


In the
Supreme Court of the United States



EQUAL MEANS EQUAL, THE YELLOW ROSES,
and KATHERINE WEITBRECHT,

Petitioners,

v.

DAVID S. FERRIERO,
ARCHIVIST OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the
United States District Court for the District of Massachusetts

**BRIEF OF EIGHTY DIVERSE *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE¹

The *Amici Curiae* are eighty, mostly non-profit organizations and associations, representing millions of members, volunteers, and dedicated staff from across the United States, including The Alice Paul Institute and the Elizabeth Cady Stanton Trust, which promote the legacies of two pivotal women’s rights activists in American history.

Amici include: The amici also include prominent labor affiliated groups such as the AAUW groups, SAG-AFTRA, and Teamsters Human Rights; as well as human rights organizations such as NOW, ERA, Niskanen Center, Global Indigenous Counsel, SVREP, and the National Women’s Political Caucus. *See* App.1a for the full list.

Although *Amici* have otherwise diverse views, they all promote equality for women in the law, society, education, workplace, and/or family. They collectively believe that the Equal Rights Amendment (“ERA”) is critical to bring women to full equality in our country. It is a notion, a value, and a right that is 244 years overdue.

¹ *Amici* requested and received consent to file from both Petitioner and Respondent. Sup. Ct. R. 37.2(a). No party or party’s counsel authored this brief in whole or in part, and no person other than *Amici* or counsel for *Amici* contributed money that was intended to or did fund the preparation or submission of this brief. Sup. Ct. R. 37.6.



WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

I. THE PETITIONERS HAVE ARTICLE III STANDING

Amici agree with Petitioners that the ERA is now part of the Constitution because three quarters of the states ratified it as of January 27, 2020. Pet.7-8. Subsequent to ratification, Respondent’s violation of 1 U.S.C. § 106(b), by refusing his ministerial duty to publish the ERA in the Constitution as the 28th Amendment, has created a barrier between Petitioners and the ERA, much as if he had locked the ERA away in a bank vault.

Amici respectfully submit that there is another way to characterize or re-frame the injury in fact the Petitioners, and similarly situated others, have suffered. This barrier has injured Petitioners, by preventing Petitioners and similarly situated others, who are mostly women but may at times include men (and shall hereinafter be referred to collectively as “Women”),² from having the benefit of the ERA, to use it as a shield — in that the ERA gives state and federal governments an initial two-year window to ameliorate their sexually discriminatory laws, to bring them into compliance with the ERA — and to then use it as a sword — in that Petitioners, and Women, will have the right to sue

² Although the Amended Complaint alleges “Facts Regarding the Class of People Affected” pertaining mostly to violence against women, there was no Motion to Certify a Class filed. These characteristics are common to all women, who are those who would chiefly benefit from the ERA. Pet.App.54a-59a.

under the ERA where sexually discriminatory laws still exist after the two-year window — thus preventing the Petitioners and Women from having equality under the law.

Under the Equal Protection Clause in the 14th Amendment, women have only been allowed a lesser intermediate scrutiny level test. *Craig v. Boren*, 429 U.S. 190, 197 (1976),³ *U.S. v. Virginia*, 518 U.S. 515, 531 (1996) (This Court required the Commonwealth of Virginia to provide an “exceedingly persuasive justification” as to why it maintained an all-male military academy. “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”). *Id.* Whereas, suspect classes, who like women have suffered historical degradation and discrimination, such as race, national origin or alienage, have the highest strict scrutiny test, which is more difficult for the offending laws or practices to overcome. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-441 (1985) (with an overview of the jurisprudence). Petitioners wrote in their Amended Complaint, that by affording sex discrimination a less stringent legal standard under the Equal Protection Clause, the Supreme Court is “thus permitting more sex discrimination than is legally tolerated against other social classes.” Pet.App.52a.

³ U.S. Const. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *Craig v. Boren*, 429 U.S. 190, 197 (1976). (The intermediate test is used for sex-based classifications. To be constitutional, the challenged law must serve an important governmental objective and be substantially related to that objective).

