ORAL ARGUMENT NOT YET SCHEDULED
No. 21-5096

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF ILLINOIS AND STATE OF NEVADA,
Plaintiffs-Appellants,

v.

DAVID FERRIERO,
IN HIS OFFICIAL CAPACITY AS ARCHIVIST OF THE UNITED STATES,
Defendant-Appellee,

STATE OF ALABAMA; STATE OF LOUISIANA; STATE OF NEBRASKA;
STATE OF SOUTH DAKOTA; STATE OF TENNESSEE,
Intervenors for Defendant-Appellees.

On Appeal from the U.S. District Court for the District of Columbia
Case No. 1:20-cv-00242-RC (Hon. Rudolph Contreras)

BRIEF OF *AMICUS CURIAE* INDEPENDENT WOMEN'S LAW CENTER IN SUPPORT OF INTERVENORS FOR DEFENDANT-APPELLEES STATE OF ALABAMA; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE, AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Independent Women's Law Center certifies as follows:

A. Parties and *Amici*

Except for the following *amici* in this Court, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants and Brief for Defendant-Appellee:

Independent Women's Law Center; ERA Illinois; Nevada State Organizations; Foundation for Moral Law; and Gregory Watson.

The Commonwealth of Virginia has been dismissed as a party to this appeal.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

C. Related Cases

References to related cases appear in the Brief for the Defendant-Appellee.

/s/ Kathryn E. Tarbert
KATHRYN E. TARBERT
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* Independent Women's Law Center certifies that it is a project of Independent Women's Forum, a nonprofit, non-partisan 501(c)(3) organized under the laws of the State of Virginia; it has no parent corporation; and no publicly held company has a 10% or greater interest in Independent Women's Law Center.

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STATEMENT PURSUANT TO D.C. CIRCUIT RULE 29(d)

Pursuant to D.C. Circuit Rule 29(d), Independent Women's Law Center states that a separate brief is necessary for its presentation to this Court to detail the distinctive views of Independent Women's Forum on (1) the numerous legal and social changes that have occurred since the Equal Rights Amendment of 1972 was first proposed, (2) the ways in which those significant developments would impact the interpretation and application of that Amendment today, and (3) the dangers to democracy generally, and to female voters in particular, that adoption of the Amendment presents.

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GLOSSARY

ERA Equal Rights Amendment of 1972

STATUTES AND REGULATIONS

All applicable statutes and constitutional provisions are contained in the Brief for Appellants, except that the purported "U.S. Const. amend. XXVIII" has not been ratified as that brief claims.

INTRODUCTION, STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

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

Independent Women's Law Center is a project of Independent Women's Forum, a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic issues. Independent Women's Forum promotes policies that advance women's interests by expanding freedom, encouraging personal responsibility, and limiting the reach of government. Independent Women's Law Center supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and the continued legal relevance of biological sex.

Independent Women's Law Center urges this Court to affirm dismissal because the deadline for ratifying the 1972 Equal Rights Amendment (ERA) has long expired. Independent Women's Law Center is concerned that adding the ERA to the Constitution now would subvert

[1] No party or counsel for a party authored this brief in whole or part, and no entity or person, other than *amicus*, its members, and its counsel, has contributed funds for preparation or submission of this brief.

democracy by preventing an entire generation of Americans from weighing in, through their elected representatives, on whether the Constitution should mandate the government always treat males and females as interchangeable. In addition, Independent Women's Law Center submits this brief to highlight the significant legal and social changes that have occurred since the ERA was proposed. Those shifts have rendered the interpretation and application of the 1972 ERA different from the one Illinois and Nevada ("Plaintiff States") and their *amici* seek today.

HISTORICAL BACKGROUND

In 1923, when suffragist Alice Stokes Paul first delivered to Congress a proposed constitutional amendment to guarantee equal treatment of the sexes, American women were second-class citizens lacking the same legal rights as men. *See, e.g.*, E. A. Dunshee, Savilla Millis Simmons & Nat'l League of Women Voters, A Survey of the Legal Status of Women in the Forty-eight States (1930). In 40 of the 48 states, for example, a woman's husband not only controlled, but owned, all property acquired by spouses' joint efforts. *Id*. at 11.

