UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

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| COMMONWEALTH OF VIRGINIA, STATE OF ILLINOIS, and STATE OF NEVADA,<br><br>Plaintiffs,<br><br>v.<br><br>DAVID S. FERRIERO, in his official capacity as Archivist of the United States,<br><br>Defendant. | ) | Case No. 1:20-cv-242-RC |

**AMICUS BRIEF OF THE ERA COALITION AND ADVOCATES IN THE WOMEN'S MOVEMENT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**


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## INTRODUCTION AND STATEMENT OF INTEREST

Achieving equality for women is a long-term project, and progress has been painfully slow. For the first 144 years of our Nation's existence, women were denied the most basic right of citizens in a democracy: the right to vote. Women who otherwise met all criteria for voting were excluded from the polls simply because of their sex. The absence of women's voices led to lawmaking and institutions that persistently discriminate against women. Indeed, after women finally obtained the right to vote, it took decades more to secure statutory protection against overt discrimination in employment and education.

Despite the long history of discrimination, women today serve with tremendous distinction in the C-suite, on the floor of Congress, on the soccer field, on the presidential debate stage, and even in combat. Women also make up the overwhelming majority of health-care workers on the front lines of the fight against COVID-19. Yet women still face persistent inequality in nearly every sphere. Women are consistently underrepresented in positions of power and overrepresented among those in poverty. Women are still paid only 81 cents on average for every dollar paid to men, and they face a continuing epidemic of domestic and sexual violence. These struggles are particularly acute for women of color, indigenous and Native American women, immigrants, trans women, and single mothers.

These struggles continue to fuel the fight for the Equal Rights Amendment, which declares, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Drafted by suffragists in the early

1920s, the ERA passed through Congress in 1972 with the support of both men and women, Republicans and Democrats. After a backlash stalled the wave of momentum for ratification of the ERA in the late 1970s, the fight for equality continued to press forward, achieving steady progress on many fronts, including in public opinion. Recent polls show that an overwhelming majority of Americans (again, both men and women, Republicans and Democrats) believe the ERA should be part of our Constitution. *See*, *e.g.*, www.eracoalition.org; www.ambar.org/CivicSurvey. Three-quarters of the States have now voted to ratify it, and there are active ratification efforts in every one of the unratified States. Yet the current administration insists that it is too late and asks this Court to send the fight for women's constitutional equality back to square one.

The painfully slow progress toward equality makes it particularly important in this context to respect the plain language of Article V, which establishes a process for amending our Constitution that does not contemplate any time limits. It provides that an amendment "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*." U.S. Const. art. V (emphasis added). The ERA satisfied this requirement in January 2020, when Virginia became the thirty-eighth State to vote in favor of ratification. Now that the ERA "has been adopted, according to the provisions of the Constitution," federal law requires the Archivist to publish and certify the amendment as valid. 1 U.S.C. § 106b.

The seven-year time frame that Congress imposed in 1972 does not and cannot alter the provisions of the Constitution that govern amendment. Unlike for some earlier amendments—for example, the Prohibition Amendment, which the Supreme Court

addressed in *Dillon v. Gloss*—Congress did not incorporate a time limit into the language of the ERA itself, to be ratified by the States. Instead, Congress inserted a time limit only in the "resolved" clause of the accompanying joint resolution. At a minimum, this means that Congress can change the time limit at its discretion in a subsequent joint resolution. After all, one Congress cannot bind future Congresses. But more fundamentally, the time limit's placement makes it ineffective to stop the ERA, now that the constitutional requirements have been met. As a matter of constitutional law, the plain language of Article V governs whether and when the ERA becomes "valid to all intents and purposes." U.S. Const. art V. Congress cannot change the Article V process on its own, without asking the States to ratify the change. A time limit imposed unilaterally by Congress cannot stand in the way of the will of the people in the thirty-eight States that ratified the ERA as provided in the Constitution.

Amici are a broad array of groups that strive for equality and opportunity for women and work to eliminate sex-based discrimination and violence. They range from the ERA Coalition—a broad assembly of organizations that have joined together to press for constitutional equality—to individual organizations that have fought for the ERA for decades, including the Feminist Majority and the National Organization for Women. They include organizations in States that have ratified the ERA, and organizations in States that have not. A complete list follows:

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Amici submit this brief to provide the Court with insight into the long and slow process of achieving equality under the law—and to describe the persistent inequality that women continue to experience today. Although the Framers did not themselves act to recognize and protect women's equality, they created a process for amending the Constitution that could reflect changes in our society's understanding of human rights, even when those changes evolve over many years. The ERA reflects just such a change.