This Court has recognized for at least thirty-five years that sex-based discriminatory laws “very likely reflect outmoded notions of the relative capabilities of men and women,” *Cleburne*, 473 U.S. at 441, yet this Court still has not afforded sex-based discrimination the strict scrutiny test. Thus, it should be clear that without the benefit of the Equal Rights Amendment, women cannot be equal under law in this country. In 2011, Justice Antonin Scalia caused a kerfuffle when he truthfully noted that there is no provision for sex-based equality in the Constitution.⁴ Now, there is a clear prohibition of sex-based discrimination with the ratification of the ERA on January 27, 2020, if this Court will only declare the ERA to be valid and instruct the Archivist to publish it.

Fortunately, this case could bring a united result, because much of it hinges on interpretation methods of which Justice Scalia would approve: considering the original intent of the Framers of the Constitution and the textural meanings of Article V and the 10th Amendment in the Constitution, 1 U.S.C § 106(b), and the text of the ERA itself.

Petitioners suffered an injury in fact due to the barrier the Archivist has imposed, by refusing to publish the ERA in the Constitution. The barring of the ERA’s publication has inflicted several harms upon Petitioners, including the frustration of their organizations’ purposes,

⁴ Max Fisher, *Scalia says Constitution Doesn’t Protect Women From Gender Discrimination*, THE ATLANTIC, Jan. 1, 2011 (<https://www.theatlantic.com/politics/archive/2011/01/scalia-says-constitution-doesn-t-protect-women-from-gender-discrimination/342789/>) (accessed 6/18/20).

increased expenditure from litigation, increased expenditure in government advocacy efforts, as well as the other harms set forth in their Amended Complaint. Pet.App.52a-62a (including but not limited to Amd. Complaint ppg.45, 51-57, 59-64).

Except for the procedural legal interest as to 1 U.S.C. § 106(b), Pet.24 — as Archivist’s violation of that statute is the creation of the barrier — the barrier arises in each of the areas where Petitioners argue that they have a protectable legal interest and an injury in fact. *See* Pet.21-31 [including the following sections: IV. A. “Injury in Fact” (1) “Petitioners have a Protectable Legal Interest in the ERA’s Continued Vitality,” *Id.* at 21-23, (2) Under “Petitioners have a Protectable Legal Interest in the Proper Enforcement of § 106b” regarding Petitioners having “standing to seek redress on behalf of themselves and all women” and “the class of people affected by government-sanctioned discrimination.” *Id.* at 25-27, (3) “Petitioners Have Demonstrated Organizational Injury,” *Id.* at 27-28, IV. B. “Equal Means Equal – Organizational Standing,” *Id.* at 28-29, IV. C. “Equal Means Equal – Associational Standing,” *Id.* at 29-30, IV. D. “The Yellow Roses – Organizational Standing,” *Id.* at 30-31].

Petitioner correctly asserts that “Respondent’s refusal to publish the ERA clearly violates the procedural provisions of [1 U.S.C.] § 106(b). . . .” Pet.24.

The resultant injury in fact flowing from the Archivist’s violation is the imposition of a barrier to the ability of women to “compete” under law on an equal basis with men; that is, to not be held back by sexually discriminatory laws, in multiple spheres, including but not limited to: safety from violence; and educational, economic, and professional roadblocks.

To have standing, Petitioners and Women do not have to prove that they would have achieved a particular result in one of these spheres, only that the Archivist's refusal to publish the ERA (the barrier), "makes it more difficult" (here, impossible) that they would have full equality with men under law, and it suffices to show injury in fact and to give Petitioners and Women standing.

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that [s]he would have obtained the benefit but for the barrier in order to establish standing.

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 657 (1993).

The Archivist's refusal to publish the ERA erected a barrier to a right to which Petitioners and Women are entitled: the use of the ERA as a sword and a shield. The barrier prevented them from exercising and benefitting from that right to be equal to men under law. In similar barrier cases, this Court held that only the wish to have the benefit (here the right to be equal to men under the law), to which the plaintiffs there had been barred, was enough to show injury in fact, just as the Petitioners and Women (as Petitioners alleged in their Amended Complaint in ppg.58, 64, and 100), "have suffered and are at increased risk of suffering harm because they are female and do not enjoy equal protection of law," Pet.App.59a, 61a, and 68a, but they wish to have the benefit of the ERA.

Northeastern Florida, 508 U.S. at 664 (citing *Turner v. Fouche*, 396 U.S. 346, 361 (1970), *Quinn v. Millsap*, 491 U.S. 95, 103 (1989) (In both, non-property holders, prevented from seats on boards, did not have to prove they would obtain a seat on the board if the barrier was removed to have standing, only that they wished to have a seat on the board). Petitioners are demanding their seat at the table now.