Beginning in the 1950s, however, the role of women in society began to change dramatically. *See, e.g.*, Noah Berlatsky, *Hey, the Gender-Role Revolution Started Way Before the Millennial Generation*, THE ATL. (May 20, 2013), https://bit.ly/3GTLAe7. In the 1960s and 1970s, American law began to reflect those changes.

In 1971, during this shift, Representative Martha Griffiths introduced a version of the constitutional amendment originally drafted by Alice Paul. Griffiths's version of the ERA read:

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

H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972).

For a proposed amendment to become law, it must be approved by two-thirds of both Houses of Congress and three-fourths of the states. U.S. Const. art. V. On October 12, 1971, more than two-thirds of the House of Representatives voted to approve the ERA. 117 Cong. Rec. 35815 (1971).

On November 22, 1971, before the Senate voted on the measure, the Supreme Court held, for the first time, that the Equal Protection Clause of the Fourteenth Amendment prohibits the government from "providing

dissimilar treatment for men and women who are … similarly situated." *Reed v. Reed*, 404 U.S. 71, 77 (1971); *see Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975) (same equal protection standards apply under Fifth and Fourteenth Amendments). *Reed* set the stage for a fundamental transformation of the constitutional landscape with respect to discrimination on the basis of sex.

On March 22, 1972, the Senate approved by a two-thirds majority an identical version of the House-approved ERA. 118 Cong. Rec. 9598 (1972). The ERA was then sent for ratification by three-fourths (38) of the states within seven years. H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972).

By the end of 1972, 22 states had ratified the ERA. Thirteen additional states ratified the proposed amendment over the next five years, but by then five states had rescinded, or added a sunset provision to, their ratifications. *See Equal Rights Amendment-Proposed March 22, 1972, List of State Ratification Actions*, NAT'L ARCHIVES & REC. ADMIN. (updated Mar. 4, 2020), https://bit.ly/3IvMvli.

Realizing the ERA would not garner the support of 38 states by the 1979 deadline, Congress, *by simple majority,* voted to extend the

ratification deadline until June 20, 1982. H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978). No additional states ratified the ERA before this "extension" expired.

Neither Virginia, Nevada, nor Illinois ratified the ERA during the seven-year ratification period, nor the (improperly passed) extension. But in March 2017, to celebrate the 45th anniversary of the ERA passing Congress, Nevada symbolically voted to endorse the ERA. Illinois followed suit in May 2018. And Virginia in January 2020.

SUMMARY OF THE CASE

On January 30, 2020, Plaintiff States filed this action against David S. Ferriero, the United States Archivist ("Archivist"), in his official capacity. The complaint sought mandamus relief to compel the Archivist to publish and certify the ERA as part of the Constitution, claiming that Virginia had become the 38th state to ratify the amendment. Compl. at ¶¶ 54-55, *Virginia v. Ferriero*, 525 F. Supp. 3d 36 (D.D.C. 2021) (No. 1:20-cv-00242-RC), ECF No. 1.

On March 5, 2021, the district court granted the Archivist's motion to dismiss. The court found that because 1 U.S.C. § 106b did not impose a duty on the Archivist to consider as valid ratifications state

endorsements that occurred well outside the ERA's congressionally imposed deadline, Plaintiff States were not entitled to mandamus relief.

ARGUMENT

Much has happened in the world during the half-century since Rep. Griffiths introduced the ERA. Most critically, for this Court's purposes, the deadline for ratification came and went. And decades passed without anyone questioning the ERA was dead.

During this time, American women gained the legal rights that the drafters of the ERA so desperately sought. Indeed, two generations of women have come of age in a country where women are fully equal under law.

More recently, Americans have entered a period of cultural debate over the very definition of the word "sex"—a word that is critical to the meaning and application of the proposed ERA. Thus, Plaintiff States ask this Court to validate an amendment that was never debated by the states that approved the proposal in the 1970s.