## ARGUMENT

### I. The fight for equality has been long and hard-fought, as advocates have struggled to correct the Framers' intentional exclusion of women.

#### A. At the founding, our Constitution reflected the norms of its time, which deprived women of the most basic rights and powers under the law.

When our Nation declared its independence and confirmed in 1776 that "all men are created equal," women were not included. A married woman had no legal identity separate from her husband; she could not vote, make contracts, institute lawsuits, write

a will, sell land, or keep her own wages. *See* Mary Beth Norton, *Liberty's Daughters: The Revolutionary Experience of American Women, 1750–1800*, 46 (1980).

This forced dependence of married women on their husbands had many devastating consequences. For example, it meant that women found it nearly impossible to run away from or seek divorce from abusive husbands—and if they succeeded, they could not remarry. *Id.* at 47–48. A woman's subordinate position also left her vulnerable to sexual coercion, which often went unreported. *See* Sharon Block, *Rape and Sexual Power in Early America* 94 (2006). Indeed, a woman had to rely on the male head of her household to bring grievances to public authorities on her behalf. If the perpetrator *was* the head of household, the victim had no recourse. *Id.* at 121, 96–97.

The lack of rights for women was no coincidence. Both the culture and the law at the time regarded women as inferior, weak, and in need of protection. *See* Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 Law & Ineq. 17, 20 (1988); *see also Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). This same rationale supported denying women any political voice. Theorists like Locke, Hobbes, and Rousseau all claimed that women were inferior—and that this inferiority was a reason to restrict them to the domestic sphere. Sylvia A. Law, *The Founders on Families*, 39 U. Fla. L. Rev. 583, 588–89, 589 n.20 (1987).

Against this backdrop, the Framers did *not* regard women as part of the Constitution's "We the People," despite their use of what now appears to be a gender-

neutral term.[1] The historical record is clear: when Abigail Adams asked her husband John to "Remember the Ladies" in "the new Code of Law," he dismissed her request as a joke. *Id.* at 587–88. And Thomas Jefferson believed that "to prevent deprivation of morals and ambiguity of issue, [women] could not mix promiscuously in the public meetings of men." Beryl J. Levine, *Closing Comments*, 6 Law & Ineq. 41, 41–42 (1988).

Further evidence comes from New Jersey's "little-known experiment" with women's suffrage. Norton, *supra*, at 14. The State's constitution originally defined voters as "all free inhabitants" who met certain property-ownership requirements, and many women seized the opportunity to cast ballots. *Id.* at 13. But the prevailing sentiment at the time was that women were not "fitted to perform this duty with credit to themselves, or advantage to the public." *Id.* (quoting William Griffith, *Eumenes: Being a Collection of Papers* 33 (1799)). The legislature acted swiftly to exclude women from the vote. *Id.* Lawmakers justified their action by saying that a woman's vote was more likely to be corrupted—reflecting the prevailing attitude that "in practical effect, placed women, not on a pedestal, but in a cage." *Frontiero*, 411 U.S. at 684.

### B. The fight for the vote took more than a century, and even then, advocates recognized that suffrage was not sufficient to ensure equality.

The women's suffrage movement traces its history to the first Women's Rights Convention, held in 1848 in Seneca Falls, New York, though the suffragists' work

[1] *Contrast* Amicus Br. of Eagle Forum at 17 (relying on what is apparently a post-King-James translation of the Bible as evidence that the 1776 phrase "'all men are created equal'" was meant to recognize the inherent equality of "all of humanity," despite undeniable evidence that the drafters of that phrase did not regard or treat women, Native Americans, or Black people as "equal" to White men in any meaningful sense).

actually began decades earlier. *See* Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820–1878*, J. Am. Hist. 836, 840 (Dec. 1987); Lisa Tetrault, *The Myth of Seneca Falls: Memory and the Women's Suffrage Movement, 1848–1898* (2014). The women who organized the 1848 gathering were veterans of the anti-slavery movement, which itself had become divided over the role of women. *Frederick Douglass on Women's Rights*, introduction, at 3–7 (Philip S. Foner, ed.). Participants gathered for two days in Seneca Falls to "discuss the social, civil, and religious condition of woman." Judith Wellman, *The Road to Seneca Falls* 186 (1984). Elizabeth Cady Stanton unveiled the Declaration of Sentiments, which corrected the Founding Fathers' error and affirmed "that all men *and women* are created equal." Report of the Woman's Rights Convention (1848) (emphasis added). The Declaration of Sentiments also included a number of resolutions, including a demand for woman's suffrage. Frederick Douglass—who had escaped from slavery just ten years earlier—testified powerfully in favor of this demand. *Frederick Douglass*, introduction, at 14–15.

