Florida, Georgia, Louisiana, Missouri, North Carolina, Ohio, Oregon and Virginia where they work tirelessly for the ERA. They are here to celebrate the fact that a long denied full

hearing is now a reality. They are also here to determine the resolve of this deliberative body to raise to an equal status the women they represent.

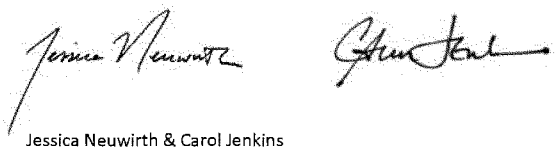
We believe the ERA is within our reach: 37 states have ratified the amendment. We need only one more state to ratify, and significant activity exists in almost every one of the thirteen non-ratified states to do that. Among the possibilities we are here today to consider is HJ Res 38, removal of the deadline on the ERA. Removal of the deadline eliminates the Congressional impediment to the ratification of the Equal Rights Amendment.

The ERA Coalition's Legal Task Force, comprised of world renowned constitutional scholars like Erwin Chemerinsky, Catharine MacKinnon, and Kathleen Sullivan, supports this option. In their legal brief, *The Equal Rights Amendment: Advocacy, Litigation and the 38th State*, attached, they conclude: "There are compelling political reasons for both Houses to pass this resolution, including the importance of women in the electorate. It would be unprecedented for Congress to allow a prior congressional resolution to stand in the way of an amendment that three-fourths of the states have approved."

Our research indicates that America is ready for this: 94% of Americans of all colors, ages, political persuasions believe in the constitutional equality of women. Eighty percent believe we have already passed the ERA, and are mystified by our failure to do so.

Today gives us the chance to rectify a centuries old exclusion from equal rights in our Constitution. While the original drafters may not have foreseen the possibility of an equal future for girls and boys, women and men, they did give us a way to make amends for the document's shortcomings. It's time to add the Equal Rights Amendment.

Sincerely,



Jessica Neuwirth & Carol Jenkins
Co-Presidents, ERA Coalition

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ERACOALITION FUND FOR WOMEN'S EQUALITY

The Equal Rights Amendment: Advocacy, Litigation, and the 38th State

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

After decades of advocacy, ratification of the Equal Rights Amendment is within reach.

Congress passed the ERA in 1972 with overwhelming support from both sides of the aisle. State legislatures raced to be the first to ratify. By the late 1970s, 35 states had ratified – three short of the 38 required for a constitutional amendment. Now the ERA is surging forward once again. In 2017, Nevada became the 36th state to ratify. In 2018, Illinois became the 37th. Virginia is poised to take up the issue again soon, with several other states on its heels – including North Carolina and Arizona. Any one of these could become the final, 38th state.

So, what about the deadline? When Congress passed the ERA in 1972, it introduced the amendment in a joint resolution with a preamble saying that the amendment would be valid "when ratified by the legislatures of three-fourths of the several States within seven years of its submission by the Congress." In 1978, Congress voted to extend that period by three years and three months. The extension expired on June 30, 1982, with 35 states having ratified.

In general, under Article V of the Constitution, an amendment to the Constitution becomes effective when the 38th state ratifies. No further action by Congress or the Executive Branch is required. Practically speaking, once the National Archives and Records Administration receives notice of ratification from the necessary number of states, the Archivist certifies the amendment as part of the Constitution, specifying the states that ratified it. 1 U.S.C. § 106(b).

It is possible that the Archivist will certify the ERA immediately upon receiving notice of the 38th ratification. But given the expired deadline, this might not happen. Some other action may be necessary to resolve any question about the deadline.

Several strategies are available for resolving this question. Members of the Coalition will likely pursue all of them. As discussed further below, these different strategies are not inconsistent. They reinforce one another.

Legislative Strategy: *Press Congress to eliminate the prior deadline.*

The Coalition is actively pursuing a resolution in Congress that would remove the deadline, confirming that the ERA will become part of the Constitution "whenever" three-fourths of the states ratify it. There are compelling political reasons for both Houses to pass this resolution, including the importance of women in the electorate. It would be unprecedented for Congress to allow a prior congressional resolution to stand in the way of an amendment that three-fourths of the states have approved.

Passing this new resolution would be consistent with Article V of the Constitution, as well as with Congress's broad power to change prior resolutions. Article V—which governs the process of amendment—does not say anything about time limits for ratification. In fact, the latest amendment (the 27th) was proposed by James Madison in 1789 and ratified nearly 203 years later, in 1992. The practice of imposing deadlines did not begin until 1917, when Congress proposed the 18th Amendment (Prohibition). Since then, Congress has imposed a deadline on all but two of its proposed amendments.

The Supreme Court has confirmed that Congress has the power to impose a reasonable deadline. In the context of the 18th Amendment, the Court explained that Article V "invest[s] Congress with a wide range of power in proposing amendments." *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921). This necessarily includes the power to set a time frame for ratification. *Id.*; *Coleman v. Miller*, 307 U.S. 433, 452 (1939) ("We have held that Congress in proposing an amendment may fix a reasonable time for ratification.").

The ERA's deadline differs from the one in the 18th Amendment in a significant way: it appears only in the preamble of the joint resolution by Congress that introduced the amendment, not in the body of the amendment itself. As discussed below, some advocates believe this makes the deadline unconstitutional (or at least ineffective).

Setting that issue aside, however, the location of the ERA's deadline is significant *because it leaves Congress with the power to make changes*. The ERA's deadline was not part of the text that the states voted on when they ratified the amendment. Instead, it merely reflected a particular Congress's view at a particular moment. One of the guiding principles of our legislative branch is that one Congress cannot bind or limit the power of later Congresses. As noted above, Congress has already changed the ERA's deadline once, extending it by more than three years. In doing so, Congress relied in part on the deadline's location in the preamble, rather than in the body of the amendment.

No legal barrier prevents Congress from eliminating the deadline altogether—and doing so retroactively. No Supreme Court case has ever cast doubt on Congress's power with respect to the timing of ratification or suggested that Congress lacks the power to

extend or remove a ratification deadline after the fact. Although one district court judge in the early 1980s concluded that Congress did lack this power, the Supreme Court vacated his decision once the extension expired. *National Organization for Women v. Idaho*, 459 U.S. 809 (1982). In the process, the Supreme Court was not presented with—and did not resolve—any question about what would happen if Congress later removed the deadline altogether. To the contrary, under current Supreme Court precedent, Congress's power regarding ratification continues throughout the process, and its judgment in exercising that power is a "political question" that courts will not second-guess. *Coleman*, 307 U.S. at 449, 454.

There is no reason to fear that eliminating or extending the deadline now could give some states a chance to "rescind" their prior ratifications, as a few states attempted to do in the 1970s. Historically, attempts to rescind prior ratifications have not been found effective. Indeed, the promulgation of the 14th Amendment depended on states that had ratified and then attempted to rescind—and yet all three branches of the federal Government treated the amendment as fully ratified. This reflects the specific role the Constitution gives the states in the national process of amendment. The only question under Article V is whether a state's legislature voted to ratify at some point in time. It does not matter if a subsequent legislature disagreed.

Litigation Strategy: *Ask the courts to declare the deadline ineffective.*

As Congress considers this legislation, plans are also underway by some ERA advocates for offensive litigation to challenge the deadline. This may take the form of a mandamus action demanding that the Archivist certify the ERA as soon as the 38th state ratifies it. It may also involve civil lawsuits to enforce the ERA's protections once they arguably come into effect.

Some ERA advocates may argue that the deadline is *unconstitutional*. They believe that deadlines for ratification improperly limit the power of the states under Article V. On that basis, they may argue that the Supreme Court should reverse its decision in *Dillon v. Gloss*—or at a minimum, that the Court should treat the ERA's deadline differently than the one addressed in *Dillon* because it appears in a preamble to Congress's joint resolution, rather than in the body of the amendment itself. This strategy would ultimately require persuading the Supreme Court to take up the issue.

Other ERA advocates may argue that the deadline—while constitutional—is *ineffective*. Article V states that an amendment proposed by Congress "shall be valid to all intents and purposes . . . when ratified by the legislatures of three fourths of the several states." Even assuming that Congress can build a time limit into the body of an amendment, it cannot limit the states' ratification powers under Article V simply by saying so in a joint

resolution. The ERA's "deadline" is therefore only a guideline—a statement of Congress's preference—rather than a binding limit on states with respect to ratification.

Sequence: *These strategies can proceed together, at the same time.*

These different strategies will likely move forward at the same time, reinforcing one another. The litigation could help to illustrate for members of Congress why removing the deadline is so important. And the legislation—if successful—would give advocates an additional reason to argue that the original deadline cannot have any force.

Importantly, asking Congress to remove the deadline does not require conceding that the deadline is constitutional and would be binding on the states absent congressional action. Nor does it require conceding that the courts have no role to play. In fact, some members of Congress may vote to remove the deadline *because they think judges will refuse to enforce it*—and they do not want the ERA to be stuck for years in the courts.

More broadly, pursuing a legislative solution is not inconsistent with pursuing constitutional litigation. A recent example confirms that this is so: marriage equality activists were pursuing same-sex marriage rights in state legislatures right up to the time when the Supreme Court found such rights in the Constitution, holding that state legislatures lack the power to deny them. The momentum of each reinforced the other.

This memorandum was drafted by the Chair of the ERA Coalition's Legal Task Force, Linda Coberly of Winston & Strawn LLP, which is one of the Coalition's Lead Organizations.

Critical research was provided by Liza Velazquez and the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP, the Coalition's pro bono legal counsel.

The memo has the endorsement of the following members of the ERA Coalition's Legal Task Force:

- *Erwin Chemerinsky, Dean and Professor of Law at Berkeley Law, University of California*
- *Catharine A. MacKinnon, Professor of Law at the University of Michigan and Harvard Law Schools*
- *Kathleen M. Sullivan, Quinn Emanuel Urquhart & Sullivan, former Dean of Stanford Law School*
- *Michele Bratcher Goodwin, Professor of Law at University of California - Irvine School of Law*
- *Linda J. Wharton, Professor of Political Science and Pre-Law Advisor, Stockton University*
- *Julie Suk, Professor and Dean for Master's Programs, Graduate Center, City University of New York*
- *Robinson Woodward-Burns, Assistant Professor of Political Science, Howard University*
- *Jessica Neuwirth, Co-President, ERA Coalition; Distinguished Lecturer and Rita E. Hauser Director of the Human Rights Program at Roosevelt House, the Public Policy Institute of Hunter College*

ALICE PAUL
INSTITUTE

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May 9, 2019

To the Honorable Members of the House Judiciary Committee,

The Alice Paul Institute (API) greatly appreciates the efforts of this committee and its members to advance the Equal Rights Amendment (ERA) one step closer to ratification and inclusion in the United States Constitution. API fully supports H.J. Resolution 38, which when passed will nullify the deadline originally given to this important proposed constitutional amendment.

The ERA, first written and introduced in Congress in 1923, is a long overdue correction to our country's founding document, which has even until now failed to explicitly recognize women as equal citizens. Once ratified, the ERA will ensure that the United States is guided by constitutional principles that represent all citizens equally, regardless of their sex, and will elevate our country beyond outdated legislative and judicial actions and patterns of sexism that devalue women's equal participation as citizens politically, socially, and culturally.

Alice Stokes Paul (1885-1977), author of the ERA, was the architect of some of the most outstanding political achievements on behalf of women in the 20th century. A leading American suffragist, she was a force in the passage and ratification of the 19th Amendment in 1920, which guaranteed women's equal right to vote (still the only constitutional right explicitly affirmed as equal for women and men). She wrote, "Most reforms, most problems, are complicated. But to me there is nothing complicated about ordinary equality."
The Alice Paul Institute, which educates the public about her life and work and offers heritage and girls' leadership programs at Paulsdale, her National Historic Landmark home in Mt. Laurel, NJ, is committed to continuing her fight to amend the United States Constitution to rectify its failure to offer equal legal protections to both women and men.

We urge the members of this committee to consider the information in the attached documents, which counters some of the central arguments of ERA opponents, and advance H.J. Resolution 38 to a vote on the House floor. To deny H.J. Resolution 38 is to deny a centuries-long fight of millions of U.S. citizens toward ordinary equality.

Respectfully submitted,

Lucienne Beard
Executive Director

Linda Coppinger
Chair, Board of Directors

Krista Niles
Outreach & Civic Engagement Director

Roberta Francis
ERA Education Consultant

Enclosures:

1. Letter from U.S. Archivist David S. Ferriero to Representative Carolyn Maloney (Oct. 25, 2012) regarding the role played by the National Archives and Records Administration in certifying amendments to the Constitution
2. *Congressional Quarterly Almanac* (1982) article, "ERA Dies Three States Short of Ratification," confirming that the 1981 Idaho v. Freeman court decision often cited by ERA opponents was vacated and has no legal standing or effect
3. "The Equal Rights Amendment: Frequently Asked Questions," fact sheet from the Alice Paul Institute website www.equalrightsamendment.org
4. "Why the Equal Rights Amendment Remains Legally Viable and Rescissions Are Invalid," fact sheet from the Alice Paul Institute website www.equalrightsamendment.org

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25 October 2012

The Honorable Carolyn Maloney
U.S. House of Representatives
Washington, DC 20515

Dear Ms. Maloney:

Thank you for your letter requesting information about the ratification status of the Equal Rights Amendment (ERA), and the role played by the National Archives and Records Administration (NARA) in certifying amendments to the Constitution.

You asked for a list of the states that ratified the ERA, and a list of states that either rejected the amendment, or rescinded an earlier ratification vote. I have attached a chart showing this information.

You also asked for legal verification of statements on NARA's website page "The Constitutional Amendment Process" (www.archives.gov/federal-register/constition). This webpage states that a proposed Amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states, indicating that Congressional action is not needed to certify that the Amendment has been added to the Constitution. It also states that my certification of the legal sufficiency of ratification documents is final and conclusive, and that a later rescission of a state's ratification is not accepted as valid.

These statements are derived from 1 U.S.C. 106b, which says that: "Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become

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valid, to all intents and purposes, as a part of the Constitution of the United States." Under the authority granted by this statute, once NARA receives at least 38 state ratifications of a proposed Constitutional Amendment, NARA publishes the amendment along with a certification of the ratifications and it becomes part of the Constitution without further action by the Congress. Once the process in 1 U.S.C. 106b is completed the Amendment becomes part of the Constitution and cannot be rescinded. Another Constitutional Amendment would be needed to abolish the new Amendment.