Because of the vast changes in the legal status of women and ongoing debate about the legal meaning of the word "sex," it is impossible for this Court to know whether the states that ratified the ERA during

the 1970s would do so again today. Perhaps some would. But today's voters—*most* of whom were either not yet born or unable to vote during the ratification period—should have an opportunity to determine, through elected representatives, whether to adopt a measure that would likely eliminate government programs that benefit women and girls and require that the government treat males and females exactly the same, irrespective of circumstance.

The Court should affirm the district court's order dismissing the case.

I. The ERA Cannot Be Ratified Half a Century After It Was Sent to the States.

According to the Constitution, Supreme Court precedent, and Congress, the time to ratify the 1972 ERA passed decades ago. The ERA is dead, and Plaintiff States' attempt to revive it undermines our system of democratic governance.

A. The Congressionally Imposed Ratification Deadline Passed Last Century.

The joint resolution passed by Congress on March 22, 1972, clearly states that the ERA will be valid:

> 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.

H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972) (emphasis added).

That deadline came and went in 1979, without the requisite 38 states. That should be the end of the matter. *See* Thomas Jipping, *Not Your Grandmother's ERA: Why Current Equal Rights Amendment Strategies Will Fail*, HERITAGE FOUND. (Oct. 26, 2021), https://herit.ag/35ijuev. And for 40 years it was.

But, today, Plaintiff States claim the Archivist—a government official whose job it is to "cause" validly ratified amendments "to be published"—has a duty to publish the ERA as part of our Constitution, despite Congress's express command that the amendment become law *only* if ratified by a date certain. Plaintiff States argue Congress *cannot* set time limits on ratification. They are mistaken.

In *Dillon v. Gloss*, the Supreme Court found "no doubt" that Congress could "fix a definite period for the ratification" of a constitutional amendment. 256 U.S. 368, 375-76 (1921). In fact, the *Dillon* Court found it "untenable" that the Constitution would even permit such an elongated ratification process. *Id.* at 375. Instead, the

Court "conclude[d] that the fair inference or implication from article 5 is that the ratification *must* be within some reasonable time after the proposal." *Id.*

B. Plaintiff States' Theory of Ratification Undermines Our Democratic System of Government.

This case exemplifies the dangers of ignoring the time constraints imposed by Congress and the Constitution. Here, two generations of Americans have come of age since the ERA went down in defeat. Indeed, fully 57 percent of eligible voters either were not born or were too young to vote when the ERA was being debated by the states. *See* Charlotte Alter, *The 2020 Election Was a Breakthrough Moment For Young Voters*, TIME (May 18, 2021), https://bit.ly/3FUHKQs (in the 2020 election, Millennials and members of Generation Z—born *after* the ERA's ratification deadline passed—comprised 31 percent of the electorate); Yair Ghitza & Jonathan Robinson, *What Happened in 2020*, CATALIST, https://catalist.us/wh-national/ (last visited Mar. 8, 2022) (another 26 percent of 2020 voters were members of Generation X, born between 1965 and 1981, too young to vote in the 1970s). This significant majority of the electorate has not had the opportunity to debate the ERA or vote for state legislators who support or reject the proposal. Furthermore, as

explained below, legal and social developments since the ERA was proposed might well give that text—if applied today—a new meaning unanticipated by original ratifiers. All of this contradicts the core holding in *Dillon* that ratification must be "contemporaneous" in order to reflect "the will of the people in all sections." 256 U.S. at 375.

The very concept of democracy, that is, majority rule, depends on a time horizon. *See id.* Imagine the Senate takes a vote on the Build Back Better bill after it passes the House, and it receives only 49 "yeas." Then the Senate and House change Congress's longstanding practice of discarding bills not passed within one congressional term. *See* Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 HARV. L. REV. 1220, 1263-65 (2019) (discussing Congress's self-imposed time limits on legislation). Imagine further the Senate instructs the clerk to leave the vote open, and in 2060, flush with new residents from the coasts, new Tennessee Senators are elected, and join the "yeas." Has the bill received majority approval? What if the House no longer supports the bill, nor the majority of then-serving Senators? In this hypothetical it is clear that majority support means a majority during *a single snapshot of time*. *See id.* at 1254-55. So too in the context of

constitutional amendments. The super-majority support required to ratify an amendment must occur within a contemporaneous time frame.