In the years following, similar conventions were held throughout the United States, featuring activists and suffragists Sojourner Truth and Sarah Remond, among many others. By the Second Woman's Convention in 1851, however, the movement's focus had moved away from full equality and more narrowly toward suffrage as the "cornerstone of [its] enterprise," at least as a first step. *See* DuBois, *supra,* at 842.

After the Civil War, suffragists saw an opportunity to gain full citizenship in debates surrounding the Reconstruction Amendments. The American Equal Rights Association—formed by former abolitionists and women's rights advocates—pushed

for universal suffrage, but the simultaneous enfranchisement of Black men and all women was viewed as politically unrealistic by some and politically undesirable by others. Tetrault, *supra*, at 17. One author notes that supporters of Black voting rights generally meant Black male suffrage, while White women who demanded women's voting rights generally meant White female suffrage, leaving Black women "struggling for visibility and access," despite their fervent activism for both. *Id*. at 21. In the end, women's rights took a back seat. The Fourteenth Amendment affirmed the citizenship of all persons born in the United States, but it guaranteed political representation only to "*male* citizens twenty-one years of age." U.S. Const. amend. XIV, § 2 (emphasis added). This was the first time an explicit sex distinction appeared in the Constitution.

The Supreme Court interpreted the Fourteenth Amendment accordingly. In 1873, the Court faced the question whether the Fourteenth Amendment's Privileges and Immunities Clause prevented a State from denying a law license to a woman based solely on her sex. *Bradwell v. State of Illinois*, 83 U.S. 130 (1873). The Court held that it did not, concluding that a State may define the privileges and immunities of its own citizens as it wished. *Id*. at 138. Three concurring justices, however, would have affirmed the state court's decision on the ground that women "had no right as citizens to engage in any and every profession, occupation, or employment in civil life." *Id*. at 141 (Bradley, J.). Their explanation reflects the status of women at the time:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The harmony, not to

> say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is[] that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. . . . [*Id.*]

Only after decades of continued advocacy—including picketing, hunger strikes, beatings, arrests, and a World War—were women finally successful in securing the right to vote. Jessica Neuwirth, *Equal Means Equal* 2 (2015). Even then, however, proponents of the Nineteenth Amendment understood that the right to vote did not mean true equality. After succeeding in her long fight for suffrage, Alice Paul drafted the first Equal Rights Amendment to ensure that all rights under law would be guaranteed equally to women and men. *Id*. The ERA was introduced to Congress in 1923 by Daniel Anthony of Kansas—a nephew of suffragist leader Susan B. Anthony—but it never came to a congressional vote. *Id.*

Support for the ERA grew slowly in the following decades. The ERA became part of the Republican party's political platform in 1940 and the Democratic platform in 1944. *Id.* at 3. It reached the floor of the Senate in 1946, securing a majority vote but not the two-thirds required in Article V of the Constitution. *Id*.

At the same time, women were emerging as an important part of the work force. When American men went overseas to fight in World War II, women took their jobs on

the home front. Julie Suk, *We the Women* 39 (forthcoming 2020). At the end of the war, many women were forced to relinquish their jobs to veterans, but they continued to enter the workforce in record numbers. *Id.* Following World War II, however, a major expansion of the U.S. economy increased the demand for labor. Miltra Toossi, *A century of change: the U.S. labor force, 1950–2050*, Monthly Labor Rev. (May 2002). Fueled by both the civil rights movement and the women's movement—as well as legislation promoting equal opportunity in employment—more and more women began to work outside the home. *Id.* at 18. Between 1950 and 1970, the percentage of women participating in the paid workforce grew from 34% to 43%. *Id.* These percentages exploded in the 1970s, growing by 20.5% for women aged 25–34 and by 14.4% for women aged 35–44. *Id.* An increase in participation rates of this magnitude in one decade is unprecedented by any other segment of the labor force. *Id.*

Still, fundamental inequality persisted. For decades after ratification of the Nineteenth Amendment, state laws continued to exclude women from certain jobs, professions, colleges and universities, scholarships, and even jury service. Suk, *supra*, at 53. Some restrictions on married women's property rights even limited women's access to credit and business opportunities. *Id.*

### C. Congress finally passed the ERA in 1972, placing a time limit only in a joint resolution and extending it after concluding that such an important and fundamental amendment deserves more time.