I hope this information answers your question and is of use to you. If you would like more information or would like to discuss this issue further, please do not hesitate to contact me again.

Sincerely,

DAVID S. FERRIERO
Archivist of the United States

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Disposition of *State of Idaho* v. *Freeman* Court Decision (1982)

***NOTE:* The underlined sentence contradicts the claim that any existing court decision has declared the ERA deadline extension illegal and state rescissions valid.**

"ERA Dies Three States Short of Ratification"

[Congressional Quarterly] CQ Almanac, 1982, pp. 377-378

After Idaho in 1978 voted to rescind its 1973 ratification of the ERA, a group of anti-ERA state legislators and other officials sued the General Services Administration (GSA), which maintained the official list of ratifying states, seeing to force removal of Idaho from the list.

Pro-ERA forces and the Justice Department sought unsuccessfully to remove Judge Marion Callister, of the federal district court in Idaho, from hearing the case because he was a Mormon, and his church opposed the ERA.

However, on Dec. 23, 1981, Callister ruled that Congress exceeded its power when it extended the ERA ratification period in 1978, and that states could rescind their approval of the amendment if they acted within the period available for ratification.

After Callister's adverse ruling, both the National Organization for Women (NOW) and the Justice Department appealed directly to the Supreme Court. NOW asked for expedited consideration of the appeal, but the Justice Department – which was under fire from conservative political groups opposed to the ERA – said such speed would be "inadvisable."

On Jan. 25, 1982, the Supreme Court agreed to hear the cases of *NOW v. Idaho* and *Carmen v. Idaho,* but denied NOW's request for expedited action.

The court did not hear arguments in the case during its 1981-82 term, and on Oct. 4, 1982, the first day of its 1982-83 term, the court dismissed the ERA cases as moot.

Not only did the justices dismiss the cases as moot, they also vacated the lower court decision, wiping it off the law books and rendering it useless as a precedent, a partial victory for those challenging it.

For further information, see www.equalrightsamendment.org and www.eracoalition.org.

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THE EQUAL RIGHTS AMENDMENT: FREQUENTLY ASKED QUESTIONS

Roberta W. Francis
ERA Education Consultant, Alice Paul Institute
February 5, 2019

The proposed Equal Rights Amendment (ERA) to the United States Constitution is a political and cultural inkblot, onto which many people project their greatest hopes or deepest fears about the changing status of women. Since it was first introduced in Congress in 1923, the ERA has generated both rabid support and fervid oppositian. Interpretations af its intent and potential impact have been widely varying and even contradictory.

The answers to these frequently asked questions about the ERA encourage evaluation of the amendment based on facts rather than misinformation. In addition, a 17-minute educational documentary, "The Equal Rights Amendment: Unfinished Business for the Constitutian," can be purchased or downloaded at www.equalrightsamendment.org.

1. *What is the complete text of the Equal Rights Amendment?*

The original ERA, first proposed in 1923, was known as the "Lucretia Mott Amendment." It stated:

"Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation."

In 1943, the original version was rewritten to the following wording (now called the "Alice Paul Amendment"):
Section 1: Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.
Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
Section 3: This amendment shall take effect two years after the date of ratification.

2. *Why is an Equal Rights Amendment to the U.S. Constitution necessary?*

The Equal Rights Amendment would provide a fundamental legal remedy against sex discrimination for both women and men. It would guarantee that the rights affirmed by the U.S. Constitution are held equally by all citizens without regard to their sex.

The ERA would clarify the legal status of sex discrimination for the courts, where decisions still deal inconsistently with such claims. For the first time, sex would be considered a suspect classification, as race currently is.

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 – a necessary relation to a compelling state interest – to be upheld as constitutional.

To those who would try to write, enforce, or adjudicate laws inequitably, the ERA would send a strong preemptive warning: the Constitution has no tolerance for sex discrimination under the law.

3. *What is the political history of the ERA?*

The Equal Rights Amendment was written in 1923 by Alice Paul, a leader of the woman suffrage movement and a women's rights activist with three law degrees. It was introduced in Congress in the same year and subsequently reintroduced in every session of Congress for half a century.

In 1943 Paul rewrote the text to its current wording, modeled on the language of the 19th Amendment ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex"). The 19th Amendment is thus far the Constitution's only explicitly affirmed guarantee of equal rights for women, the right to vote.

On March 22, 1972, the 1943 version of the ERA finally passed the Senate and the House of Representatives by the required two-thirds majority and was sent to the states for ratification. An original seven-year deadline was later extended by Congress to June 30, 1982. When this deadline expired, only 35 of the necessary 38 states (the constitutionally required three-fourths) had ratified the amendment. The ERA is therefore not yet a part of the U.S. Constitution.

In accordance with the traditional ratification process outlined in Article V of the Constitution, the Equal Rights Amendment has been reintroduced in every session of Congress since 1982. The only procedural action taken on it, a House floor vote in 1983, failed by six votes.

In the 116th Congress (2019-2020), the traditional ERA ratification bill is *H.J. Res. 35* (lead sponsors, Representatives Carolyn Maloney, D-NY, and Tom Reed, R-NY):

> *Section 1*: Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
> *Section 2*: Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.
> *Section 3*: This amendment shall take effect two years after the date of ratification.

Beginning with the 113th Congress (2014-2015), the text of the traditional ERA bill in the House of Representatives has included wording not present in the 1972 bill passed by Congress. Section 1 specifically names women in the Constitution for the first time, and the addition of "and the several States" in Section 2 affirms that enforcement of the constitutional prohibition of sex discrimination is a function of both federal and state levels of government.

In the 116th Congress, bills to override any deadline and affirm ratification when 38 states have ratified are *S.J. Res. 6* (Senators Benjamin Cardin, D-MD, and Lisa Murkowski, R-AK) and *H.J. Res. 38* (Representative Jackie Speier, D-CA). These bills are related to a non-traditional route to ERA ratification, a novel and unprecedented "three-state strategy," which has been advanced since 1994. (See Question 5 for more details.) In that year, Representative Robert Andrews (D-NJ) introduced a bill stating that when an additional three states ratify the ERA, the House of Representatives shall take any necessary action to verify that ratification has been achieved. In 2011, he joined

Representative Tammy Baldwin (D-WI) in support of her bill to remove the ERA's ratification deadline and make it part of the Constitution when three more states ratify. The Senate companion bill to that legislation was introduced by Sen. Benjamin Cardin (D-MD).

In pursuit of this strategy, ERA supporters have since 1995 advocated for passage of ERA ratification bills in the 15 "unratified" states. (See the list in Question 5.) As of 2019, such bills have been introduced in one or more legislative sessions in 14 of these states, with only Alabama never having filed such a bill.

On March 22, 2017, after more than two decades of advocacy based on the three-state strategy, Nevada became the 36th state to ratify the ERA, 45 years to the day after Congress passed the amendment and sent it to the states for ratification. In May 2018, Illinois became the 37th state to ratify the ERA.

4. ***Which 15 states did not ratify the ERA by June 30, 1982?***

The 15 states whose legislatures did not ratify the Equal Rights Amendment by the 1982 deadline are: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.

5. ***Why are these states being asked to ratify the ERA even though the 1982 deadline has passed?***

Political activity regarding ERA ratification is the result of a "three-state strategy" that was developed after the 1992 ratification of the 27th (Madison) Amendment to the Constitution more than 203 years after its 1789 passage by Congress. Acceptance of that ratification period as sufficiently contemporaneous has led to the legal argument that Congress has the power to maintain the legal viability of the ERA's existing 35 state ratifications. The time limit on ERA ratification is open to change, as Congress demonstrated in extending the original deadline, and precedent with the 14th and 15th Amendments shows that legislative votes retracting ratifications have never been recognized as valid. (See Question 6.) Thus the 35 ratifications achieved before 1982 may be viable, and state ratifications that occur after 1982 may be accepted as valid.

The legal analysis for this strategy is explained in "The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States" (Allison Held *et al., William & Mary Journal of Women and the Law*, Spring 1997). The Library of Congress's Congressional Research Service (CRS) discussed this law article in its 1996, 2014, and 2017 reports on the status of ERA ratification. CRS analysts concluded that acceptance of the Madison Amendment does have implications for the three-state strategy, and the issue is more a political question than a constitutional one.

Since 1995, ERA supporters have advocated for passage of ERA ratification bills in the 15 unratified states. On March 22, 2017, 45 years to the day after Congress passed the amendment and sent it to the states for ratification, Nevada became the 36th state to ratify the ERA, and in May 2018, Illinois became the 37th state to ratify it. With only one more state needed to reach the required 38, legislatures in a number of unratified states have ERA ratification bills already introduced in the current session. Even after the 38th state ratifies, the remaining states continue to have the opportunity to ratify the amendment.

6. ***Can a state rescind or otherwise withdraw its ratification of a constitutional amendment that is still in the process of being ratified?***

Five states – Idaho, Kentucky, Nebraska, Tennessee, and South Dakota – have attempted to withdraw their approval of the Equal Rights Amendment. However, according to precedent and statutory language, a state rescission or other withdrawal of ratification of a constitutional amendment is not accepted as valid.

During the ratification process for the 14th Amendment, New Jersey and Ohio voted yes and then rescinded their ratifications, but they were both included in the published list of states approving the amendment in 1868. New York retracted its ratification of the 15th Amendment before the last necessary state ratified in 1870, but it was listed as a ratifying state. Tennessee, the final state needed to ratify the 19th Amendment guaranteeing women's right to vote, approved the amendment by one vote on August 18, 1920. The Tennessee House then "non-concurred" on August 31, but the Secretary of State had already announced the amendment's inclusion in the Constitution on August 26 (now celebrated as Women's Equality Day).

In *The Story of the Constitution* (1937), the United States Constitution Sesquicentennial Commission explained that "an amendment was in effect on the day when the legislature of the last necessary State ratified. Such ratification is entirely apart from State regulations respecting the passage of laws or resolutions.... Approval or veto of such ratification by the Governor is of no account either as respects the date or the legality of the sanction. The rule that ratification once made may not be withdrawn has been applied in all cases; though a legislature that has rejected may later approve, and this change has been made in the consideration of several amendments."

Archivist of the United States David Ferriero wrote on October 25, 2012 to Representative Carolyn Maloney (NY), lead sponsor of the ERA in the House of Representatives, in response to her query about the validity of rescissions:

> *"NARA's [National Archives and Records Administration's] website page "The Constitutional Amendment Process" . . .states that a proposed Amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states, indicating that Congressional action is not needed to certify that the Amendment has been added to the Constitution. It also states thot [the U.S. Archivist's] certification of the legal sufficiency of ratification documents is final and conclusive, and that a later rescission of a state's ratification is not accepted as valid."*

These statements are derived from 1 U.S.C. 106b . . . : "Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States. . . . [O]nce NARA receives at least 38 state ratifications of a proposed Constitutional Amendment, NARA publishes the amendment along with a certification of the ratifications and it becomes part of the Constitution without further action by Congress. Once the process in 1 U.S.C. 106b is completed the Amendment becomes part of the Constitution and cannot be rescinded. Another Constitutional Amendment would be needed to abolish the new Amendment.

7. ***Do some states have state ERAs or other guarantees of equal rights on the basis of sex?***

Only a federal Equal Rights Amendment can provide U.S. citizens with the highest and broadest level of legal protection against sex discrimination. However, the constitutions of 25 states – Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New

Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming – provide either inclusive or partial guarantees of equal rights on the basis of sex.

As a point of historical comparison, by the time the 19th Amendment guaranteeing women's right to vote was added to the Constitution in 1920, one-quarter of the states had enacted state-level guarantees of that right.

States guarantee equal rights on the basis of sex in various ways. Some (e.g., Utah, Wyoming0 entered the Union in the 1890s with constitutions that affirm equal rights for male and female citizens. Some (e.g., Colorado, Hawaii) amended their constitutions in the 1970s with language virtually identical to the federal ERA. Some (e.g., New Jersey, Florida) have language in their state constitution that implicitly or explicitly includes both males and females in their affirmation of rights. Some states place certain restrictions on their equal rights guarantees: e.g., California specifies equal employment and education rights, Louisiana prohibits "arbitrary and unreasonable' sex discrimination, and Rhode Island excludes application to abortion rights.

Ironically, four states with state-level equal rights amendments or guarantees (Florida, Louisiana, Utah, and Virginia) have not yet ratified the federal ERA.

State-level equal rights jurisprudence over many decades has produced a solid body of evidence about the prospective impact of a federal ERA and has refuted unfounded claims of ERA opponents. Further information on state ERAs is available in "State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination" (Linda J. Wharton, Esq., *Rutgers Law Journal,* Volume 36, Issue 4, 2006).

8. ***Since the 14th Amendment guarantees all citizens equal protection of the laws, why do we still need the ERA?***

The 14th Amendment was ratified in 1868, after the Civil War, to deal with race discrimination. In referring to the electorate, it added the word "male" to the Constitution for the first time. Even with the 14th Amendment in the Constitution, women had to fight a long and hard political battle over more than 70 years to have their right to vote guaranteed through the 19th Amendment in 1920.

It was not until 1971, in *Reed* v. *Reed*, that the Supreme Court applied the 14th Amendment for the first time to prohibit sex discrimination. However, in *Reed* and subsequent decisions (e.g., *Craig* v. *Boren*, 1976; *United States* v. *Commonwealth of Virginia*, 1996), the Court declined to elevate sex discrimination claims to the strict scrutiny standard of review that the 14th Amendment requires for the suspect classifications of race, religion, and national origin. Discrimination based on those categories must bear a necessary relation to a compelling state interest in order to be upheld as constitutional.

The Court now applies heightened (so-called "skeptical") scrutiny in cases of sex discrimination and requires extremely persuasive evidence to uphold a government action that differentiates on the basis of sex. However, the intermediate standard of review for such claims requires only that such classifications must substantially advance an important governmental objective. The ERA would require courts to go beyond the current application of the 14th Amendment by adding sex to the list of suspect classifications protected by the highest level of strict judicial scrutiny.

In an interview reported in the January 2011 *California Lawyer*, the late Supreme Court Justice Antonin Scalia disregarded 40 years of 14th-Amendment precedent when he stated that the Constitution does not protect against sex discrimination. This remark has been cited as clear evidence of the need for an Equal Rights Amendment to guarantee that all judges, regardless of their judicial or political philosophy, will interpret the Constitution to prohibit sex discrimination.