Plaintiff States instead ask this Court to adopt a one-way ratchet, where states can change their minds in favor of ratification in perpetuity but can never repeal previous ratifications. That would mean proponents of a particular amendment need only wait it out, collecting ratifications across centuries—or even millennia—until one day they have 38 (or three-quarters of however many states the nation then has). Under such a ruling, any proposed amendment could become part of the Constitution with the present-day support of only *a single state* (where other states had previously ratified but then repealed that amendment). This contradicts the entire purpose of Article V, which is to ensure that changes to our governing charter be made only with super-majorities of popular support. *See Dillon*, 256 U.S. at 375; Prakash, *supra*, at 1224 ("Democracy rests upon majority rule . . . [which] surely demands that the putative majority actually demonstrate that it is a majority.").

II. Significant Legal and Social Changes Undermine the Rationale for the ERA and Raise Questions as to the Amendment's Current Meaning.

Much in this country has changed since the time for ratifying the ERA expired. Given significant shifts in the law and the social and economic status of women, it is far from clear voters would deem that amendment necessary today. Moreover, it is uncertain what the ERA would mean under current precedent. The amendment Plaintiff States pursue is not the amendment other states ratified decades ago.

A. Although the ERA Failed, America Achieved the Goal of Equal Treatment under Law.

In 1971, when the House of Representatives approved the ERA, courts had yet to hold that the Equal Protection Clause forbids discriminatory treatment of individuals by the government on the basis of sex. *See, e.g.*, *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (rejecting Equal Protection Clause challenge to Illinois's prohibition on women practicing law); *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948) (upholding law banning women from bartending unless "the wife or daughter of the male owner"); *Hoyt v. Florida*, 368 U.S. 57, 64-65 (1961) (upholding law banning women from serving on juries unless they specifically requested to do so).

The Supreme Court's failure to strike down policies that unjustly discriminated against women drove support for a constitutional amendment that would require courts to do so. Andrew Schepard, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1502 (1971) ("failure to eliminate legal sex discrimination" was "the major motivating force behind the concerned campaign to secure congressional approval of a constitutional amendment.").

But in 1972, while the Senate was debating the proposed ERA, the Supreme Court changed course and for the first time used the Equal Protection Clause to invalidate a law that treated similarly-situated men and women differently. *Reed*, 404 U.S. at 76-77. Over time, the Court applied the equal protection analysis to hold a broad range of sex-specific policies unlawful. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973) (benefits for military family members); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (jury selection); *United States v. Virginia*, 518 U.S. 515 (1996) (college admissions). Today, it is clear the Equal Protection

Clause of the Constitution outlaws governmental policies that unfairly discriminate on the basis of sex.[2]

Federal law today also contains a plethora of prohibitions on discrimination by both private and public actors. *See, e.g.*, Equal Pay Act, 29 U.S.C. § 206(d); Title VII, 42 U.S.C. § 2000e (prohibiting sex-based discrimination in employment); Title IX, 20 U.S.C. § 1681 (1972) (prohibiting sex-based discrimination in educational programs receiving federal financial assistance);[3] Equal Credit Opportunity Act, 15 U.S.C. § 1691(a) (prohibiting sex discrimination against credit applicants); Fair

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[2] Some *amici* nonetheless suggest women's rights are "insecure" because the Equal Protection Clause does not mention sex. *See Amicus Curiae* Br. of ERA Coalition in Support of Reversal 17 ["ERA Coalition Br."]. But the broad wording of that clause has been its strength, protecting *all* Americans from myriad harmful classifications. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (sex); *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968) (nonmarital parentage).

[3] The Supreme Court additionally has held that sexual harassment can constitute a form of unlawful sex discrimination prohibited by Titles VII and IX. *See, e.g.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (sexually hostile work environment can provide basis for claim of sex discrimination under Title VII); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (school's failure to act when notified of teacher-on-student sexual harassment may constitute sex discrimination under Title IX); *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629 (1999) (school's failure to act when notified of student-on-student sexual harassment may constitute sex discrimination under Title IX).

Housing Act, 42 U.S.C. § 3604 (prohibiting sex discrimination in sale, rental, and financing of housing); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (requiring employers to treat pregnant women the same as other similarly capable employees).