In 1970, Congresswoman Martha Griffiths of Michigan filed a discharge petition in the House to bring the ERA to the floor. H.R. Rep. No. 116-378, at 2. (2020). In the debate leading up to the House's historic vote, Republicans and Democrats alike

testified in favor of the ERA's passage. Suk, *supra,* at 55. Ultimately, the House passed the ERA by a 354-to-24 margin. The text contains three sections:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or 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.

H.J. Res. 208, 92d Cong. (1971). In 1972, the Senate passed the ERA by a vote of 84 to 8—again, with strong bipartisan support. H.R. Rep No. 116-378, at 12 (2020).

In the preamble of its joint resolution, Congress purported to impose a seven-year limit on the States' ratification. H.J. Res. 208, 92d Cong. (1971) (stating that the amendment would be valid when "ratified by the legislatures of three-fourths of the several States within seven years of its submission to Congress"). Such time limits are a modern creation. Congress injected a time limit for ratification for the first time in 1917, when it included a seven-year time limit in the Prohibition Amendment. Danaya C. Wright, "*Great Variety of Relevant Conditions, Political, Social and Economic": The Constitutionality of Congressional Deadlines on Amendment Proposals under Article V*, 28 Wm. & Mary Bill of Rights J. 1, 1 (2019). Before that amendment, there had never been a time limit on ratification. Indeed, our most recent amendment—the Twenty-Seventh, relating to congressional pay—was proposed by James Madison in 1789 and took 203 years to reach full ratification, becoming part of the Constitution in 1992. *Id*. at 19.

For the first half of the Twentieth Century, Congress placed these time limits in the text of the amendment itself, where they would be part of the language that the

States would ratify. *Id*. at 20–25. It was this kind of time limit that the Supreme Court addressed in *Dillon v. Gloss*, 256 U.S. 368 (1921), which involved the Prohibition Amendment itself. Notably, however, neither *Dillon* nor any other Supreme Court case considered whether a time limit could actually be *effective* to stand in the way of an amendment once all constitutional requirements had been met. The States had ratified the Prohibition Amendment within seven years, so the time limit had no real impact on the ratification process; the argument in *Dillon* was that the mere presence of the time limit in the amendment's text rendered it invalid, allowing a bootlegger to avoid prosecution. *Id*. at 367–77. This was an "audacious" argument, and the Supreme Court unsurprisingly rejected it. Wright, *supra*, at 28.

Beginning with the Twenty-Third Amendment in the early 1960s, Congress changed its practice, moving the time limit to the "resolving" clause that introduced the amendment. *Id*. at 25. This had two important legal consequences. First, and at a minimum, by placing the time limit in the joint resolution—which the States are not called upon to ratify—Congress preserved for itself the power to *change* the time limit later on. As the Department of Justice later opined in connection with the ERA, a subsequent Congress may "act to extend the seven-year limitation clause." H.R. Rep No. 116-378, at 9 (citing H.J. Res. 638 Hrgs. at 13 (1977 Opinion of the Office of Legal Counsel)). More broadly, though, this change in location defeated any analogy to *Dillon v. Gloss*. Even if the *Dillon* Court had addressed the *effectiveness* of a time limit—and as discussed above, it did not—the time limit it considered was fundamentally different from the time limit in the amendments proposed after 1960. When a time limit does not

appear in the text actually ratified by the States, it is simply a unilateral assertion by Congress, so it cannot change the constitutional process set forth in Article V.

At first, ratification of the ERA proceeded very quickly. Within a year of Congress's adoption, the legislatures of thirty States voted to ratify. H.R. Rep No. 116-378, at 3. By the end of 1977, however, the number of ratifications had reached only thirty-five—three short of the required thirty-eight. *Id.* Rather than let the time limit expire, Congress extended the time limit by three years, into 1982. H.J. Res. 638, 95th Cong. (1978). By doing so, Congress affirmed that the previous time limit was not binding and could be altered, given that it appeared only in the joint resolution and not in the text that the States would vote to ratify. H.R. Rep. No. 116-378, at 7–9 (2020).

The extension of the lime limit reflected Congress's understanding that a short deadline would not be appropriate for an amendment that concerned a matter of basic cultural change. Testifying before Congress, Professor Thomas Emerson explained that "history has demonstrated that a long period of time is necessary for the nation to make up its mind with respect to fundamental changes in the status of large groups in the population." *Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civil and Const. Rights of the H. Comm. on the Judiciary*, 95th Cong. 64 (1978) (statement of Thomas I. Emerson, Lines Prof. of L. Emeritus, Yale L. Sch.). He observed that women's suffrage had been under consideration for at least three-quarters of a century before ratification of the Nineteenth Amendment. *Id.* Both Professor Emerson and then-Professor Ruth Bader Ginsburg testified to the continued vitality of and need

for the ERA, notwithstanding the time limit. *Id.* at 64 and 125 (statement of Ruth Bader Ginsburg, Prof. of L., Colum. L. Sch.).