9. ***Why has the ERA sometimes been referred to as the Women's Equality Amendment?***

The ERA is sometimes called the Women's Equality Amendment to emphasize that women have historically been guaranteed fewer rights than men, and that equality can be achieved by raising women's legal rights to the same level of constitutional protection as men's. As its sex-neutral language makes clear, however, the ERA's guarantee of equal rights would protect both women as a class and men as a class against sex discrimination under the law.

10. ***Aren't there adequate legal protections against sex discrimination in the Equal Pay Act, the Pregnancy Discrimination Act, Titles VII and IX of the 1964 Civil Rights Act, court decisions based on the 14th Amendment's equal protection principle, and other laws and court cases?***

Without the ERA in the Constitution, the statutes and case law that have produced major advances in women's rights since the middle of the last century are vulnerable to being ignored, weakened, or even reversed. Congress can amend or repeal anti-discrimination laws by a simple majority, the Administration can negligently enforce such laws, and the Supreme Court can use the intermediate standard of review to permit certain regressive forms of sex discrimination.

Ratification of the ERA would also improve the United States' global credibility with respect to sex discrimination. Many other countries affirm legal equality of the sexes in their governing documents, however imperfectly implemented. Ironically, some of those constitutions – in Japan and Afghanistan, for example – were written under the direction of the United States government.

The ERA is necessary to make our Constitution conform with the promise engraved over the entrance to the Supreme Court – "Equal Justice Under Law."

11. ***How has the ERA been related to reproductive rights?***

The repeated claim of opponents that the ERA would require government to allow "abortion on demand" is a clear misrepresentation of existing federal and state laws and court decisions.

In federal courts, including the Supreme Court, a number of restrictive laws dealing with contraception and abortion have been invalidated since the mid–20th century based on the constitutional principles of right of privacy and due process. The principles of equal protection or equal rights have not yet been applied to such cases at the federal level.

State equal rights amendments have been cited in a few state court decisions (e.g., in Connecticut and New Mexico) regarding a very specific issue – whether a state that provides funding to low-income Medicaid-eligible women for childbirth expenses should also be required to fund medically necessary abortions for women in that government program. Those courts ruled that the state must fund both of those pregnancy-related procedures if it funds either one, in order to prevent the government from using fiscal pressure to exert a chilling influence on a woman's exercise of her constitutional right to make medical decisions about her pregnancy. The New Jersey Supreme Court issued a similar decision based on the right of privacy and equal protection, with no reference to its state constitution's equal rights guarantee.

The presence or absence of a state ERA or equal protection guarantee does not necessarily correlate with a state's legal climate for reproductive rights. For example, despite Pennsylvania's state ERA, the state Supreme Court decided that restrictions on Medicaid funding of abortions were constitutional. The U.S. Supreme Court in separate litigation (*Planned Parenthood* v. *Casey*, 1992) upheld Pennsylvania's restrictions on abortion under the federal due process clause.

State court decisions on reproductive rights are not conclusive evidence of how federal courts would decide such cases. For example, while some state courts have required Medicaid funding of medically necessary abortions, the U.S. Supreme Court has upheld the constitutionality of the federal "Hyde Amendment," which has for decades prohibited the federal government from funding most or all Medicaid abortions, including many that are medically necessary.

Recent Supreme Court decisions on reproductive rights (e.g., *Burwell* v. *Hobby Lobby Stores, Inc.,* 2014) have raised concerns about the vulnerability of women's choices regarding contraception as well as abortion. The existence of an Equal Rights Amendment in the Constitution would almost certainly influence such deliberations in the future.

12. ***How has the ERA been related to discrimination based on sexual orientation and the issue of same-sex marriage?***

Opponents of the ERA have long claimed that it would require government to uphold same-sex marriage and other so-called "gay rights," but discrimination on the basis of sexual orientation has not traditionally been treated legally by courts as a form of sex-based discrimination protected by an equal rights guarantee.

Even without an ERA in the Constitution, laws and court decisions have rapidly evolved over the past two decades toward legalizing same-sex marriage and overturning discrimination on the basis of sexuality, based primarily on equal protection and individual liberty principles. At the state level, where most laws dealing with marriage are passed and adjudicated, laws, court decisions, and voter referendums have increasingly supported the principle of equal marriage rights for same-sex couples, with or without the existence of a state ERA.

In *U.S.* v. *Windsor* (2013), the Supreme Court declared unconstitutional a 1996 federal Defense of Marriage Act (DOMA), which prohibited the federal government from recognizing same-sex marriages and denied federal benefits to spouses in such marriages. The 5-4 majority ruled that DOMA violated the Constitution's equal liberty and equal protection guarantees.

In June 2015, by a 5-4 decision in *Obergefell* v. *Hodges*, the Supreme Court conclusively recognized a constitutional right to same-sex marriage and required the states to permit same-sex couples to exercise that right. The decision rested primarily on the Constitution's due-process and equal protection clauses, not on equal rights legal analysis.

13. ***How has the ERA been related to single-sex institutions?***

Even without an ERA in the Constitution, Supreme Court decisions have for decades increasingly limited the constitutionality of public single-sex institutions.

In 1982, the Court found in *Mississippi University for Women* v. *Hogan* that Mississippi's policy of refusing to admit males to its all-female School of Nursing was unconstitutional. Justice Sandra Day O'Connor wrote for the majority that a gender-based classification is compensatory only if members of the benefited sex have actually suffered a disadvantage related to it.

In the Court's 1996 *United States* v. *Commonwealth of Virginia* decision, which prohibited the use of public funds for then all-male Virginia Military Institute unless it admitted women, the majority opinion written by Justice Ruth Bader Ginsburg stated that sex-based classifications may be used to compensate the disadvantaged class "for particular economic disabilities [they have] suffered," to promote equal employment opportunity, and to advance full development of the talent and capacities of all citizens. Such classifications may not be used, however, to create or perpetuate the legal, social, and economic inferiority of the traditionally disadvantaged class, in this case women.

Thus, single-sex institutions whose aim is to perpetuate the historic dominance of one sex over the other are already unconstitutional, while single-sex institutions that work to overcome past discrimination are constitutional now and, if the courts choose, could remain so under an ERA.

14. *How has the ERA been related to women in the military?*

Approximately 15% of U.S. military personnel are women. Women have participated in every war our country has fought, beginning with the American Revolution, and they have held top-level positions in all branches of the military, as well as in government administration of defense and national security. They are fighting and dying in combat, and the armed services could not operate effectively without their participation.

However, without an ERA, women's equal access to military career ladders and their protection against sex discrimination in their chosen profession are not guaranteed.

The issue of the draft is often raised as an argument against the ERA. In fact, the lack of an ERA in the Constitution does not protect women against involuntary military service. Congress already has the power to draft women as well as men, and the Senate debated the possibility of drafting nurses in preparation for a possible invasion of Japan in World War II.

Traditionally and at present, only males are required to register with the Selective Service System. After removing troops from Vietnam in 1973, the United States shifted to an all-volunteer military and has not since that time drafted registered men into active service. In 1981, in *Rostker* v. *Goldberg*, the Supreme Court upheld the constitutionality of a male-only draft registration. In recent years, however, Department of Defense planning memos and Congressional bills dealing with the draft or national service have included both men and women in the system.

The Department of Defense's 2015 decision to open all combat positions to women has resurrected the public debate about whether a future draft would include women. It is virtually certain that a reactivated male-only draft system would be legally challenged as a form of sex discrimination, and it would most likely be found unconstitutional, with or without an ERA in the Constitution. Draftees would continue to be examined for "mental, physical, and moral fitness" and other grounds for exemption (e.g., student status, parental status) before being deferred, exempted, or inducted into military service. Since there is no imminent prospect of reinstituting the draft and no way to know what its requirements would be if it were reactivated, a discussion about the ERA's relation to it is primarily theoretical.

However, the immediate practical value of putting the ERA into the Constitution would be to guarantee equal treatment for the women who voluntarily serve in the military and to provide them with the "equal justice under law" that they are risking and even sacrificing their lives to defend.

15. *Would the ERA adversely affect existing benefits and protections that women now receive (e.g., alimony, child custody, Social Security payments, etc.)?*

Most family law is written, administered, and adjudicated at the state level. Court decisions in states with ERAs show that the benefits that opponents claim women would lose are not in fact lost. They remain constitutional if they are provided in a sex-neutral manner based on function rather than on an assumption of stereotyped sex roles. That same principle would apply to laws and benefits (e.g., Social Security) at the federal level.

Based on the text of the ERA, legislators would have two years after the amendment is ratified to change sex-based

classifications in laws that might be vulnerable to challenge as unconstitutional. Those laws can be brought into conformity with the ERA by substituting sex-neutral categories (e.g., "primary caregiver" instead of "mother") to achieve their objectives.

Courts have for many years been moving in the direction of sex-neutral standards in family court decisions, and legislatures have been writing laws with increased attention to sex-neutral language and intent. It is unlikely that the ERA would have a significant impact on those trends.

16. ***Does the ERA shift power from the states to the federal government?***

Opponents have called Section 2 of the ERA ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article") a "federal power grab." In fact, that clause, sometimes including enforcement by the states as well, appears in eight other amendments, beginning with the 13th Amendment in 1865.

The ERA would not transfer jurisdiction of any laws from the states to the federal government. It would simply be one more legal principle among many others in the U.S. Constitution by which the courts evaluate the constitutionality of governmental actions.

17. ***What level of public support exists for a constitutional guarantee of equal rights for women and men?***

The remarkably high level of public support for a constitutional guarantee of equal rights on the basis of sex continues to rise.

According to a 2016 poll commissioned by the national ERA Coalition, 94% of Americans support an amendment to the Constitution to guarantee equal rights for men and women. This support reached as high as 99% among 18-to-24-year-olds, African Americans, Asian Americans, and Hispanic Americans. However, 80% of those polled thought the Constitution already guarantees equal rights to males and females.

In April 2012, a poll for Daily Kos/Service Employees International Union (SEIU) asked, "Do you think the Constitution should guarantee equal rights for men and women, or not?" The responses were 91% yes, 4% no, and 5% not sure.

An Opinion Research Corporation poll commissioned in 2001 by the ERA Campaign Network of Princeton, NJ showed that nearly all U.S. adults – 96% – believed that male and female citizens should have equal rights. The vast majority – 88% – also believed that the U.S. Constitution should make it clear that these rights are supposed to be equal. However, nearly three-quarters of the respondents – 72% – mistakenly believed that the Constitution already includes such a guarantee.

By asking these questions without mentioning the words "Equal Rights Amendment," the surveys filtered out the negative effect of widespread misrepresentations and misperceptions of the ERA. These responses show that citizens of the United States overwhelmingly, almost unanimously, support a constitutional guarantee of equal rights on the basis of sex.

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WHY THE EQUAL RIGHTS AMENDMENT REMAINS LEGALLY VIABLE AND RESCISSIONS ARE INVALID

THE EQUAL RIGHTS AMENDMENT

Section 1: Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.
Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
Section 3: This amendment shall take effect two years after the date of ratification.

The Equal Rights Amendment to the U.S. Constitution, first proposed by Alice Paul in 1923, was passed by the Senate and the House of Representatives on March 22, 1972, by the required two-thirds majority and was sent to the states for ratification. An original seven-year deadline in the proposing clause was later extended by Congress to June 30, 1982. At that date, only 35 of the necessary 38 of the states had ratified the ERA. It has not yet become part of the Constitution.

The ERA is still legally viable and properly before the states.

In the 1990s, supporters began to advocate for passage of ERA ratification bills in the 15 so-called "unratified" states (Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia). Between 1995 and 2019, ERA ratification bills were introduced in one or more legislative sessions in 14 of these states (all except Alabama).

Political activity in the unratified states is the result of a "three-state strategy" for ERA ratification, which was developed after the 27th ("Madison") Amendment was added to the Constitution in 1992, more than 203 years after its 1789 passage by Congress. Acceptance of that uniquely long ratification period as sufficiently contemporaneous has led to legal analysis contending that the ERA's existing 35 state ratifications remain legally viable and it is still properly before the states for consideration. The time limit on ERA ratification is open to change, as Congress demonstrated in extending the original deadline, and precedent with the 14th, 15th, and 19th Amendments shows that rescissions or other legislative retractions of ratifications have never been accepted as valid.

This untrodden constitutional ground is explored by Allison Held *et al.* in "The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States," *William & Mary Journal of Women and the Law*, Spring 1997. The Library of Congress's Congressional Research Service discussed this analysis in their 1996, 2014, and 2017 reports on the status of

ERA ratification and concluded that acceptance of the Madison Amendment does have implications for the legal viability of the ERA's three-state strategy.

On March 22, 2017, 45 years to the day after Congress sent the amendment to the states for ratification, Nevada became the 36th state to ratify the ERA. On May 30, 2018, Illinois became the 37th state to ratify. In 2019, legislatures in several other unratified states may provide the 38th approval necessary to put the ERA into the Constitution.

No previous efforts to withdraw a state ratification by rescission or other means have ever been accepted as valid.

Five states – Idaho, Kentucky, Nebraska, Tennessee, and South Dakota – have attempted to withdraw their approval of the Equal Rights Amendment after first ratifying it. However, based on precedent, case law, and statutory language, a state's vote to rescind or otherwise withdraw its ratification of a constitutional amendment has never been accepted as valid.

During the ratification process for the 14th Amendment, New Jersey and Ohio voted to rescind their ratifications after first voting yes, but they were both included in the published list of states approving the amendment in 1868. New York retracted its ratification of the 15th Amendment before the last necessary state ratified in 1870, but it was listed as one of the ratifying states.

In *Leser v. Garnett* (1922), the Supreme Court upheld the constitutionality of the 19th Amendment with language supporting the claim that a state's ratification of a federal amendment ends its ability to further participate in that amendment's ratification process:

> "The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed amendment was ratified by the Legislatures of 36 states, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States." As the Legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts."

In *The Story of the Constitution* (1937), the United States Constitution Sesquicentennial Commission explained that:

> "...an amendment was in effect on the day when the legislature of the last necessary State ratified. Such ratification is entirely apart from State regulations respecting the passage of laws or resolutions.... Approval or veto of such ratification by the Governor is of no account either as respects the date or the legality of the sanction. The rule that ratification once made may not be withdrawn has been applied in all cases; though a legislature that has rejected may later approve, and this change has been made in the consideration of several amendments."