Over time, Congress has not only strengthened but also added support structures for those anti-discrimination laws. The Violence Against Women Act, for example, protects women from acts of sex-based violence by strengthening federal penalties for repeat offenders, creating the National Domestic Violence Hotline, and authorizing grants to local law enforcement entities to investigate and prosecute violent crimes against women. Lisa N. Sacco, *The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization*, CONG. RSCH. SERV. (Apr. 23, 2019), https://fas.org/sgp/crs/misc/R45410.pdf.

Interpreting the Constitution in *Dillon*, the Supreme Court recognized that "it is only when there is deemed to be a necessity therefor that amendments are to be proposed." 256 U.S. at 375. Congress, voters, and their duly elected representatives could easily conclude no such necessity exists under the legal landscape today. Indeed, as the late Justice Ruth Bader Ginsburg, an early supporter of the ERA, once

observed, today "[t]here is no practical difference between what has evolved and the ERA." Reva B. Siegal, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1334 (2006) (quoting Justice Ginsburg). *Accord* Erika Bachiochi, *The Contested Meaning of Women's Equality*, 46 NAT'L AFFS. (Winter 2021), https://bit.ly/3nQeRie ("successful legislative and litigation strategies women's-rights advocates pursued in the early 1970s" have resulted in a "de facto ERA").

B. Given the Seismic Changes to the Social and Economic Status of Women, State Legislators Might Not View the ERA as Necessary Today.

Like the law, the social and economic status of women has changed dramatically in the past half-century.

In 1972, women held only 20 percent of managerial positions. George Guilder, *Women in the Work Force*, THE ATL. (Sept. 1986), https://bit.ly/3IwQw8Z. But today women hold approximately 52 percent of them. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/cps/cpsaat11.htm (last modified Jan. 20, 2022).

The advancement of American women over the past half century is also evident on the playing field. Between 1972 and 2016, the number of women playing college sports increased 545 percent and the number of female high school athletes increased by 990 percent. Beth A. Brooke-Marciniak & Donna de Varona, *Amazing things happen when you give female athletes the same funding as men*, WORLD ECON. F. (Aug. 25, 2016), https://bit.ly/3fTH5nX.

So too have women made gains in the political arena. In 2020, women comprised 53 percent of voters. *See Voting and Registration in the Election of November 2020, Table 1: Reported Voting and Registration, by Sex and Single Years of Age: Nov. 2020*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://bit.ly/3hpikR8. Today, a record number of women serve in Congress and state legislatures. Carrie Blazina & Drew DeSilver, *A record number of women are serving in the 117th Congress*, PEW RSCH. CTR. (Jan. 15, 2021), https://pewrsr.ch/3IxLXLU; Carl Smith, *The Rise of Women in State Legislatures*, GOVERNING (Mar. 10, 2021), https://bit.ly/341P7Zd.

These changes are, perhaps, not surprising, given the massive increase in women's educational attainment during this period. Men, as

a group, were better educated than women in 1971. But by 2019, women earned 57 percent of all Bachelor's degrees (compared to 44 percent in 1972) and 60 percent of all Master's degrees (compared to 40 percent in 1972). *See* Nat'l Ctr. for Educ. Stats., *Table 322.20: Bachelor's degrees conferred by postsecondary institutions, by race/ethnicity and sex of student: Selected Years, 1976-77 through 2018-19,* DIG. EDUC. STAT. (July 2020), https://bit.ly/3KFj7uN; Nat'l Ctr. for Educ. Stats., *Table 323.20: Master's degrees conferred by postsecondary institutions, by race/ethnicity and sex of student: Selected Years, 1976-77 through 2018-19*, DIG. EDUC. STAT. (June 2020), https://bit.ly/3tZ0uw7; Nat'l Ctr. for Educ. Stats., *Table 310: Degrees conferred by degree-granting institutions, by level of degree and sex of student: Selected Years, 1869-70 through 2021-22*, DIG. EDUC. STAT. (June 2012), https://bit.ly/3KHRuRF. Today women outnumber men in both law school and medical school. *Law School Rankings by Female Enrollment (2020)*, ENJURIS, https://bit.ly/33FIkEZ (last visited Jan. 23, 2022); Brendan Murphy, *Women in medical schools: Dig into latest record-breaking numbers,* AM. MED. ASS'N (Sept. 21, 2021), https://bit.ly/3u4f8BY.