### D. During and after the 1970s, the movement for equality proceeded on other fronts, though its success has been incremental and incomplete.

As the fight for the ERA moved forward, advocates also sought other protections for the rights of women—both in court and in legislatures across the country. Inspired by the federal ERA campaign, fourteen States added equal rights protections to their own constitutions in the 1970s. L.J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 Rutgers L.J. 1201 (2005). These provisions generally tracked the proposed federal ERA, and "their legislative histories indicate a specific desire to provide more comprehensive protection against sex discrimination than that available under the existing Federal constitution." *Id.* Today, twenty-four state constitutions provide either inclusive or partial guarantees of equal rights on the basis of sex. Alice Paul Institute, *ERA Frequently Asked Questions* (2018), https://www.equalrightsamendment.org/faq/. Yet those state provisions have no impact on discrimination by agencies and officials in the federal government. And in the other twenty-six States, women remain without constitutional equality protections at the federal *or* state level.

Another important area of advocacy for the advancement of women's rights was in court, under the Fourteenth Amendment. The Supreme Court's century-old refusal to recognize sex discrimination under the Fourteenth Amendment ended in 1971, when the Court held that it was unconstitutional for a State to prefer men over women to

administer a deceased's estate. *Reed v. Reed*, 404 U.S. 71 (1971). The Court held that a preference based on sex was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 76. This was the first such victory for then-Director of the ACLU Women's Rights Project, Ruth Bader Ginsburg. She went on to lead a number of cases that succeeded in securing some measure of protection against sex discrimination under the Fifth and Fourteenth Amendments. For example, in *Craig v. Boren*, 429 U.S. 71 (1976), the Court overturned an Oklahoma law allowing women to purchase beer at an earlier age than men—holding for the first time that laws that treated men and women differently should bear "intermediate scrutiny"—in other words, a substantial relationship to an important government objective. Justice Ginsburg's influence continued after her confirmation to the Supreme Court—most notably with her opinion for the majority in *United States v. Virginia*, 518 U.S. 515 (1996), which held that Virginia Military Institute's male-only admissions process was unconstitutional.

Although this jurisprudence certainly reflects progress, the "intermediate scrutiny" for sex discrimination under the Fourteenth Amendment is both inadequate and insecure, particularly given the current administration's impact on the federal bench. The late Justice Antonin Scalia "and most other originalists have concluded that Section One of the Fourteenth Amendment does not prohibit discrimination on the basis of sex." Steven G. Calabresi & Julia Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. __ (2011). Justice Scalia explained his views this way: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is

whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that." *Legally Speaking: The Originalist*, Cal. Law. (Jan. 2011).

### E. Since 2016, the ERA has surged forward, with a new understanding of persistent inequality, sexual harassment, and sex-based violence.

The recent push to ratify the ERA has gained significant strength from a new generation of activists, spurred on by the Women's March and the "Me Too" movement. The Women's March sprang out of a post on Facebook after the 2016 presidential election, quickly growing as women and their allies mobilized to create a nationwide movement. Although it was initially a response to the election results, it aimed to draw attention to women's rights and collective power. Duaa Eldeib, *Women plan march on Washington day after Trump's inauguration*, Chicago Tribune (Nov. 29, 2016). Women and men of all ages took to the streets on January 21, 2017, in the largest single-day protest in U.S. history, drawing an estimated 4.1 million people in the United States alone. Erica Chenoweth & Jeremy Pressman, *This is what we learned by counting the women's marches*, Washington Post (Feb. 7, 2017). The Unity Principles distributed by the organizers of the Women's March called for, among other things, passage of an Equal Rights Amendment to the U.S. Constitution. Women's March, *Guiding Vision and Definition of Principles* 4 ("We believe it is time for an all-inclusive Equal Rights Amendment to the U.S. Constitution.").

On the heels of this highly public movement, the ERA surged forward once again. Ratification efforts had been ongoing for many years, with sustained advocacy both in state legislatures and in Congress. Neuwirth, *supra*, at 99. The new voices and

attention after the Women's March combined with these sustained efforts to push the ERA forward. In March 2017—on the forty-fifth anniversary of the ERA's passage through Congress—the Nevada legislature voted to ratify the ERA.