A 1981 court decision (*Idaho v. Freeman*) in the U.S. District Court of the District of Idaho is sometimes inaccurately cited as support for the claim that the ERA time extension was invalid and rescission votes are permissible. This decision was appealed to the Supreme Court, which

did not hear arguments on the appeal before the June 30, 1982 ratification deadline passed. As the Congressional Quarterly's 1982 *CQ Almanac* explained:

> "Not only did the justices dismiss the cases as moot, they also vacated the lower court decision [*Idaho v. Freeman*], wiping it off the law books and rendering it useless as a precedent, a partial victory for those challenging it."

In an October 25, 2012 letter to Congresswoman Carolyn Maloney (NY), longtime lead sponsor of the traditional ERA ratification bill in the House of Representatives, Archivist of the United States David Ferriero wrote:

> "[The National Archives and Records Administration's] website page "The Constitutional Amendment Process" (www.archives.gov/federal-register/constitution) ... states that a proposed Amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the states, indicating that Congressional action is not needed to certify that the Amendment has been added to the Constitution. It also states that [the U.S. Archivist's] certification of the legal sufficiency of ratification documents is final and conclusive, and that a later rescission of a state's ratification is not accepted as valid....These statements are derived from 1 U.S.C. 106b."

Bills in Congress support implementation of the three-state strategy for ERA ratification.

Since 1994, bills have been introduced in each session of Congress to support the premise that ERA ratification will be accomplished when an additional three states beyond the original 35 ratify it.

In the 116th Congress (2019-2020),) companion bills *S.J. Res. 6,* co-sponsored by Senators Benjamin Cardin (D-MD) and Lisa Murkowski (R-AK), and *H.J. Res. 53*, sponsored by Representative Jackie Speier (CA), aim to maintain the legal viability of the 35 state ratifications achieved before the 1982 deadline. They resolve

> That notwithstanding any time limit contained in House Joint Resolution 208, 92d Congress, as agreed to in the Senate on March 22, 1972, the article of amendment [the ERA] proposed to the States in that joint resolution shall be valid to all intents and purposes as part of the Constitution whenever ratified by the legislatures of three-fourths of the several States.

For further information, see www.equalrightsamendment.org and www.eracoalition.org.

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May 6, 2019

Representative Steve Cohen
U.S. House of Representatives
Chair
House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties

Representative Mike Johnson
U.S. House of Representatives
Ranking Member
House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties

Re: House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties April 30, 2019 hearing on the Equal Rights Amendment

Dear Chairman Cohen and Ranking Member Johnson,

Legal Momentum, the Women's Legal Defense and Education Fund, submits this testimony in full support of the ratification of the Equal Rights Amendment in order to permanently enshrine within our Constitution the United States' values of equality, dignity, inclusion and equal opportunity for all.

Over the course of our nearly five-decade history, Legal Momentum has fought to realize full equality for women under the law. We have brought challenges under Title VII on behalf of traditional and non-traditional work forces including steel workers, flight attendants, professors, veterans, fire fighters and police officers. Recognizing that issues of sex discrimination intersect with many other forms of subjugation, we have also focused our efforts on issues including affirmative action, the military, the criminal justice system, poverty alleviation, and many other issues such as marital rape, the rights of pregnant women and victims of domestic violence, and broadening the definition of sexual harassment. In addition to working on economic equality and empowerment issues, Legal Momentum remains committed to realizing the promise of Title IX of the Education Amendments of 1972 and continues to challenge sex discrimination in educational settings. We are proud to have been closely involved in developing the landmark bipartisan legislation that became the Violence Against Women Act (VAWA) of 1994—a watershed moment in seeking equality for women and girls. We have played a critical role in drafting and advocating for VAWA's passage then, and in each subsequent effort to reauthorize VAWA including the current effort to do so.

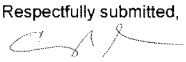
As Legal Momentum continues our 50-year mission to advance the rights of women and girls, we believe that the strength and endurance of a constitutional amendment guaranteeing the equal rights of women can no longer be overlooked. The words of the Constitution can never be adequately replaced with the acts of Congress and the Supreme Court alone. Ratifying the ERA would mean that the equal rights of women

will not be subject to the whims of divisive politics. The ERA would change the character of the debate on legislation such as VAWA by making clear that the right to be free from violence, the right to pursue economic opportunities equally, and the right to realize our full potential are not subject to negotiation.

Ensuring equality for women is one of the most important principles underpinning America's democracy. Yet it has been 229 years since women were omitted from the text of the Constitution, 96 years since the ERA was first introduced in Congress, 48 years since the ERA was passed with overwhelming bipartisan consensus by both houses of Congress, and 36 years since the last congressional hearing held on the ERA. The time to ratify the ERA is now, and we are only one state away. To that end, we strongly support the HJ res 38 to eliminate the deadline for the ratification of the ERA and believe that this resolution has the weight of esteemed constitutional scholars within the legal community.

The core principle of the ERA is simple: that women deserve to be treated with dignity. Women have been an afterthought in our democracy for too long. The need for the ERA is as critical today as it was in 1971. It is time to correct, once and for all, the omission of women's equality from our nation's Constitution and to restore women to our full potential and dignity.

Respectfully submitted,



Carol Moody
President and CEO
Legal Momentum, the Women's Legal Defense and Education Fund

May 6, 2019

To: Honorable Members of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties

Re: H.J.Res.38 - Removing the deadline for the ratification of the equal rights amendment.

Thank you for the opportunity to present testimony to the House of Representatives Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties. My name is Kate Kelly; I am a Human Rights Attorney at Equality Now. Equality Now is an international human rights organization established in 1992 that works to promote and protect the rights of all women and girls around the world, including legal equality and access to justice, and ending harmful practices, sex trafficking and sexual violence. Equality Now is a lead organization of the ERA Coalition and has worked with local organizations for equality in other constitutions around the world, including Afghanistan, Egypt and Kenya. I have personally worked on ratification of the Equal Rights Amendment (ERA) since 2012 at both the local level, in several different states, and the federal level.

Almost **every other country in the world has a gender equality provision in their constitution**.[1] This includes all industrialized nations, and many emerging democracies like Afghanistan where the United States has played a major role in shaping the constitution. Article 22 of the Afghan Constitution states, in part: "The citizens of Afghanistan, man and woman, have equal rights and duties before the law."[2] The lack of a gender provision in the U.S. Constitution makes us an outlier among nations, and it is time to remedy this. Adding the ERA to the Constitution would also bring the United States into compliance with its obligations under international law, including the International Covenant on Civil and Political Rights,[3] and its commitments under Agenda 2030 for Sustainable Development[4], making the United States more credible on the international stage.

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[1] UN Women Global Gender Equality Constitutional Database. *available at* http://constitutions.unwomen.org/en/dashboard.
[2] The Constitution of Afghanistan (Ratified) January 26, 2004, *available at* http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf.
[3] ICCPR, art. 2.
[4] *Sustainable Development Goal 5: Achieve gender equality and empower all women and girls,* United Nations Sustainable Development Goals Knowledge Platform, https://sustainabledevelopment.un.org/sdg5.

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Gender equality is an American value, not a partisan issue. The original ERA was long supported by members of all political parties, and that support continues in the modern-day ratification effort. One of the lead sponsors of the successful ERA ratification in Illinois in 2018 was Steve Andersson, a Republican member of the Illinois House of Representatives. The lead patron of the ERA ratification resolution in the Virginia Senate in 2019 is also from the GOP, Senator Glen Sturtevant of Richmond. The deadline elimination bills in both the House and Senate enjoy bipartisan support.[5] **The ERA is straightforward and is supported by common-sense politicians on both sides of the aisle**.

The primary procedural hurdle for ratification of the ERA remains the expiration of the 1982 extended deadline. Given that Article V is silent on the issue of deadlines and left the governance of the ratification process up to Congress, it is clear that **Congress has the power to remove the original deadline** it put in place in the preamble. Equality Now urges you to favorably pass Representative Speier's H.J.Res.38 out of this committee and send it to the full House floor for a vote to remove the deadline, allow for additional states to ratify, and for the amendment to be fully incorporated into the U.S. Constitution when it meets the 3/4ths state ratification requirement contained in Article V.

The ERA would provide permanent protection for all women and all marginalized genders from sex based discrimination directly in our Constitution, and is desperately needed. **American women should not be some of the least protected under law in all the world.** Thank you for your service and your continued work to protect our basic human rights. We applaud you for being part of this historic, and long-overdue change to our founding document.

Sincerely,

Kate Kelly
Human Rights Attorney, Equality Now

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[5] Lisa Murkowski and Ben Cardin, "It's time to finally pass the Equal Rights Amendment," The Washington Post, January 25, 2019, *available at* https://www.washingtonpost.com/opinions/its-time-to-finally-pass-the-equal-rights-amendment/2019/01/25/54b3626e-20d0-11e9-9145-3f74070bbdb9_story.html

STATEMENT FOR THE RECORD FROM
ALEJANDRA Y. CASTILLO
CEO
YWCA USA

THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUION, CIVIL RIGHTS, AND CIVIL LIBERTIES
U.S. HOUSE OF REPRESENATIVES

AT A HEARING ENTITLED
"Equal Rights Amendment"
APRIL 29, 2019

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Chairman Cohen and Ranking Member Johnson, and Members of the Committee, thank you for allowing me to submit this statement for the record on the immediate need to ratify the Equal Rights Amendment (ERA).

Founded 160 years ago, YWCA is one of the oldest and largest women's organizations in the nation. Today, there are more than 200 local YWCA associations in over 1,300 communities across 46 states and the District of Columbia, serving more than 2 million women, girls, and their families by combining programming and advocacy to generate lasting change in the areas of racial justice and civil rights, empowerment and economic advancement for women and girls, and improved health and safety for women and girls.

Removing barriers and expanding opportunities for women's successful workplace participation is at the heart of YWCA's mission to empower women. This is why we support fair wages and equal pay; safe, fair, and inclusive workplaces free of discrimination and harassment; and job-protected safe leave, paid sick leave, and paid family leave. It is also why YWCAs around the country provide 260,000 women and girls with economic empowerment programming each year to help them advance economically and become leaders.

In line with this core part of our mission, we appreciate that the ERA would help expand and improve women's access to economic security by:

- Setting legal standards for sex discrimination claims that would provide better accountability and access to legal remedies for women who experience discrimination in the workforce;
- Closing the legislative loophole of "factors other than sex" that is currently used to perpetuate pay inequity; and
- Helping ensure that women can work safely and continue to earn needed income during pregnancy, including by ensuring that pregnant workers can receive reasonable workplace accommodations.

Moreover, as the largest network of domestic and sexual violence service providers in the United States, YWCA knows that women and girls of all ages, income levels, racial and ethnic communities, sexual orientations, gender identities, and religious affiliations continue to experience violence in the form of domestic violence, sexual assault, dating violence, stalking, and trafficking. We work for practical solutions to protect survivors, hold perpetrators accountable, and eradicate all forms of gender-based violence. Every year, YWCAs provide more than 535,000 women with safety services, which include domestic violence and sexual assault programs and services such as emergency shelter, crisis hotlines, counseling and court assistance, and other community safety programs.

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Too often, law enforcement and the judicial system fail in meeting their fundamental obligation to provide safety and security for survivors of violence. The failure of law enforcement to protect Jessica Gonzalez from abuse by her husband and the death of her three children at the hands of her husband provides a case in point. Ms. Gonzales' three daughters were killed by their father when law enforcement failed to enforce her order of protection against her husband. In subsequent litigation (*Castle Rock v. Gonzales*), the Supreme Court held that there was no constitutional basis for Ms. Gonzales' section 1983 claim against the Castle Rock police department, thereby enabling law enforcement agencies to escape liability even when they have been negligent in protecting women from gender-based violence.

Survivors of sexual assault have faced a similar lack of justice. For instance, in 2000, the Supreme Court struck down the provision of the Violence Against Women Act (VAWA) that permitted a college freshman, Christy Brzonkala, to bring a case against a fellow student who raped her. The Court held that cases such as hers did not fall within the scope for the Commerce Clause (under which VAWA had been passed), and thus there was no constitutional basis for the law or her claim.

The ERA would prevent these and similar miscarriages of justice for victims and survivors of gender-based violence. With the ERA, law enforcement would be held to a higher standard of accountability for blatantly disregarding the rights and safety needs of survivors. The Equal Rights Amendment would help improve the lives of survivors of domestic and sexual violence like Ms. Gonzalez and Ms. Brzonkala by:

- Giving Congress the constitutional basis to pass laws that give women victimized by gender-based violence recourse in the courts; and
- Providing a constitutional basis for claims of gender-based violence.

These are just a few of the numerous ways in which the ERA would empower and improve the lives of women. YWCA USA remains committed to ensuring that that the Equal Rights Amendment is quickly ratified so that women across the country can benefit from comprehensive protection against discrimination in schools, employment, during pregnancy, and in many other parts of their lives.

YWCA appreciates the opportunity to share our views with you. If you have any questions, please contact YWCA USA Vice President of Public Policy and Advocacy, Catherine Beane, at cbeane@ywca.org or 202-835-2354.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ALLEGHENY REPRODUCTIVE HEALTH CENTER, ALLENTOWN WOMEN'S CENTER, BERGER & BENJAMIN LLP, DELAWARE COUNTY WOMEN'S CENTER, PHILADELPHIA WOMEN'S CENTER, PLANNED PARENTHOOD KEYSTONE, PLANNED PARENTHOOD SOUTHEASTERN PENNSYLVANIA, and PLANNED PARENTHOOD OF WESTERN PENNSYLVANIA,	:	No. 26 MD 2019
Petitioners,	:	**PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT SEEKING DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**
v.	:	

2019 JAN 16 PM 12:49

PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, TERESA MILLER, in her official capacity as Secretary of the Pennsylvania Department of Human Services, LEESA ALLEN, in her official capacity as Executive Deputy Secretary for the Pennsylvania Department of Human Service's Office of Medical Assistance Programs, and SALLY KOZAK, in her official capacity as Deputy Secretary for the Pennsylvania Department of Human Service's Office of Medical Assistance Programs,	:
Respondents.	:

NOTICE TO PLEAD

YOU ARE HEREBY NOTIFIED to file a written response to the enclosed Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief within twenty (20) days from service hereof, or a judgment may be entered against you.