The notion that women in 2022 need constitutional change to preserve equal rights strikes many women as deceiving, if not dismissive of their many accomplishments. These spectacular achievements, combined with legal changes ensuring equal treatment under law, would surely impact whether voters and their duly elected representatives would deem the ERA necessary today.

C. Adopting the ERA on Top of Our Current Anti-Discrimination Framework Could Have Significant Consequences to Which States Have Not Consented.

As detailed above, American law today broadly prohibits the unequal treatment of women the ERA was intended to cure. Thus, it is possible that the decision to add the 1970s ERA to our current Constitution would be viewed by courts as merely symbolic. It is also possible, however, that courts could read the amendment to require something more than just equal treatment of similarly-situated persons irrespective of sex, which current law already provides. That "something more," hinted at in *amicus* briefs, certainly differs from the equal rights for women that state legislators thought they approved in the 1970s.

First, adding the ERA to the Constitution on top of current guarantees of equal protection could lead courts to analyze sex-based

policies the same way they analyze policies based on race. Under current equal protection jurisprudence, a race-based policy is unconstitutional unless the government can demonstrate that it is *necessary* for the achievement of a *compelling* government interest. By comparison, a sex-based policy is unconstitutional if it is not *substantially related* to the achievement of *important* governmental objectives. *Compare City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989), *with Craig v. Boren*, 429 U.S. 190, 197 (1976). These different approaches comport with common sense: Racial distinctions are almost never justifiable, where biological sex differences sometimes provide relevant grounds for distinction. Maintaining separate prisons for male and female inmates makes obvious sense, for example, but housing black and white inmates separately does not. *See Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 926 (D.C. Cir. 1996) (citing *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989)) (segregating inmates by sex is "unquestionably constitutional"); *see also* Inez Feltscher Stepman, *Don't Revive the ERA,* CITY J. (Feb. 27, 2020), https://bit.ly/3g01NCJ.

Intermediate scrutiny of sex-based policies has allowed courts to accommodate legitimate distinctions between males and females while

still prohibiting harmful sex discrimination. The Supreme Court has, for example, declared unconstitutional a law providing that husbands, but not wives, can be required to pay alimony upon divorce, *Orr v. Orr*, 440 U.S. 268 (1979), but has permitted a statutory-rape law that punished only the older male participant, *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464 (1981), and the practice of requiring only men to register for the draft, *Rostker v. Goldberg*, 453 U.S. 57 (1981). So too have courts upheld distinctions such as female-only athletic teams, *Clark v. Ariz. Interscholastic Ass'n,* 695 F.2d 1126, 1131 (9th Cir. 1982), and separate public restrooms, *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993).

Had the ERA been adopted in the 1970s, it is likely courts would have interpreted the amendment along the same lines they interpreted the Equal Protection Clause—as a prohibition on discrimination against similarly-situated individuals, *not as a mandate to dissolve every policy that recognizes the truism that men and women are different.*

If, however, the ERA is added to the Constitution now, courts might very well understand it as requiring more—that is, requiring strict scrutiny of sex-based policies—so as not to render the amendment redundant. *See generally Radlax Gateway Hotel, LLC v. Amalgamated*

Bank, 566 U.S. 639, 645 (2012) (applying "cardinal rule that, if possible, effect shall be given to every clause and part of a statute"). This is not speculation: Although the indeterminant text of the ERA says nothing about the level of scrutiny that should apply, ERA proponents seek and expect it to require strict scrutiny of all sex-based policies and classifications. *See, e.g.*, Br. for *Amici Curiae* Generation Ratify and Ten Other Youth-Led Orgs. in Support of Pls.-Appellants 14 n.35 [hereinafter "Generation Ratify Br."]; ERA Coalition Br. 16; Lisa Baldez, *The U.S. might ratify the ERA. What would change?,* WASH. POST (Jan. 23, 2020), https://wapo.st/3ubYlgL.