In the case *sub judice*, it is undisputed that the injury in fact was caused by the Archivist's barrier, and the Archivist has stated publicly, in the *NARA Press Statement on the Equal Rights Amendment*, that he would publish the ERA if a court ordered him to do so; thus, redressability is undisputed as well. Pet.App.95a (in which the Archivist states that he "will abide by the OLC opinion, unless otherwise directed by a final court order.").

II. THIS IS THE MOST IMPORTANT CASE SINCE *BROWN V. BOARD OF EDUCATION* BECAUSE EQUALITY OF ALL CITIZENS IS ESSENTIAL TO AMERICAN DEMOCRACY.

A. American Democracy Is a Form of Liberal Democracy, Based Largely on the Idea of the Equality of Citizens.

Equality is a bedrock principle of American Democracy. Equal rights of citizenship is one of the most basic of all human rights.⁵ Yet, half our population has never had equal citizenship under law. Justice Ruth Bader Ginsburg spent her career working towards that goal for women. In 2014, Justice Ginsburg said,

⁵ *Infra*, at note 7.

“If I could choose an amendment to add to the Constitution, it would be the Equal Rights Amendment.”⁶ In 2018, she affirmed that we still need the Equal Rights Amendment; she wanted it for her granddaughters.⁷

It’s important to have an Equal Rights Amendment in the Constitution, even if the 14th Amendment has been interpreted in the way an equal rights provision would. . . . [E]very constitution in the world, written since the year 1950, has the equivalent of a statement that men and women are people of equal citizenship stature. . . . I would like to be able to take out [my granddaughters’] pocket Constitution, and say to them, you see, this statement of the equal stature of men and women is as fundamental as other basic

⁶ Nikki Schwab, *Ginsburg: Make ERA Part of the Constitution*, U.S. NEWS & WORLD REPORT, April 18, 2014 (Justice Ruth Bader Ginsburg speaking to the National Press Club on April 17, 2014). (<https://www.usnews.com/news/blogs/washington-whispers/2014/04/18/justice-ginsburg-make-equal-rights-amendment-part-of-the-constitution>) (accessed 9/29/20).

⁷ *What Ginsburg Wants to Tell Her Granddaughters*, CNN, February 11, 2018 (Justice Ruth Bader Ginsburg said on video in an interview with Poppy Harlow). (<https://www.cnn.com/videos/us/2018/02/11/rbg-on-equal-rights-amendment.cnn>) (accessed 9/29/20); *Accord*, Justine Coleman, *Ginsburg Says ‘We Still’ Need an Equal Rights Amendment to Make US ‘More Perfect,’* THE HILL, Feb. 10, 2020. (Justice Ginsburg said, “[W]omen should have equality in all fields of human endeavor, so we needed an Equal Rights Amendment, and I think, at least in my view, we still do.”) (<https://thehill.com/regulation/court-battles/482440-ginsburg-says-we-still-need-an-equal-rights-amendment-to-make-us>) (accessed 9/30/20).

human rights, the right to free speech, freedom of religion, freedom of the press. The equal stature of men and women, it belongs in the Constitution. And recently there have been efforts to revive the Amendment. I hope they succeed.

Id.

The United States is a “liberal democracy,”⁸ which can be defined as a government where citizens have property rights, political rights, and civil rights.⁹ “‘Political rights’ refer to free and fair elections; ‘civil rights’ combine measures of independent judiciary, rule of law, and equal treatment.”¹⁰ “The truly distinctive nature of liberal democracy is the protection of civil rights (equal treatment by the state for all groups) in addition to the other two.”¹¹ In a liberal democracy, the “elected government cannot discriminate against specific individuals or groups when it administers justice, protects basic rights such as freedom of assembly and free speech, provides for collective security, or distributes economic and social benefits.”¹²

Historically, subordinated groups across the world were “profoundly influenced by American ideas of civil

⁸ Sharun W. Mukand & Dani Rodrik, *The Political Economy of Liberal Democracy*, THE ECONOMIC JOURNAL, April 2020, pp.765-792 (https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/the_political_economy_of_liberal_democracy_ej.pdf) (accessed 6/16/20).

⁹ *Id.* at 770.

¹⁰ *Id.* at 786. (Emphasis supplied and parentheticals omitted).

¹¹ *Id.* at 765.