By: _____

Date:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ALLEGHENY REPRODUCTIVE HEALTH CENTER, ALLENTOWN WOMEN'S CENTER, BERGER & BENJAMIN LLP, DELAWARE COUNTY WOMEN'S CENTER, PHILADELPHIA WOMEN'S CENTER, PLANNED PARENTHOOD KEYSTONE, PLANNED PARENTHOOD SOUTHEASTERN PENNSYLVANIA, and PLANNED PARENTHOOD OF WESTERN PENNSYLVANIA,	:	No. _____
Petitioners,	:	**PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT SEEKING DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**
v.	:	
PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, TERESA MILLER, in her official capacity as Secretary of the Pennsylvania Department of Human Services, LEESA ALLEN, in her official capacity as Executive Deputy Secretary for the Pennsylvania Department of Human Service's Office of Medical Assistance Programs, and SALLY KOZAK, in her official capacity as Deputy Secretary for the Pennsylvania Department of Human Service's Office of Medical Assistance Programs,	:	
Respondents.	:	

PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT SEEKING DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

INTRODUCTION

A woman's ability to determine whether and when to have children is essential to her health, equal citizenship, and liberty. For more than three decades, low-income women in Pennsylvania who choose to terminate their pregnancy and who would otherwise have their medical care covered by Medical Assistance have been forced to choose: continue their pregnancy to term against their will or use money that they would have used for shelter, food, clothing, or childcare to pay for the procedure. This is exactly the choice -- between health care and basic essentials -- that Medicaid was created to avoid. Yet low-income women in Pennsylvania, and women alone, routinely face this choice.

Pennsylvania's Medicaid program, known as Medical Assistance, provides health care coverage for low-income Pennsylvanians. Medical Assistance covers medical procedures to preserve and protect the health of both male and female low-income Pennsylvanians, with one glaring exception: it does not cover abortions, unless the pregnancy is caused by rape or incest, or where the abortion is necessary to avert the death of the pregnant woman. The denial of Medical Assistance coverage for low-income women seeking to terminate a pregnancy contravenes fundamental guarantees of equality and poses a dire threat to their

health and well-being. This denial pursuant to 18 Pa. C.S. § 3215(c) & (j) (the "Pennsylvania coverage ban") violates the Pennsylvania Constitution's Equal Rights Amendment and equal protection guarantees.

The Pennsylvania coverage ban was upheld by the Pennsylvania Supreme Court in 1985 in *Fischer v. Dep't of Public Welfare*, 502 A.2d 114 (Pa. 1985). That case was incorrectly reasoned at the time, goes against recent developments in Pennsylvania law with respect to independent interpretations of our state constitution, and is contrary to a modern understanding of the ways in which the denial of women's reproductive autonomy is a form of sex discrimination that perpetuates invidious gender and racial stereotypes. Petitioners seek reconsideration of *Fischer* and ultimately a court order requiring the Department of Human Services to comply with the Constitution by covering abortion through Medical Assistance.

JURISDICTION

1. This Court has original jurisdiction over this action pursuant to 42 Pa. C.S. § 761(a), because this action is brought against the Commonwealth government and agents of the Commonwealth government acting in their official capacities.

PARTIES

PETITIONERS

Allegheny Reproductive Health Center

2. Petitioner Allegheny Reproductive Health Center ("Allegheny Reproductive") is a for-profit corporation incorporated in Pennsylvania. Its principal place of business is Pittsburgh, Pennsylvania.

3. Since 1975, Allegheny Reproductive has provided women in greater western Pennsylvania with a broad range of reproductive health care services, including: comprehensive gynecological care; screening and treatment for sexually transmitted infections; breast exams and mammogram referrals; and contraceptive counseling and medical services. Allegheny Reproductive performs surgical abortion through 23.6 weeks of pregnancy, measured from the first day of the woman's last menstrual period ("LMP"). Allegheny Reproductive provides medication abortion through 10 weeks LMP. Allegheny Reproductive is enrolled as a Medicaid provider.

4. Many of Allegheny Reproductive's patients are enrolled in or eligible for Medical Assistance benefits. These patients include women who seek abortions but who, due to the Pennsylvania coverage ban, cannot use their insurance to cover the procedure.

Allentown Women's Center

5. Petitioner Allentown Women's Center ("AWC") is a for-profit corporation incorporated in Pennsylvania. Its principal place of business is Bethlehem, Pennsylvania.

6. Since 1978, AWC has served patients from Berks, Bucks, Carbon, Lackawanna, Lehigh, Luzerne, Montgomery, Monroe, Northampton, and Schuylkill counties. AWC offers its patients comprehensive reproductive health care, including: comprehensive gynecological care; therapeutic and trauma-informed counseling services, such as pregnancy loss counseling and miscarriage management; contraceptive counseling and medical services; and LGBTQ-affirming services.

7. AWC performs surgical abortion through 22.6 weeks LMP. AWC provides medication abortion services up to 10 weeks LMP.

8. Many of AWC's patients are enrolled in or eligible for Medical Assistance benefits. These patients include pregnant people who seek abortions but who, due to the Pennsylvania coverage ban, cannot use their insurance to cover the procedure.

Berger & Benjamin

9. Petitioner Berger & Benjamin is a for-profit corporation incorporated in Pennsylvania. Its principal place of business is Philadelphia, Pennsylvania.

10. Since 1974, Berger & Benjamin has provided women in greater southeastern Pennsylvania with a complete range of reproductive health services, ranging from routine women's reproductive health services to treatment for complex and high-risk reproductive health issues.

11. Berger & Benjamin performs surgical abortion up to 20.6 weeks LMP, and provides medication abortion through 10 weeks LMP.

12. Many of Berger & Benjamin's patients are enrolled in or eligible for Medical Assistance. These patients include women who seek abortions but who, due to the Pennsylvania coverage ban, cannot use their insurance to cover the procedure.

Delaware County Women's Center

13. Petitioner Delaware County Women's Center ("DCWC") is a for-profit corporation incorporated in Pennsylvania. Its principal place of business is Chester, Pennsylvania.

14. Since 2013, DCWC has provided women in the greater Delaware County area with essential reproductive health and family planning

services. DCWC previously operated as the Reproductive Health and Counseling Center, which commenced its operations in 1973.

15. DCWC provides medication abortion care through 10 weeks LMP.

16. Many of DCWC's patients are enrolled in or eligible for Medical Assistance benefits. These patients include women who seek abortions but who, due to the Pennsylvania coverage ban, cannot use their insurance to cover the procedure.

Philadelphia Women's Center

17. Petitioner Philadelphia Women's Center ("PWC") is a for-profit corporation incorporated in Pennsylvania. Its principal place of business is Philadelphia, Pennsylvania.

18. Since 1972, PWC has provided women in the greater Philadelphia area with quality reproductive health and family planning services, and today serves as a training site for many nationally recognized medical institutions.

19. PWC performs surgical abortion up to 24 weeks LMP, and provides medication abortion through 10 weeks LMP.

20. Many of PWC's patients are enrolled in or eligible for Medical Assistance benefits. These patients include women who seek abortions but who,

due to the Pennsylvania coverage ban, cannot use their insurance to cover the procedure.

Planned Parenthood Keystone

21. Petitioner Planned Parenthood Keystone ("PPKeystone") is a non-profit corporation incorporated in Pennsylvania. PPKeystone maintains administrative offices in Harrisburg, the Lehigh Valley, Warminster, and York, and operates nine health centers in Allentown, Bensalem, Harrisburg, Lancaster, Quakertown, Reading, Warminster, Wilkes-Barre, and York. PPKeystone serves thirty-seven counties throughout the Commonwealth, home to over half of Pennsylvanians.

22. Since 1926, health centers affiliated with PPKeystone have provided and promoted access to essential reproductive health care and family planning services, including: comprehensive gynecological care; cancer screenings; testing and treatment of sexually transmitted diseases; pregnancy testing; and contraceptive counseling and medical services. PPKeystone serves over 35,000 patients annually.

23. PPKeystone offers abortion services at its health centers in Allentown, Harrisburg, Reading, Warminster, and York. Each of these centers provides medication abortion through 10 weeks LMP and, with the exception of the Harrisburg location, performs surgical abortion up to 14 weeks LMP.

24. Many of PPKeystone's patients are enrolled in or eligible for Medical Assistance benefits. These patients include women who seek abortions but who, due to the Pennsylvania coverage ban, cannot use their insurance to cover the procedure.

Planned Parenthood Southeastern Pennsylvania

25. Petitioner Planned Parenthood Southeastern Pennsylvania ("PPSP") is a non-profit corporation incorporated in Pennsylvania. PPSP's administrative office is located in Philadelphia, Pennsylvania, and it operates ten health centers throughout Philadelphia, Coatesville, Media, Pottstown, Norristown, Upper Darby, and West Chester.

26. Since 1929, health centers affiliated with PPSP have provided and promoted access to essential reproductive health care and family planning services. Its services include comprehensive gynecological care, cancer screenings, testing and treatment of sexually transmitted infections, vaccinations, pregnancy testing, childbirth classes, adoption referrals, and contraceptive counseling and medical services.

27. PPSP offers abortion services at its health centers in Center City Philadelphia, Norristown, Northeast Philadelphia, and West Chester. Each of these centers provides medication abortion through 10 weeks LMP and, with the

exception of the Norristown location, performs surgical abortion up to varying gestational ages.

28. Many of PPSP's patients are enrolled in or eligible for Medical Assistance benefits. These patients include women who seek abortions but who, due to the Pennsylvania coverage ban, cannot use their insurance to cover the procedure.

Planned Parenthood of Western Pennsylvania

29. Petitioner Planned Parenthood of Western Pennsylvania ("PPWP") is a non-profit corporation incorporated in Pennsylvania. PPWP's administrative office is located in Pittsburgh, Pennsylvania, and it operates health centers located in Bridgeville, Greensburg, Johnstown, Moon Township, Pittsburgh and Somerset.

30. Since 1930, health centers affiliated with PPWP have provided and promoted access to essential reproductive health care and family planning services, including quality comprehensive gynecological care, contraceptive counseling, pregnancy testing and counseling, colposcopies and cryotherapy, pelvic and breast exams, and testing and treatment of sexually transmitted infections. PPWP's health care, education, and advocacy efforts reach people in 27 northwestern and southwestern counties of Pennsylvania.

31. PPWP offers abortion services at its health center in Pittsburgh, performing surgical abortion up to 18 weeks LMP, and providing medication abortion through 10 weeks LMP.

32. Many of PPWP's patients are enrolled in or eligible for Medical Assistance benefits. These patients include women who seek abortions but who, due to the Pennsylvania coverage ban, cannot use their insurance to cover the procedure.

Petitioners' Standing

33. Collectively, Petitioners provide about 95% of all abortions performed in the Commonwealth of Pennsylvania.

34. All Petitioners are enrolled Medical Assistance providers.

35. Due to the Pennsylvania coverage ban, the vast majority of Petitioners' Medical Assistance-eligible patients who need abortions cannot use their insurance to cover the procedure. As a result, Petitioners' low-income patients face substantial difficulty amassing the funds necessary to obtain the procedure.

36. Petitioners frequently offer these Medical Assistance-eligible women financial assistance, performing abortions at a financial loss to the organization. Petitioners also invest their own time and resources to identify and secure private funding sources to assist low-income women to pay for their abortion, resulting in a loss of time and productivity for Petitioners' staff.

37. In some cases, Medical Assistance-eligible women are forced to delay their abortion procedures while they attempt to gather funds. This results in women prolonging their pregnancies before getting an abortion, which for some women results in delay past the gestational age at which they can obtain a medical abortion, thus requiring a different type of procedure. For other women, the delay causes an increase in the risk and cost of the procedure.

38. For some low-income women, the coverage ban means that they ultimately must forgo obtaining an abortion altogether and are forced to carry the pregnancy to term, either having never secured the funds necessary to afford the procedure, or having faced such lengthy delays that they become ineligible for the procedure.

39. Petitioners sue on behalf of their patients who seek abortions and who are enrolled in or eligible for Medical Assistance, but whose abortions are not covered because of the Pennsylvania coverage ban.

RESPONDENTS

40. Respondent Pennsylvania Department of Human Services ("DHS"), located in Harrisburg, Pennsylvania, is sued as the Commonwealth agency responsible for administering Pennsylvania's Medical Assistance programs. *See* 62 P.S. § 403.

41. Respondent Teresa Miller ("Secretary Miller") is sued in her official capacity as the Secretary of DHS, located in Harrisburg, Pennsylvania. Secretary Miller is responsible for the control and supervision of the Office of Medical Assistance Programs, the medical insurance program for Pennsylvanians living in poverty, and is responsible for implementing Pennsylvania's Medical Assistance program in accordance with federal and state law. *See* 62 P.S. §§ 403, 403.1.

42. Respondent Leesa Allen ("Deputy Secretary Allen") is sued in her official capacity as the Executive Deputy Secretary for Medical Assistance Programs, located in Harrisburg, Pennsylvania. Deputy Secretary Allen plans, coordinates, and directs the provision of Medical Assistance benefits and services in Pennsylvania and is responsible for ensuring that the program is in compliance with federal and state law.

43. Respondent Sally Kozak ("Deputy Secretary Kozak") is sued in her official capacity as the Deputy Secretary for the Office of Medical Assistance Programs, located in Harrisburg, Pennsylvania. Deputy Secretary Kozak assists in planning, coordinating, and directing the provision of Medical Assistance benefits and services in Pennsylvania and is responsible for ensuring that the program is in compliance with federal and state law.

STATEMENT OF FACTS

STATUTORY AND REGULATORY FRAMEWORK

44. Medicaid is a joint federal-state program that provides medical assistance to the poor. 42 U.S.C. §§ 1396 to 1396w-5. Medical Assistance is Pennsylvania's Medicaid program. 62. P.S. §§ 431-437.

45. Medical Assistance is a public insurance system that provides eligible Pennsylvanians with medical insurance for covered medical services that fall within the scope of benefits as set forth at 55 Pa. C.S. § 1101.31.

46. Pennsylvania operates two different Medical Assistance programs -- Fee-for-service and HealthChoices. The Fee-for-service program reimburses providers directly for covered medical services provided to enrollees. HealthChoices is a managed care program, meaning DHS pays a per enrollee amount to managed care organizations that agree to reimburse health care providers that provide care for enrollees.

47. With some exceptions, Medical Assistance enrollees are required to enroll with a managed care organization participating in HealthChoices rather than the Fee-for-service program. As of July 1, 2018, 84.6% of Pennsylvania Medical Assistance enrollees were in a HealthChoices managed care plan, and 15.4% were in the Fee-for-service program.