Applying strict scrutiny to sex would restrict, if not eliminate, necessary flexibility to take sex into account where biology is relevant, such as, for example, in the case of separate-sex athletic teams at public colleges and schools. *See, e.g.*, *Att'y Gen. v. Mass. Interscholastic Athletic Ass'n*, 378 Mass. 342, 363-64 (1979) (under state Equal Rights Amendment, public schools are forbidden from barring males from trying out for or competing on women's sports teams). It could also render unlawful hundreds (if not thousands) of programs designed to support women and girls—programs such as the Special Supplemental Nutrition

Program for Women, Infants, and Children; federal grants that attempt to increase the participation of women and girls in science and math programs; and grants administered pursuant to the Violence Against Women Act.

Perhaps most radically, layering the ERA on top of existing constitutional guarantees of equal treatment could be interpreted to require, not just *equal treatment of individuals*, but *equal societal outcomes for males and females as groups*. *See* Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 BROOK. L. REV. 397, 418 (2015) ("Under the ERA, evidence of a purpose or intent to discriminate would not be required to invalidate governmental action that has a disparate impact on gender."); *Why We Need an Equal Rights Amendment*, ERA COAL. FUND FOR WOMEN'S EQUAL., https://bit.ly/3IGnPXm (last visited Jan. 27, 2022) (ERA will "provide the possibility of recourse when women are clearly disadvantaged . . . *without having to prove intent to discriminate*") (emphasis added). *Amici* Generation Ratify, for example, suggest the ERA is broad enough to rectify all sorts of societal disparities—including the unequal participation of women in certain careers—and require

statistical parity in all walks of life, from schools to the workplace. *See* Generation Ratify Br. 13-14, 17, 21-24. Such an approach would also require that women register for the selective service and could require the military to send equal numbers of women and men into combat. Moreover, and paradoxically, statistical parity requirements could strip women of opportunities when they happen to be represented in higher numbers than men (such as in higher education).

The potentially radical impact of allowing the 1972 ERA to become part of the Constitution today is described quite clearly by *amici* Generation Ratify, which highlight as suspect entirely neutral laws, such as sales taxes, that may disparately impact women. Generation Ratify Br. 14 n.35 (discussing potential illegality of applying sales tax on menstrual products). This shift would go far beyond current jurisprudence for even strict-scrutiny categories such as race, where the Supreme Court has always required unconstitutional government action to have a discriminatory purpose, not just a disparate impact. *See Washington v. Davis*, 426 U.S. 229, 239 (1976); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194 (2003).

Because, of course, women and men *are* different, the list of neutral policies with potentially disparate impact on one sex or the other is endless. As such, adoption of the ERA now could make a constitutional issue out of everything from the cost of sex-specific medications to the sex-neutral allocation of COVID treatments (as men have worse outcomes from the virus). Yet ERA proponents in the 1970s assured the public that the amendment would not prohibit government policies that take into account physical characteristics unique to one sex. *See* Siegal, *supra*, at 1366-69, 1381-84 & nn.156, 158 (discussing proponents' arguments and legislative history of the ERA). Adopting the ERA today could do just that.

D. Changed Understandings of the Phrase "On Account of Sex" Suggest the ERA Today May Not Be the Same Amendment the States Debated in the 1970s.

The 1972 ERA does not define the phrase "on account of sex." Regardless whether that phrase's public meaning was obvious in the early 1970s, it is far from obvious today. *See, e.g.*, Generation Ratify Br. 14-15 ("gender equality" protected by ERA "need not be limited to cisgender, heterosexual women"); *Selecting Your Gender Marker*, U.S. DEP'T STATE, https://bit.ly/35oHpZP (last visited Jan. 27, 2022) (planning

for "X" marker for non-binary, intersex, and gender non-conforming persons to ensure fair treatment "regardless of their sex or gender"); *IOC Framework on Fairness*, INT'L OLYMPIC COMM., https://bit.ly/3o4EwnF (last visited Jan. 27, 2022) (rules to ensure "everyone, irrespective of their gender identity or sex variations" can fairly compete).[4]