At the same time, the "Me Too" movement also drew attention to the continued problem of sexual harassment and assault against women in the workplace. Tarana Burke created the "Me Too" movement in 2007 to help victims of sexual harassment and assault. *See The Facts Behind the #MeToo Movement: A National Study on Sexual Harassment and Assault* at 9 (2018), *available at* http://www.stopstreetharassment.org. In October 2017, actress and ERA advocate Alyssa Milano helped popularize the term on Twitter by inviting people to use a #MeToo hashtag to show just how widespread sexual harassment and assault are in the United States. *Id*. Within days, more than a million people had used the hashtag. *Id.* Around the same time, many women in Hollywood were coming forward with sexual abuse allegations against the now-convicted film producer Harvey Weinstein. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. Times (Oct. 5, 2017). In the ensuing months, dozens of high-profile men in entertainment, the arts, politics, sports, and business were fired or resigned as women and some men had come forward with credible allegations of abuse. Within the entertainment industry, this movement led to the formation of the high-profile TIME'S UP, an organization dedicated to exposing and defeating sexual assault, harassment, and inequality in the workplace.

The renewed public attention to these important issues added fuel to the drive for the ERA. In May 2018, the Illinois General Assembly voted to ratify the ERA, and

the Virginia General Assembly followed suit in January 2020. Three-quarters of the States have now voted to ratify the ERA, satisfying the requirements of Article V.

Immediately following Virginia's ratification, the U.S. House of Representatives voted on a bipartisan basis to remove the time limit in the joint resolution, to eliminate any question that the effectiveness of the ERA depends solely on Article V. H.J. Res. 79, 116th Cong. (2d Sess. 2020) (enacted). Indeed, the language of this resolution tracks the language of Article V, providing that "'notwithstanding any time limit contained in' the previously deadline passed by Congress for ratification of the ERA, the ERA 'shall be valid to all intents and purposes . . . whenever ratified by the legislatures of three-fourths of the several States.'" H.R. Rep. No. 116-378, at 2 (2020) (quoting H.J. Res. 79). The House's approval of this resolution reflects not only its judgment that the time limit is not immutable (*id*. at 7–8) but also its recognition that for a "broad and fundamental principle" like the one reflected in the ERA, no time limit is appropriate (*id*. at 8):

> Unlike the Eighteenth Amendment at issue in *Dillon*, which related to the particular and narrow social policy of prohibition, the ERA stands for a broad and fundamental principle: namely, government institutions may not discriminate on the basis of sex. The Committee finds no less need to affirm that principle today than in 1972 or 1978—and it finds no reason to believe that such a principle will lose its vitality in the years to come. [*Id.*]

*Id*. A similar bill is pending in the Senate, also with bipartisan sponsorship. *See* S.J. Res. 6, 116th Cong. (2019–20). At the same time, active ratification efforts continue in all of the as-yet-unratified States.[2]

[2] *See, e.g.*, Jeffrey Martin, *South Carolina Latest State to Move to Ratify Equal Rights Amendment With Bipartisan Effort*, Newsweek (June 7, 2020); Ben Nadler, *Georgia push for Equal Rights Amendment draws GOP support*, AP News (Jan. 30, 2019); Editorial Board,

## II. Women today face persistent inequality in nearly every sphere—inequality that reflects a continued and acute need for the Equal Rights Amendment.

Even as they have emerged as a powerful force in our economy and the electorate, women continue to face persistent inequality. These problems are particularly acute for women of color, immigrants, indigenous and Native American women, trans women, single mothers, and victims of sexual and domestic violence. This continued inequality is the legacy of the historical exclusion of women's voices from our government, legal system, and other institutions. It also holds our society back more broadly, as the subjugation of women produces a society that has more conflict, less peace, less stability, and less prosperity than one that recognizes and reinforces women's fundamental equality. *See generally* Valerie M. Hudson, et al., *The First World Order: How Sex Shapes Governance and National Security Worldwide* (2020). Below, we provide information about the disparities women experience in two particularly critical areas: violence and employment.

### *A. Domestic and Sexual Violence*

More than 40% of American women experience sexual violence at some point in their lives. Sharon G. Smith, et al., Nat'l Center for Injury Prevention & Control, Div. of Violence Prevention, *National Intimate Partner and Sexual Violence Survey: 2015 Data Brief* (2018). Many cases go unreported, and tens of thousands of rape kits go untested.