48. Medical Assistance covers comprehensive medical care for its enrollees. Relevant to this Petition, Medical Assistance covers inpatient hospital services, outpatient hospital services, physicians' services, clinic services at independent medical clinics and ambulatory surgical centers, and family planning services, 55 Pa. C.S. §§ 1101.31(b)(1), (3), (8), (11), (16), as well as all pregnancy-related care except abortion, including prenatal care, obstetric, childbirth, neonatal, and post-partum care.

49. The Pennsylvania coverage ban prohibits the expenditure of state funds "for the performance of an abortion." 18 Pa. C.S. § 3215(c). The law contains three exceptions: 1) abortions that are necessary to avert the death of the pregnant woman, 2) when the pregnancy is caused by rape, and 3) when the pregnancy is caused by incest.

50. Implementing the Pennsylvania coverage ban, Medical Assistance regulations likewise prohibit coverage of abortion except in those same three circumstances -- threat to the woman's life, rape, and incest. 55 Pa. Code § 1141.57 (physicians' services); *id.* at § 1163.62 (inpatient hospital services); *id.* at § 1221.57 (clinic and emergency room services). Accordingly, Medical Assistance does not cover the cost of abortion procedures for covered individuals who seek abortions that do not fit within any of the three enumerated exceptions.

51. Health care providers, like Petitioners, are prohibited by DHS regulation from billing for services inconsistent with Medical Assistance regulations and are subject to sanctions for doing so. 55 Pa. Code §§ 1141.81, 1163.491, 1221.81. Health care providers who bill HealthChoices managed care organizations are also prohibited from billing for services inconsistent with Medical Assistance regulations and are subject to sanctions for doing so. *Id.* § 1229.81.

52. Thus, Petitioners are prohibited from billing or being reimbursed for abortions for both Fee-for-service and HealthChoices enrollees that do not fall within the Pennsylvania coverage ban's three enumerated exceptions.

53. Although federal law bars the use of federal Medicaid funds to cover the cost of abortion other than in cases of threat to the woman's life, rape, and incest, federal law does not prevent states from using state funds to provide coverage for a broader range of services. Sixteen states, including three of Pennsylvania's neighbors (New Jersey, New York, and Maryland) allow Medicaid to cover abortions under their state Medicaid programs beyond these three exceptions.

54. There is no parallel coverage ban for men. There is no medical condition specific to men for which Medical Assistance denies coverage. When a male recipient requires a covered service, including all services related to

reproductive health, Medical Assistance covers it. In contrast, when a woman requires an abortion, Medical Assistance covers it only if she would otherwise die or if the pregnancy results from rape or incest.

55. Medical Assistance covers medical care for pregnancy and childbirth for women who choose to continue their pregnancy to term. The medical costs to the Medical Assistance program associated with covering pregnancy and childbirth services far exceed the cost of an abortion, particularly for women with medically complicated pregnancies.

EFFECT OF THE PENNSYLVANIA COVERAGE BAN

56. In 2016, the latest year for which Pennsylvania Department of Health data are available, Pennsylvania providers performed 30,881 abortions. Petitioners account for fifteen of the seventeen freestanding abortion providers in the state and collectively provide approximately 95% of the abortions performed in Pennsylvania.

57. Many of Petitioners' patients are low income and either enrolled in or eligible for Medical Assistance. For example, an estimated 47% of PPSP's patients, 45% of AWC's patients, 50% of Allegheny Reproductive's patients, 60% of Benjamin & Berger's patients, and 46% of PPWP's patients are enrolled in or eligible for Medical Assistance.

58. Both women on Medical Assistance who seek abortions in Pennsylvania and Petitioners suffer significant harm from the Pennsylvania coverage ban and its implementing regulations.

59. The coverage ban interferes with the ability of poor women in Pennsylvania to access the abortion care they need. The Pennsylvania coverage ban forces women on Medical Assistance who seek abortions in Pennsylvania to choose between continuing their pregnancy to term against their will and using money that they would have otherwise used for daily necessities, such as shelter, food, clothing, or childcare, to pay for the procedure. *See generally* Expert Declaration of Colleen M. Heflin, attached hereto as Exhibit A; Expert Declaration of Elicia Gonzales, attached hereto as Exhibit B. This is exactly the choice -- between health care and basic essentials -- that Medicaid was created to avoid.

60. Access to a provider of abortion care is a significant problem for many women in Pennsylvania, but the problem is far worse for poor women and women living in rural areas. *See* Ex. A, Heflin Dec. Most counties in Pennsylvania do not have an abortion provider. In fact, only 16% of Pennsylvania counties have a facility that performs abortions. This means that women from the rest of the state must travel significant distances to obtain an abortion. In 2017, AWC estimated that approximately 40% of its abortion patients had to travel between 50 to 99 miles one way to get their procedure, and about 10% traveled

between 100 miles to over 200 miles for abortion care. PPWP estimates that approximately 17.5% of its patients traveled more than 50 miles one way to get their procedure, and about 8% traveled more than 100 miles for abortion care. Allegheny Reproductive estimates that around 70% to 75% of its abortion patients travel more than 50 miles one way, and that 30% of its patients travel over 100 miles for abortion care. The need to travel long distances increases the costs associated with the procedure, as bus fare, gas, tolls, lodging, time lost from work, and child care expenses come into play. These added expenses -- some of which would be covered medical transportation expenses under Medicaid if abortion were covered -- make it even more difficult for low-income women in Pennsylvania to access abortion care, if they can make the trip at all. *Id.*

61. In many cases, women on Medical Assistance who seek abortions in Pennsylvania are forced to delay abortion care in order to raise funds for their procedure. *Id.*

62. All Petitioners work with low-income patients who need funding from private charitable sources to help pay for their procedure; however, not all patients are able to obtain private financial assistance. *See* Ex. B, Gonzales Dec. For example, half of all Allegheny Reproductive abortion patients are enrolled in or eligible for Medical Assistance; only 43% of those patients are able to access private funding for their procedure. Benjamin & Berger estimates that 60

to 70% of its low-income patients receive 20 to 40% of the cost of the procedure through third-party funding grants. Accordingly, even patients who are able to secure grants must raise part of the cost of the procedure, which causes these patients significant economic hardship. *Id.*

63. For many poor women, the obstacles caused by these coverage restrictions are not merely burdensome, but insurmountable. National studies show that roughly 25% of women on Medicaid who seek an abortion in a state with a coverage ban are forced to continue their pregnancies to term against their will because they are unable to acquire the funds to pay for the procedure. *See* Expert Declaration of Terri-Ann Thompson, attached hereto as Exhibit C.

64. As a result of the Pennsylvania coverage ban, there are Pennsylvania women who are forced to carry their pregnancies to term against their will. *Id.*

HARM TO WOMEN WHO ARE FORCED TO CARRY THEIR PREGNANCIES TO TERM

65. Women who are forced to carry their pregnancies to term against their will because of the Pennsylvania coverage ban are harmed in many ways. They are denied the autonomy and dignity that come with being able to control their reproductive future. When women are denied control over whether or not to have children, their plans for the future, financial status, and ability to participate equally in society are placed at risk. *See* Ex. A, Heflin Dec. For low-

income women, trying to maintain a job, obtain an education, or adequately care for family members can become close to impossible. *Id.*

66. Women who are forced to carry a pregnancy to term against their will face an increased risk of psychosocial harm. Their education may be interrupted, their job and career prospects circumscribed. *Id.* A year after unsuccessfully seeking abortion, they are more likely to be impoverished, unemployed, and depressed than women in similar circumstances who were able to obtain abortion care. *Id.*

67. While both pregnancy and childbirth are a source of joy for many women and families, carrying a pregnancy to term carries medical risks for all women. Expert Declaration of Courtney Anne Schreiber, attached hereto as Exhibit D. Indeed, the maternal mortality risks associated with childbirth are approximately fourteen times greater than the risk associated with abortion care. The risk for African-American women of carrying a pregnancy to term is even higher, as the African-American maternal mortality rate is three times that of white women.

68. In Pennsylvania in particular, according to Pennsylvania's Department of Health, almost 13 women die within 42 days of the end of pregnancy for every 100,000 live births in the state, a rate that has doubled since 1994. In cities like Philadelphia, that rate is much higher.

69. Pregnancy can affect women's physical and mental health in serious ways, some of which can result in permanent disability and even ultimately lead to life-threatening conditions. For example, pregnancy taxes every organ of the body, including the brain, the heart, and the immune system. *Id.* During pregnancy, a woman's blood volume increases by 30-50%, and her heart rate also increases. *Id.* This forces a pregnant woman's heart to work much harder throughout her pregnancy, during labor and delivery, and after giving birth. *Id.* A woman's immune system is also weakened during pregnancy, making her more vulnerable to infections. *Id.*

70. The risks associated with pregnancy and childbirth are particularly acute for women with pre-existing conditions, such as heart disease, lupus, cancer, diabetes, obesity, hypertension, renal disease, liver disease, epilepsy, sickle cell disease and numerous other conditions. *Id.* Unable to cover the cost of terminating a pregnancy, a woman with a pre-existing condition may be forced to continue a pregnancy that can exacerbate these conditions, and pose serious threats to the woman's long-term health by causing seizures, diabetic coma, hemorrhage, heart damage, and loss of kidney function. *Id.* This health damage, though serious and potentially life-threatening, is usually not imminent enough to qualify the patient for abortion coverage under the statutory exception to the coverage ban,

which requires that the abortion be necessary to "avert the death" of the woman, rather than to avoid serious long-term health consequences.

71. Pregnancy can also force a woman to alter current treatment or medication plans for the safety of the fetus, but to the detriment of her own health. *Id.* Some treatment plans, such as mental health medication or cancer treatments, are incompatible with pregnancy. Accordingly, a woman undergoing these treatments will be forced to choose between halting or compromising critical medical care or placing the fetus at risk. This can result in devastating health outcomes.

72. In addition to exacerbating pre-existing conditions, pregnancy can also harm a woman's health in its own right; pregnancy and childbirth carry inherent health risks for all pregnant women. *Id.* Moreover, some women who were otherwise healthy at the beginning of their pregnancy may develop serious complications during the pregnancy such as gestational diabetes, hypertension, or hyperemesis gravidarum. *Id.*

73. The risks associated with pregnancy are not limited to physical health. Pregnancy and the postpartum period are times of increased vulnerability to mental health issues. Expert Declaration of Sarah C. Noble, attached hereto as Exhibit E. Mental health issues may present for the first time during pregnancy, and pregnancy also poses a significant risk of relapse or worsening of symptoms

across a broad range of psychiatric illnesses, including bipolar disorder, schizophrenia, and obsessive-compulsive disorder. *Id.* The weeks and months immediately following birth also pose a risk for postpartum depression, which can be severe for some women. *Id.*

74. Some women's mental health issues are directly related to not being able to terminate their pregnancy. Women may suffer severe psychological distress as a result of being forced to continue an unwanted pregnancy. *Id.* Other women who learn the fetus they are carrying has a severe anomaly or has a condition incompatible with life may also suffer severe distress from being unable to terminate the pregnancy.

75. Preventing access to abortion for low-income women can also increase their exposure to physical and mental abuse at the hands of their partners, as abuse can increase when a woman becomes pregnant, and the abuse may target the locus of the pregnancy. *See id.* Moreover, if forced to remain with a partner in order to support a new child, abused women and their children are likely to suffer serious physical and psychological harm, and even deadly consequences. *See id.*

HARM TO WOMEN WHO ARE ABLE TO OBTAIN AN ABORTION DESPITE THE COVERAGE BAN

76. Some women on Medical Assistance in Pennsylvania are able to obtain an abortion despite the Pennsylvania coverage ban. Nonetheless, those women are still likely to suffer because of it.

77. The cost of an abortion in Pennsylvania ranges from several hundred dollars to several thousand, depending on how far along in the pregnancy the woman is, the type of abortion she has, whether she has any underlying medical conditions, and what type of facility cares for her. Ex. B, Gonzales Dec.

78. For women on Medical Assistance, who are near or below the federal poverty line, this amount of money is often more than they have. When a woman is living paycheck to paycheck, denying coverage for an abortion can push her deeper into poverty.

79. As a result, to pay for their abortion, impoverished women on Medical Assistance are forced to make enormous financial sacrifices. Low-income women are forced to divert funds they need for basic subsistence, such as rent, utilities, food, diapers, children's clothing, and medical care. *Id.*; Ex. A, Heflin Dec. Others are forced to ask for money from relatives and friends, jeopardizing the confidentiality of their pregnancy and abortion decision. Ex. B, Gonzales Dec.

80. Raising the money through these means takes time, and the cost of an abortion procedure increases further in pregnancy. With increased price comes increased difficulty to raise funds, which results in additional delay. This is a vicious cycle that sometimes leads to women being forced into a surgical abortion even if she prefers a medication abortion or being delayed beyond the gestational limit at the closest abortion clinic or even beyond the legal limit to

obtain an abortion in Pennsylvania. And some women are not able to raise enough money at all.

81. Although abortion at all stages of pregnancy is safer than childbirth, as pregnancy advances, abortion presents additional risks. Thus, the delay that women on Medical Assistance face while trying to raise the funds to pay for their abortion causes them to face an increased risk of medical complications from their abortion. Ex. D, Schreiber Dec.

82. Delay can also cause some women to have a more invasive procedure than they would have otherwise sought. Delay can push women beyond the gestational limit for a medical abortion, requiring them to have a surgical procedure instead. Delay can also force women to have a two-day procedure when they would have otherwise been able to complete it in just one.

83. The harm imposed by the Pennsylvania coverage ban does not fall evenly upon all women. Restrictions on funding for abortion care particularly harm women of color. Ex. C, Thompson Dec. This is because women of color are more likely than white women to be poor. In Pennsylvania, 25.8% percent of Black women, 30.5% of Latinx women, and 15.5% of Asian women live in poverty, compared with 10.5% of white women. Additionally, low-income women of color are more likely to rely on Medical Assistance for health care and less likely to be

able to afford out-of-pocket costs for their abortion compared to their white counterparts.

HARM TO PETITIONERS

84. Because of the coverage ban, health care providers, like Petitioners, who provide abortions in Pennsylvania are also harmed. Petitioners' mission to provide comprehensive reproductive health care to women and to serve at-risk populations is frustrated by the coverage ban because it forces Petitioners to divert money and staff time from other mission-central work to help Pennsylvania women on Medical Assistance who do not have enough money to pay for their abortion.