Recently, the Supreme Court held that a federal statutory prohibition on discrimination "because of sex"—which the Court said was interchangeable with "on account of sex"—prohibits discrimination because of *gender identity*. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739, 1741 (2020) ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."). Given this holding, it is quite possible that in 2022 the ERA's prohibition of different treatment "on account of sex"

[4] The ERA thus bears no resemblance to the 27th Amendment, which governs congressional pay. The text of that Amendment is straightforward, and its meaning was not altered over time. Furthermore, the concerns about self-dealing that motivated that Amendment were the same when the Amendment was proposed and ratified. The opposite is true here: major changes in society and law have altered opinions about the status of women, whether women need additional legal protection in the 21st century, and potentially even the public meaning of the term "sex."

would be interpreted similarly, to prohibit discrimination on the basis of gender identity.[5]

The definitional shift outlined above would have significant implications for untold thorny issues, from bathroom usage to eligibility for single-sex athletic teams. *See, e.g.*, Generation Ratify Br. 18. And although Americans *could* choose to resolve these complex issues permanently with a blunt constitutional tool, that choice was certainly not before state legislatures in the 1970s. *Cf. Dillon*, 256 U.S. at 375 ("an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day"). Given the state of law and society in 1972 compared to the state of law and society now, it is plain that those 35 states ratified a *different* amendment than the one Plaintiff States symbolically approved.

[5] Although *Bostock* was a Title VII case, its implications have already stretched well beyond that law, given the array of federal statutes and regulations that prohibit discrimination based on sex. *See, e.g.*, Exec. Order 13988, Preventing & Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation (Jan. 20, 2021); Mem. from Jeanine M. Worden, Acting Assistant Sec'y for Fair Hous. & Equal Opportunity, Implementation of Exec. Order 13988 (Feb. 11, 2021); Notice of Interpretation & Enforcement, 86 Fed. Reg. 27984 (May 10, 2021).

CONCLUSION

Forty-five years is an awfully long time, especially for a country only 246 years old. In that time, not only has the goal of the 1970s ERA been achieved, but the population has changed radically. States that supported that ERA now include tens of millions of residents, and a majority of voters, who have not been given an opportunity to weigh in on the merits of the proposed amendment.

The only way to determine whether super-majorities of Americans want to add the ERA to the Constitution today is, in Justice Ginsburg's words, to put it "back in the political hopper" and start again. Ariane de Vogue, *Ruth Bader Ginsburg says deadline to ratify Equal Rights Amendment has expired: 'I'd like it to start over'*, CNN (Feb. 10, 2020), https://cnn.it/3FZweDo. Only then can we have a meaningful *national* conversation about the advantages and disadvantages of this proposed amendment, as Congress required and the Constitution demands.

It is notable that the last time citizens of the United States had such a national conversation, the ERA's ratification spiraled from destiny to death, thanks to a strong grassroots movement led by a determined lawyer named Phyllis Schlafly. Lesley Kennedy, *How Phyllis Schlafly*

Derailed the Equal Rights Amendment, HISTORY (Mar. 19, 2020), https://bit.ly/3AvocB2. That campaign displayed the power of women to advocate for themselves on both sides of this issue. This Court should not allow Plaintiff States to short-circuit the constitutionally prescribed process for adopting an amendment simply because they fear losing the debate again.

The district court's order dismissing this case should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, on this 11th day of March, 2022, that the foregoing Brief of *Amicus Curiae* complies with the word limit under Fed. R. App. P. 29(a)(5) and this Court's briefing order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,493 words. The number of words was determined through the word-count function of Microsoft Word. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/Kathryn E. Tarbert
KATHRYN E. TARBERT

ANTI-VIRUS CERTIFICATION

I certify that the foregoing Brief of *Amicus Curiae* submitted in PDF format via the ECF system was scanned using the current version of Microsoft Defender and no viruses or other security risks were found.

/s/Kathryn E. Tarbert
KATHRYN E. TARBERT

CERTIFICATE OF SERVICE

I certify that on March 11, 2022, I caused the foregoing Brief of *Amicus Curiae* to be filed with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/Kathryn E. Tarbert
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