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*Utah should ratify the Equal Rights Amendment*, Salt Lake Tribune (Dec. 7, 2019); Timothy Fanning, *Sarasota puts Florida on notice: Ratify Equal Rights Amendment*, Herald-Tribune (Dec. 3, 2019); Editorial Board, *NC can make history – and Republicans can make amends – by ratifying the ERA*, Raleigh News & Observer (Aug. 30, 2019).

Kathleen C. Basile et. al., Centers for Disease Control & Prevention, *Sexual Violence Surveillance: Uniform Definitions and Recommended Data Elements Version 2.0* (2014); Steve Reilly, *Tens of thousands of rape kits go untested across USA*, USA Today (July 16, 2015).

Between one-third and one-half of all women will be assaulted at some point in their lives, "primarily by intimate partners, including spouses and boyfriends." Nat'l Council of Juvenile & Family Court Judges, *A Guide for Effective Issuance and Enforcement of Protection Orders* (citing Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 Geo. Pub. Policy. R. 51, 53 (2000)); Promundo-US, *What We Know: An Evidence Review of What We Know About Sexual Harassment and Dating Violence* (2018). Although state law generally provides for orders of protection, such orders often go unenforced. *Id.* Almost one-half of petitioners were abused again by their abusers within two years of obtaining a restraining order. *Id*. at 3 (citing Andrew Klein, *Re-abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work, in Do Arrests and Restraining Orders Work?* (Eve Buzawa & Carl Buzawa, eds., Sage Pubs. 1996)). And the Supreme Court held in 2005 that the police could not be sued for failing to enforce a restraining order against a woman's abusive husband—a failure that led to the murder of her three daughters. *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

Indigenous and Native American women face particularly unique challenges that intensify the epidemic of gendered violence. In the United States, violence against indigenous women has reached unprecedented levels on tribal lands and in Alaska Native Villages. Indian Law Resource Center, *Ending Violence Against Native Women*,

https://indianlaw.org/issue/ending-violence-against-native-women. More than half of American Indian and Alaska Native women have experienced sexual violence. *Id.* Federal government studies show that American Indian women experience much higher levels of sexual violence than other women in the United States. Futures Without Violence, *American Indian Alaskan Native Violence Fact Sheet* 2 (2012).

Sexual and domestic violence is also an acute problem for immigrant women. Nat'l Sexual Violence Resource Ctr., *Immigrant Victims of Sexual Assault* 6–12. Immigrants are also more susceptible to sexual assault in the workplace. *Id.* Victims of sexual violence who are immigrants confront not only the trauma of the sexual violence they experienced, but also the legal, economic, community, and other significant pressures that are related to, or arise from, their status as immigrants. *Id.* They may be unfamiliar with the U.S. legal system, lack access to service providers, and face language barriers. They may also hesitate to report their abuse, for fear that seeking justice could lead to deportation. *Id.* Perpetrators of sexual assault often target undocumented women because they can be isolated due to language and cultural barriers, generally do not know their rights, and may be especially vulnerable. *Id.*

Where federal legislation has been enacted to protect against these kinds of violence, enforcement of those protections fluctuates based on political control. For example, Title IX prohibits discrimination on the basis of sex in federally funded programs or activities, but the regulations implementing those protections in the context of campus sexual assault are currently being rolled back. Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations*,

N.Y. Times (Sept. 22, 2017). One in five women will be a victim of completed or attempted sexual assault while in college. Christopher P. Krebs, et al., *The campus sexual assault (CSA) study: Final report* (2007).

At the same time, federal efforts to legislate against gender-based violence have run into difficulty because of political controversy and a perceived lack of congressional power. The Violence Against Women Act of 1994 (Pub. L. 103-322) passed in Congress with broad bipartisan support but was struck down in part as exceeding the power of Congress under the Commerce Clause. *United States v. Morrison*, 529 U.S. 598 (2000). Its other provisions were reauthorized by Congress in 2000, 2005, and 2013, but opponents have since allowed it to expire because of political controversy over the protections it would grant to Native Americans, LGBTQ individuals, and immigrants, as well as restrictions it would impose on gun ownership by domestic abusers who are not legally married to their victims. Relatedly, a federal court in 2019 struck down a federal statute that criminalized female genital mutilation, holding that it too exceeded the power of Congress under the Commerce Clause. *U.S. v. Nagarwala*, 350 F. Supp. 3d 613 (2018). The second clause of the ERA—which confers power on Congress to enact legislation to protect the rights embodied in the first clause—could provide an alternative basis for congressional action in these and other respects.