85. Petitioners regularly subsidize (in part or in full) abortions for Pennsylvania women on Medical Assistance who are not able to pay the fee on their own. Petitioners lose money on the abortion procedures they subsidize.

86. Petitioners also expend valuable staff resources to assist patients in securing funding from private charitable organizations that fund abortion for women on Medical Assistance. These local, regional, and national organizations help some, but not all, low-income women pay for abortions. Petitioners devote anywhere from part of a full-time staff position to multiple full-time staff positions connecting patients with these organizations, managing the funding that comes from these organizations, and communicating with patients

about their financial situations once the funding from these organizations comes through.

87. The Pennsylvania coverage ban also interferes with Petitioners' counseling of patients. The coverage ban forces Petitioners to expend their counselors' time delving into personal matters that the patient may wish not to discuss, such as whether the sex that led to conception was non-consensual or with a family member, just to assess the patient's eligibility for Medical Assistance funding. At times, exploring these personal matters can be painful, intrusive and without any medical or therapeutic purpose, and may create difficulties in the patient-counselor relationship for patients who would otherwise not want to talk about these sensitive matters.

COUNT ONE

THE PENNSYLVANIA COVERAGE BAN VIOLATES PENNSYLVANIA'S EQUAL RIGHTS AMENDMENT

88. Petitioners reallege and incorporate herein by reference each and every allegation of paragraphs 1 to 87 inclusive.

89. Pennsylvania's Equal Rights Amendment, Article I, Section 28 of the Pennsylvania Constitution, states: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." The Equal Rights Amendment, which has no federal counterpart, prohibits all sex-based discrimination by government officials in Pennsylvania.

90. Any classification that disadvantages women based on pregnancy or reproductive capacity constitutes a sex-based distinction. The Pennsylvania coverage ban singles out and excludes abortions, a procedure sought singularly by women as a function of their sex, from Pennsylvania's Medical Assistance programs. In contrast, there is no statute or regulation that singles out or excludes any sex-based healthcare consultation or procedure for men under Medical Assistance. By singling out and excluding abortions from Medical Assistance, women throughout this Commonwealth are denied coverage for essential health care services solely on the basis of their sex.

91. The coverage ban also flows from and reinforces gender stereotypes about the primacy of women's reproductive function and maternal role, and thus offends the Pennsylvania Equal Rights Amendment's prohibition against sex discrimination.

92. Because the Pennsylvania coverage ban improperly discriminates against women based on their sex without sufficient justification, the ban, as enforced and administered by DHS, Secretary Miller, and Deputy Secretaries Allen and Kozak, violates women's constitutional right to equality of rights under the law, as guaranteed by Article I, Section 28 of the Pennsylvania Constitution.

COUNT TWO

THE PENNSYLVANIA COVERAGE BAN VIOLATES PENNSYLVANIA'S EQUAL PROTECTION PROVISIONS

93. Petitioners reallege and incorporate herein by reference each and every allegation of paragraphs 1 to 92 inclusive.

94. Pennsylvania's Constitution protects against denials of equal protection through Article I, Sections 1 and 26, and Article III, Section 32. In particular, Article I, Section 1 guarantees that all persons within the Commonwealth "have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty . . . and of pursuing their own happiness," Article I, Section 26 states that "[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right," and Article III, Section 32 provides that the "General Assembly shall pass no local or special law in any case which has been or can be provided by general law." These provisions together guarantee equal protection of the law and prohibit discrimination based on the exercise of a fundamental right.

95. The Pennsylvania coverage ban singles out and excludes women from exercising the fundamental right to choose to terminate a pregnancy, while covering procedures and health care related to pregnancy and childbirth. By singling out and excluding abortions from Medical Assistance, women throughout

this Commonwealth who seek abortion care are being discriminated against for exercising their fundamental right to choose to terminate a pregnancy.

96. Because the Pennsylvania coverage ban operates to discriminate singularly against those women who seek abortion-related health care services by denying them coverage under Pennsylvania's Medical Assistance programs, the Pennsylvania coverage ban, as enforced and administered by DHS, Secretary Miller, and Deputy Secretaries Allen and Kozak, discriminate based on the exercise of a fundamental right under the equal protection principles of Article I, Sections 1 and 26, and Article III, Section 32 of the Pennsylvania Constitution.

WHEREFORE, Petitioners respectfully request that the Court declare the Pennsylvania coverage ban, 18 Pa. C.S. § 3215(c) & (j) and its implementing regulations, 55 Pa. Code §§ 1147.57, 1163.62, 1221.57, unconstitutional under Article I, Section 28, and/or Article I, Sections 1 and 26, and Article III, Section 32, of the Pennsylvania Constitution; declare that abortion is a fundamental right under the Pennsylvania Constitution; enjoin enforcement of the Pennsylvania coverage ban, 18 Pa. C.S. § 3215(c) & (j), and its implementing regulations, 55 Pa. Code §§ 1147.57, 1163.62, 1221.57; and grant Petitioners such other, further, and different relief as the Court may deem just and proper.

Dated: January 16, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Name: Thomas B. Schmidt, III

Attorney ID Number: 19196

When the Equal Rights Amendment (ERA) was first introduced, it wasn't ratified, making protections against sexual discrimination under the Constitution incomplete for more than forty years.[1] Since then we've also seen federal courts shift into right-wing anti-choice hands and attacks on our right to legal abortion guaranteed under *Roe v. Wade* multiply.[2,3]

In order to protect our reproductive freedom today it's essential we pass the newly re-introduced bill to ratify the ERA. With its ratification, 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 because they violate both the constitutional right to privacy and sexual equality.[4,5]

Without reproductive freedom, we are not truly free. Add your name in support of the ERA now!

It's past time that all Americans have the right, enshrined in our Constitution, to pursue our destinies free from discrimination based on sex. Now, the ERA has been re-introduced by Rep. Carolyn Maloney, and we have a new opportunity to ensure women will be treated equally under the law.[6] Without bodily autonomy, we are not fully free to participate in the workforce, fulfill our educational aspirations; or determine if, when, and how to begin or grow a family. **And there's no plainer truth than this: We deserve to be fully equal citizens under the Constitution.**

Join us in advocating for the passage of the ERA to help protect our rights and the rights of generations to come. Add your name!

Thank you for all you do for reproductive freedom,
Jennifer Warburton,
Director of Government Relations, NARAL Pro-Choice America

Sources:

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Is the Equal Rights Amendment Relevant in the 21st Century?

By Bonnie Grabenhofer, Vice President - Education, National Organization for Women Foundation, and Jan Erickson, Director of Programs, National Organization for Women Foundation

(This article will be published in an upcoming special edition of *Frontiers – A Journal of Women Studies*, Ohio State University, and printed by the University of Nebraska Press. Guest Editor of the special edition is Laura Mattoon D'Amore, Ph.D. , Roger Williams University.)

Yet women, on the whole, are not men's legal equals or, by most standards, men's social equals.
Catharine A. MacKinnon, Toward a Renewed Equal Rights Amendment: Now More than Ever[1]

The language of the 1972 Equal Rights Amendment as ratified by 35 states:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
Section 3. This article shall take effect two years after the date of ratification.

As to the question posed in the title, whether an Equal Rights Amendment (ERA) to the U.S. Constitution has any relevancy in the 21st century, the answer from women's rights advocates that should logically follow is, 'Yes, a constitutional guarantee of equality of rights for women and men, prohibiting governments from discriminating on the basis of sex, is still crucially important.'

The unfortunate truth is that despite a series of important legislative gains and court rulings over the last half century prohibiting discrimination and improving economic opportunity, women remain second-class citizens. Our status has been only modestly improved by such gains which are subject to revision or repeal at any point by a simple majority vote.

Women are still disproportionately poor, suffer from widespread gender-based violence, endure extensive regulation of our reproductive lives, experience sex-based pay discrimination in all occupational categories, are sexually-harassed and subjected to biased consideration in hiring and promotion, subjected to discriminatory treatment by employers in pregnancy and motherhood, among numerous other practices that seek to subjugate women.

Women's rights advocates say that adoption of a sex-equality amendment is necessary to protect gains made over the past forty-plus years, plus build on progress we have made. Many of those advances are coming under increasing attacks from the growing strength of arch-conservative politicians at state and national levels. Since the 2014 mid-term election, thirty state legislatures, the U.S. House of Representatives, and the Senate now have substantial conservative Republican majorities that have

[1] See generally Catharine A. MacKinnon, "Toward A Renewed Equal Rights Amendment: Now More Than Ever, *Harvard Journal of Law & Gender*, Vol. 37 (2013-2014), 569.

passed hundreds of laws greatly restricting women's access to reproductive health care.[2] Plus, conservative lawmakers have refused to expand health insurance coverage under the Affordable Care Act, opposed equal pay laws and minimum wage increase measures, opposed paid sick and family leave, cut state funding for public sector employment where many woman are employed, repealed worker protections that benefit women and have passed numerous socially-regressive laws which disproportionately harm women and their families. With the U.S. Senate now under conservative control, it is less likely that legislation addressing gender or economic inequality will be advanced.

In spite of a discouraging political landscape, the general public supports a sex-equality amendment. Several public opinion polls have found large majorities in favor of the amendment, with the most recent being a 2012 poll for Daily Kos/Service Employees International Union (SEIU) which asked, "Do you think the Constitution should guarantee equal rights for men and women, or not?", with 91 percent responded in favor of that guarantee.[3]

Without the Equal Rights Amendment there is no clear guarantee that rights protected by the Constitution are accorded to all citizens irrespective of sex. Currently, there is a differential legal standing which assumes that men hold rights, but women must still prove that they have rights. The ERA would eliminate that different legal standing and, consequently, shift the burden of proof to the party accused of discrimination. Without a constitutional amendment clarifying women's legal standing, women will continue to have to wage extended, costly and challenging political and legal battles for equal rights.

In the rationality-review structure, discrimination on the basis of sex does not call for a *strict judicial scrutiny* – only a lesser standard of *intermediate or skeptical scrutiny* -- because sex is not a *suspect classification*. This is a critical shortcoming. Under an ERA, when government laws and policies treat women and men differently, these would have to meet the highest standard of justification – that is, proving a *compelling state interest* – in order to be found constitutional. Prohibition of sex discrimination is not as strongly enforceable as the prohibition of race discrimination. An ERA would ensure uniformity and consistency in sex discrimination cases, helping clarify for the sometimes confused lower courts how to deal with sex discrimination claims.

More than a few constitutional law experts have asserted that the Equal Protection Clause of the 14th Amendment serves in place of a sex-equality amendment. Critics point out that the Equal Protection Clause has not been interpreted to protect against sex discrimination in the way that the ERA would be able to do. Both the Equal Protection Clause and Title VII of the 1964 Civil Rights Act's sex discrimination prohibition are limited in their effectiveness for women because only an intermediate standard of

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[2] NARAL Pro-Choice America, *Who Decides? 2013 Edition*, "Key Findings: Threats to Choice, Cumulative Number of Statewide Measures Enacted Since 1995," 4, http://www.prochoiceamerica.org/assets/download-files/2014-who-decides.pdf

[3] The Equal Rights Amendment – Unfinished Business for the Constitution, FAQ, http://equalrightsamendment.org/faq.htm

scrutiny is applied in sex discrimination challenges. Additionally, the equal protection requirement calls for proof of intentional discrimination – something that is very difficult to establish in court.

The Equal Rights Amendment could make a difference in the following areas:

Equal Pay – The gender wage gap – the 21.7 percent spread between men's and women's median annual earnings as full-time, year round workers -- has been painfully slow in closing: at the current glacial pace, women's and men's pay will not be equal until 2058. It may take even longer for the gap to close for African American women (36 percent) and Latinas (31.9 percent) as compared to white men's median weekly earnings.[4] The ERA could help move pay equity legislation that has been stuck in Congress for several years and provide a more effective tool for sex -based employment discrimination litigation. It may also exert a positive influence in helping to raise pay in the numerous occupational categories where wages are low simply because these occupations are traditionally and primarily held by women, such as retail clerks, home health aides, nursing aides, waitresses, and many others .

Title IX – An ERA could enhance and solidify Title IX protections that promote equal opportunity in academics and athletics programs which suffer from inadequate implementation and have been weakened under various administrations. It could also have an impact on unequal educational resources in sex-segregated in public schools and athletic programs, stereotyped barriers to career and technical education, sexual harassment and campus sexual assault. [5]

LGBTQIA Equal Rights – Gay rights advocates argued that prohibitions against same-sex marriage were a form of sex discrimination because one party is denied marriage to another because of that individual's sex. [6] Unfortunately, in the landmark Supreme Court ruling in *Obergefell v. Hodges* same-sex marriage case, "the majority opinion avoided any determination that discrimination on the basis of sexual orientation is subject to any form of heightened judicial scrutiny (such as strict or intermediate), or that homosexuals or bisexuals (of any gender) are a protected class."[7]

The ERA would require strict scrutiny in challenges to the many state laws that deny LGBTQIA persons equal access to public accommodations, permit discrimination in housing, employment discrimination, credit and retail services, jury service and educational programs, among others.

Reproductive Rights – Although opinion is divided on the question, an ERA –properly interpreted – could negate the hundreds of laws that have been passed restricting access to abortion care and contraception. Denial of legal and appropriate medical care for women – and only women – is sex

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[4] Ariane Hegewisch and Heidi Hartman, "The Gender Wage Gap: 2014, Earnings Differences by Race and Ethnicity," Institute for Women's Policy Research, March, 2015, http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2014-earnings-differences-by-race-and-ethnicity

[5] See generally Title IX at 40 – Working to Ensure Gender Equity in Education, Washington, D.C, National Coalition of Women and Girls in Education, 2012. http://ncwge.org/TitleIX40/TitleIX-print.pdf

[6] See generally Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, *New York University Law Review*, Vol. 69-197, (May, 1994): 197-287.

[7] Obergefell v. Hodges, https://en.wikipedia.org/wiki/Obergefell_v._Hodges

discrimination and a powerful ERA should recognize and prohibit that most harmful of discriminatory actions.

Discrimination in Insurance – Auto insurers currently charge fixed semi-annual premiums that cost women more on average per mile than men for insuring their cars.[8] Life insurers charge women more for annuities that on retirement pay identical benefits to both women and men. [9] A strong ERA would enable – and require – state insurance regulators to end these sex-based discriminatory practices by private insurance companies against their women customers.