### *B. Economic and Employment-Related Disparities*

Women are still subject to significant economic disparities, and legislative efforts have not succeeded in leveling the playing field. These disparities—coupled with many other problems, including a lack of affordable, high-quality childcare—make it

inevitable that women are dramatically overrepresented among Americans in poverty. Women are 35% more likely than men to be poor, with single mothers at particularly high risk. *See* Legal Momentum, *Women and Poverty in America*; *see also* Meika Berlan & Morgan Harwood, Nat'l Women's Law Center, *National Snapshot: Poverty Among Women and Families* (2018). The ERA could help to drive change in this area as well, even if it does not apply against private sector employers directly.

In 2018, the median gender wage gap was 19 cents—meaning that a woman who worked full time earned only 81% of what a man earned. U.S. Bureau of Labor Stat., *Highlights of women's earnings in 2018*, Report 1083, 1 (Nov. 2019). This ratio has remained largely unchanged for more than a decade. *Id.* A woman in the United States can expect to make anywhere from $700,000 to $2 million less than a male colleague over her lifetime, depending on education level. Neuwirth, *Equal Means Equal* at 15 (citing the WAGE Project). The National Committee on Pay Equity identified the last Equal Pay Day as March 31, 2020, which symbolizes "how far into the year women must work to earn what men earned the previous year." U.S. Census Bureau, *Equal Pay Day: March 31, 2020* (Mar. 31, 2020). Not surprisingly, these disparities are far more pronounced for women of color. Black women are typically paid 62 cents, Native American women 57 cents, and Latinas 54 cents for every dollar paid to White, non-Hispanic men. National Partnership for Women & Families, *America's Women and the Wage Gap: Fact Sheet* 1 (Mar. 2020).

Studies estimate that anywhere from a quarter to four-fifths of women will experience workplace sexual harassment in their lifetimes. Elyse Shaw, et al., Inst. for

Women's Policy Research, *Sexual Harassment and Assault at Work: Understanding the Costs* 1 (Oct. 2018). In addition to the damage to a woman's mental and physical health, workplace sexual harassment can result in lost opportunities for on-the-job learning and advancement, or a forced job change, unemployment, and abandonment of a well-paying career. *Id.* at 4–5. And pregnancy discrimination remains widespread, both in physically demanding jobs and in corporate office towers. Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination is Rampant Inside America's Biggest Companies*, N.Y. Times (Feb. 8, 2019).

In the public sector, women in military service also face persistent inequality, despite serving with great distinction at all levels. Although Congress repealed the combat exclusion in 1993, Department of Defense policy continued to exclude women from direct ground combat for another 20 years. Kristy N. Kamarck, Cong. Research Serv., R42075, *Women in Combat: Issues for Congress* 6, 13 (2016). Only a few years ago, women were finally given the opportunity to serve in all military occupations, including special forces billets that were previously reserved for men only. *Id.* at 14. Yet female officers continue to face adversity in promotion, in part because of their underrepresentation at service colleges and their difficulty in obtaining combat experience. Nancy A. Youssef, *The Military Offers Women Pay Equity and Opportunity, but Few Still Make Top Ranks*, Wall Street J. (Oct. 13, 2019). At the same time, sexual harassment and assault remain prevalent. Kelsey L. Campbell, *Protecting Our Defenders: The Need to Ensure Due Process for Women in the Military before Amending the Selective Service Act*¸ 45 Hastings Const. L. Q. 115, 129 (2017). Servicewomen are 16% more likely

to be sexually assaulted than women in the general population (*id.* at 126), and one in four active-duty women experience sexual harassment or some form of gender discrimination (*id.* at 120 n.31).

This is a problem not only for the servicewomen themselves but also for our Nation's military readiness. The recruitment of women is essential to maintain an all-volunteer force. *See* Defense Adv. Comm. on Women in the Service, *2018 Annual Report* 6 (Dec. 11, 2018). In its March 2020 report to Congress, a national military commission recommended that the Selective Service Act be extended to women as well as men. Nat. Comm'n on Military, Nat'l & Pub. Serv., *Inspired to Serve* 111–23 (Mar. 2020). The potential inclusion of women in the draft further supports the notion that it is time for men and women to be recognized as equal citizens of this country.

## CONCLUSION

The ERA remains as critical today as it was in 1923—when it was first introduced—and in 1972, when a bipartisan supermajority in Congress passed it and sent it to the States. The fundamental nature of constitutional equality—as well as the slow process of achieving it—makes it all the more important to respect the plain language of Article V, which sets out a process for amending our Constitution that imposes no time limits. We ask that the Court hold that a time limit in a congressional joint resolution cannot stand in the way of an amendment that meets the constitutional requirements in Article V. There can be no time limit on equality.

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Respectfully submitted,

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