Pregnancy Discrimination – Even though a federal law, the Pregnancy Discrimination Act (PDA), was passed in 1978 prohibiting discrimination against pregnant women on the job and directing employers to make reasonable accommodation, many fail to do so and courts often ignore or misinterpret the law.[10] The Supreme Court decision in the case of *Young V. UPS*[11] did make clear to employers that pregnancy is not a reason to discriminate. But the Court failed to clarify what "reasonable accommodation" in different workplace contexts would be for pregnant workers . The ERA could bolster the effectiveness of the PDA.

Military Policy – Historically, women have been prevented from advancement in the military due to exclusion from combat assignments and other factors. The ban on women serving in ground combat units was rescinded by the Secretary of Defense and the Chairman of the Joint Chiefs of Staff in January , 2013,[12] but some restrictions against women in different branches of the military remain. Advocates for military women say that once the ERA is enacted the military will have to comply with the law and structure its policies, procedures, and protocols to meet the needs of women soldiers in providing career advancement, pay, retirement compensation, training, and providing for medical services particular to the women's physiology.[13] This would include access to abortion care for servicewomen and their dependents. The ERA may even help curb the epidemic of sexual assault which disproportionately affects women in the military.

Broad Impact of an ERA - The leaders of the National Organization for Women have said that an ERA must advance the rights of all women, including women of color and LGBTQIA persons, and it must provide the power to more effectively seek redress for women's economic marginalization and reverse the accelerating trend of restricted access to reproductive health care.

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[8] Patrick Butler, Twiss Butler and Laurie L. Williams, "Sex-Divided Mileage, Accident, and Insurance Cost Data Show that Auto Insurers Overcharge Most Women," *Journal of Insurance Regulation*, 6, Part I, 243-84 and Part II, (1988) 373-420.

[9] Elizabeth Shilton,"Insuring Inequality: Sex-Based Mortality Tables and Women's Retirement Income," *37 Queen's L.J.* 383 (2011-2012)

[10] Emily Martin, Written Testimony, Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities, U.S. Equal Employment Opportunity Commission meeting, February 15, 2012, http://www.eeoc.gov/eeoc/meetings/2-15-12/martin.cfm

[11] http://www.supremecourt.gov/opinions/14pdf/12-1226_k5fl.pdf

[12] http://servicewomen.org/women-in-combat/

[13] Jacqueline Nantier-Hopewell, Remarks Delivered at National NOW Conference, Re-energizing the ERA and Putting Diversity at the Center workshop, June 27, 2014.

On our list of desired advances: a significant and rapid reduction in the wage gap; a recognized right to abortion care that is not limited by medically-unnecessary restrictive laws; improved contraceptive access and other reproductive health care services that overcome so-called conscience refusals; better funding to prevent violence against women and to better protect survivors; a vigorous prevention of pregnancy discrimination; full recognition of same sex marriage in all states; prohibition of all forms of discrimination against LGBTQIA individuals; and, a clearer prohibition against sex-based discrimination in the hiring, pay and promotion of women.

Curbing Violence Against Women - The full effect of equal rights for women and men cannot be attained as long as one sex is the target of violent threats and actions. Violence against women remains a pervasive form of intimidation and a constant reinforcement of women's second class status; approximately 1.3 million women are victims of physical assault each year but this is likely only one-quarter of the actual number.[14] In 2012, the number of women murdered by men (single victim/single offender) reported to the FBI was 1,706.[15] It is the ultimate feminist goal that women will someday be able to live in a gender violence-free society. The problem will be with us as long as governments permit gender-based violence to continue by underfunding programs to protect victims and fail to properly punish perpetrators. Rape and sexual assault persist at high levels –one out of every six women has been a victim of attempted or completed rape [16] -- often with ineffective responses by law enforcement and judicial bias against victims. Hundreds of thousands of forensic rape kits go untested despite many millions of federal dollars made available to law enforcement authorities. [17]

Advocates hope that an ERA could help underscore arguments for improved funding of the Violence Against Women Act (VAWA) which in its 20 year history has never been funded sufficiently to meet documented need.[18] An estimate based on an annual one-day census of shelters suggests that more than three million individuals seeking help have to be turned away each year for lack of adequate staffing and resources. [19]

Attaining Reproductive Justice - During the 1972 ERA ratification campaign, several prominent women's leaders denied that an ERA would apply to abortion rights. But a number of feminist legal scholars and influential leaders have urged that abortion rights be integrated with sex equality and the ERA. In 1985, Ruth Bader Ginsburg, now one of three Supreme Court female justices, wrote that, in separating abortion from sex equality, "[T]he Court's *Roe* position is weakened, I believe, by the opinion's

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[14] National Coalition Against Domestic Violence, "Domestic Violence Facts," http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf

[15] Violence Policy Center, *When Men Murder Women*, September, 2014, http://www.vpc.org/studies/wmmw2014.pdf

[16] Rape, Abuse and Incest National Network, "Who are the Victims," https://www.rainn.org/get-information/statistics/sexual-assault-victims

[17] Laura Bassett, "House Approves Funding boost for Rape Kit Testing," http://www.huffingtonpost.com/2014/05/29/house-approves-additional_n_5412475.html

[18] National Network to End Domestic Violence, "Census: Domestic Violence Counts," http://nnedv.org/resources/census.html

[19] Testimony of Terry O'Neill, President, National Organization for women, A Hearing before the Senate Committee on the Judiciary, July 13, 2011, The Violence Against Women Act – Building on Seventeen Years of Accomplishment

concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."[20]

Even U.S. Sen. Orrin Hatch (R-Utah), an opponent of abortion rights, wrote in 1983, "Since abortions, by their nature, are limited to women, those laws which relate to abortions are "suspect" in the same manner as are laws that directly classify men and women in a different manner."[21] Hatch further wrote, "Under the Equal Rights Amendment, however, even the small amount of state authority remaining over abortion would probably be eliminated. The absolutist mandate of the Amendment would likely transform any state restriction on abortion into an unconstitutional exercise in violation of the 'equality of rights' guarantee of the ERA."[22]

With 835 measures restricting women's reproductive rights adopted by the states since 1995[23], in addition to those passed at the federal level, many women's reproductive rights advocates have come to realize that denial of reproductive health care targeting only women is a form of sex discrimination. As women's access is limited by a further narrowing of abortion rights and perhaps an outright ban upheld by the conservative majority on the U.S. Supreme Court, the issue is all the more urgent. Denial of access to reproductive health care *is* sex discrimination; women's rights activists can help define it as such to enable a broader interpretation of the Equal Rights Amendment.

For many women, inequality is driven by two fundamental engines: political control of women's reproductive capacities and limited economic opportunities. Denial of access to abortion is sex discrimination as it denies women – and only women --control over their reproductive lives which in turn affects women's financial stability and affects important life decisions. Denial of access to abortion care prevents women's from maintaining bodily autonomy, without which there can be no sex equality.

According to an analysis of the 2012 census data, more than one in seven women – nearly 17.8 million -- lived in poverty, and nearly 7.8 million of them lived in extreme poverty , with incomes below half the poverty level. The poverty rates for black, Hispanic, and Native American women were more than three times higher than for white non-Hispanic men.[24] This high poverty rate for women -- and especially for women of color – is the result of the complex of barriers to equality involving occupational segregation in low-paying jobs, lack of access to reproductive health care, unaffordable child care and other purposeful social policies that disadvantage women.

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[20] Ruth Bader Ginsburg, "Some thoughts on Autonomy and Equality in relation to *Roe v. Wade*," *North Carolina Law Review Rev.* 63-375 (1985): 386.

[21] Orrin G. Hatch, *The Equal Rights Amendment: Myths and Realities* (Savant Press, 1983), 47.

[22] Ibid., 48.

[23] NARAL Pro-Choice America, *Who Decides?*, The Status of Women's Reproductive Rights in the United States, 24th Edition,Kry Findings: Threats to Choice, http://www.prochoiceamerica.org/government-and-you/state-governments/key-findings-threats-to-choice.html

[24] Joan Entmacher, Katherine Gallagher Robbins, Julie Vogtman, and Lauren Frohlich, *Insecure and Unequal- Poverty and Income Among Women and Families 2000-2012*, National Women's Law Center, 2013, http://www.nwlc.org/nwlc-analysis-2013-census-poverty-data

Limitations of Our Legal System - Feminist legal theorist and University of Michigan law Professor Catharine A. MacKinnon notes that an equal rights amendment cannot halt all the institutionalized social practices by which women are disadvantaged, exploited and abused by the men. The inequality that most women experience is not the result of sex-based discrimination, per se, but is due to a hierarchal ordering by gender that allocates material resources and social status: men have more, women have less.[25] Because of the limitations of our legal system where essentially women have to first be equal to men (that is, experience a situation or condition that is comparable to one that men might experience) in order to prove discrimination, the ERA strictly interpreted would have distinct limitations.

New language proposed in Rep. Carolyn Maloney's (D- New York) Equal Rights Amendment legislation (H.J. Res. 52, 114th Congress) offers a better approach to identifying inequality and facilitating corrective action, perhaps even for expanding women's reproductive rights. Rep. Maloney adds a simple sentence to Section 1 of the traditional language: **Women shall have equal rights in the United States and every place subject to its jurisdiction.**

Prof. MacKinnon points out that, ""Women shall have equal rights, "could if correctly interpreted, remedy the effective shut out from the legal system most women still face today in these two fundamental engines of sex inequality in a way that existing law, interpreted as it has been, is intrinsically incapable of doing."[26] The language identifies who is being discriminated against and heightens the possibility of guaranteeing rights to all women even when the discrimination against them isn't directly based on sex, MacKinnon explains. The new language states a positive right to women's equality and places the responsibility for assuring equal rights for women on governments. We agree with Prof. MacKinnon in that this seems a far better path to equality than a negatively-framed ERA which makes it necessary for women to first be equal to men to prove discrimination.[27]

But, as Prof. MacKinnon concludes and we agree either the traditional or Rep. Maloney's newer language can spur new legislation and policy to remedy inequalities and could have a political impact that would change the way that laws are interpreted. Moreover, an ERA could serve to warn those who would attempt to roll back laws and policies advancing women's equality.

A strong women's equality amendment remains a crucially important need. With the benefit of many decades of experience in dealing with the deficiencies of our legal and political systems, women's rights activists have a clearer understanding of what is required in a powerful equal rights amendment. It is up to the next generation of activists to further an equality agenda by organizing, lobbying and certainly, to achieve full ratification of the Equal Rights Amendment. Combining the knowledge of an older generation with the energy of a new one – and a public that is on our side – the path to a strong Equal Rights Amendment in the U.S. Constitution is in sight.

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[25] See generally Catharine A. Mackinnon, "Unthinking ERA Thinking," *Women's Lives Under Men's Laws*, (Cambridge, Massachusetts and London: Belknap Press of Harvard University Press, 2005): 13-21.
[26] Catharine A MacKinnon, "Toward a Renewed Equal Rights Amendment: Now More Than Ever," *Harvard Journal of Law & Gender 37* (2013-2014): 570
[27] Ibid, 259-579.

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COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL RIGHTS

COMMITTEE STATEMENT:
EQUAL RIGHTS AMENDMENT
2141 RAYBURN HOUSE OFFICE BUILDING
APRIL 30, 2019
10:00AM

- I would like to thank the Chairman for holding this hearing, and for our witnesses today for their testimony.

- In our nation's constitution—the oldest written charter in the world—the term "woman" is nowhere to be found.

- For over 95 years, it has been the cause of powerful, female (and some male) social engineers to amend the constitution to give women equal legal standing as men.

- While the cause has taken longer than any would want, I am proud today to once again lend my full support to joint resolutions, currently introduced by two of my colleagues not on this committee, to help finally ratify the Equal Rights Amendment.

- In a public opinion survey conducted in the United States, 92% of respondents indicated that there should be gender equality in the Constitution, and 72% believe it is already in place.

- In the early 1970s, when this effort was making its way through the halls of congress, the resolution in support of an Equal Rights Amendment passed overwhelmingly in both houses of Congress.

- During that time, 38 states were required for ratification—35 ratified it at that time.

- There are real consequences to a federal constitution that lacks an equal rights amendment.

- Without a ratified Equal Rights Amendment, the U. S. Supreme Court can refuse to hear cases regarding sex discrimination.

- This means that when scrutinizing laws that impact gender rights, the law receives intermediate scrutiny, rather than strict scrutiny which is applied to laws alleging racial discrimination, for example.

- This inequity has been recognized by jurists of differing philosophies—Antonin Scalia and Ruth Bader Ginsburg.

- And the need to address this inequity is no less urgent, as the country reckons itself with the impact of the #MeToo movement.

- For the last many years, women who have been victimized are empowered by the knowledge that they are not alone, and that there is strength in numbers, and shared experiences.

- And, rather than the debate ending with this knowledge, we must use this moment to revisit business that is no less urgent.
- This country can build on the unity that has been produced in this moment.
- After all, victims of sexual assault and sex discrimination do not distinguish based on political party, gender, race, age or socioeconomic status.
- This belief is what led 700,000 Latina farm workers to encourage those within the Hollywood business ecosystem to speak out about crimes in which gender is a motivating factor.
- The impetus for the letter was based on the shared experiences of women across the professional spectrum.
- With the ERA, actions which are designed to combat the prevalence of sexual assault will be more effective.
- Upon enactment, it will create a clearer, stricter judicial standard for deciding cases of sex discrimination and provide protection against rolling back advances in women's reproductive rights.
- It also has the added benefit of providing a stronger foundation for legal battles associated with equal pay.

- I am especially proud to sponsor resolutions in support of the Equal Rights Amendment, offered by Representatives Carolyn Maloney and Jackie Speier, not just because of my steadfast support for equality for all, but also because of the late great Barbara Jordan, who was my predecessor and mentor.

- She endorsed me for the seat I hold today, and whose memory has been a guiding spirit in my representation of the Eighteenth Congressional District.

- But also because of her work in making sure that the Equal Rights Amendment was not forgotten.

- In 1978, alongside her colleague in Congress, Elizabeth Holtzman, Congresswoman Jordan advocated for an extension of the time required to ratify the amendment.

- While the effort did not ultimately lead to enactment of the Amendment, the moment was but one small act which will soon lead to full ratification.

- At that time, we will have the service of Barbara Jordan to thank.

- Until then, we must all do our part to ensure all—women and men—are equal in the eyes of the law and our constitution.

- And with that, I yield back my time.