¹² *Id.* at 770. [Emphasis supplied].

rights liberalism and its commitment to defend equality.”¹³ Equality of all citizens is essential to American Democracy. Yet, half our population, the women,¹⁴ are Constitutionally excluded from equal treatment as a fundamental protection. Without the ERA, equal treatment of women is largely dependent on elected lawmakers. Despite progress that has been made in reducing inequality, 244 years of unequal treatment has shown that depending on political cycles results in continued unequal treatment.

The belief in the need for equality of men and women in order for democracy to reach its full potential is not one born in modern times. Abigail Adams wrote her husband, John Adams, a Founding Father and later our second President, after the Revolutionary War had begun.¹⁵ The future First Lady admonished her husband, who was shortly thereafter put on the drafting committee for the Declaration of Independence:

[I]n the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all

¹³ *Id.* at 785. (Internal citation omitted).

¹⁴ United States Census Bureau, *Quick Facts, Population Estimates as of July 1, 2019*. (Women make up 50.8% of the United States population) (<https://www.census.gov/quickfacts/fact/table/US/PST045219#PST045219>) (accessed 6/15/20).

¹⁵ ConstitutionFacts.com, *Drafting the Declaration of Independence* (Declaration of Independence was drafted from June 11 to July 5, 1776) (<https://www.constitutionfacts.com/us-declaration-of-independence/drafting-the-declaration/>), (accessed 6/18/20).

Men would be tyrants if they could. If particular (sic) care and attention is not paid to the Ladies (sic) we are determined to foment a Rebellion (sic), and will not hold ourselves bound by any Laws in which we have no voice, or Representation.¹⁶

Neither the Declaration of Independence nor the United States Constitution remembered the ladies. In fact, neither women nor black Americans were provided any rights at all. The Declaration of Independence was based upon the belief that all men had “natural rights”¹⁷ that made them equal, as opposed to some being born noble, like kings, and others not. The Constitution was adopted in 1787.¹⁸ It is a remarkable document that provided the United States with three equal branches of government protected with checks and balances, but presented at least two glaring omissions when it came to equality — slaves and women.

Moreover, in Article V,¹⁹ with forethought and self-evident humility, the Founders included a method to amend the Constitution. Article V allows the

¹⁶ Letter from Abigail Adams to John Adams, from Braintree, Massachusetts, March 31, 1776, p.2. (<https://www.masshist.org/digitaladams/archive/doc?id=L17760331aa>) (accessed 6/16/20).

¹⁷ Thomas G. West, *Jaffa Versus Mansfield: Does America Have a Constitutional or a “Declaration of Independence” Soul?*, 31 PERSPECTIVES ON POLITICAL SCIENCE 4 (Fall 2002), 237-40.

¹⁸ *Id.* at 244.

¹⁹ U.S. Const. art. V; National Archives and Records Administration, *The Constitution of the United States: A Transcription* (<https://www.archives.gov/founding-docs/constitution-transcript>) (accessed 6/15/20).

improvement of the foundational basis of American democracy, including the addition of the 28th Amendment,²⁰ known as the ERA. Section 1 reads: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”²¹

Article V allows the United States to become “a more perfect Union.”²² What is infuriating to many is that our Founders did not find all people created equal at the birth of our country. Perhaps failure to provide equality for women at the outset, can be understood by looking at the laws and norms that were so ingrained in their society in the late 18th century.

B. Under the Common Law, Married Women Were Legal Non-entities.

The basis of law in the United States was the Common Law of England. While unmarried women were allowed to own property, married women were not legally considered individuals. When a man and a

²⁰ The *Amici* concur with the legal arguments put forth by the Petitioners; thus, once this case is properly resolved, it will be held that the 28th Amendment was duly ratified on January 27, 2020 when the Commonwealth of Virginia became the thirty-eighth state to ratify it.

²¹ 86 STAT. 1523 (1972), National Archives and Records Administration, JOINT RESOLUTION OF MARCH 22, 1972, 86 STAT 1523, *Proposing an Amendment to the Constitution of the United States Relative to Equal Rights for Men and Women*. (<https://catalog.archives.gov/id/7455549>) (accessed 6-15-20).

²² National Archives and Records Administration, THE CONSTITUTION OF THE UNITED STATES: A TRANSCRIPTION (Preamble to the Constitution). (<https://www.archives.gov/founding-docs/constitution-transcript>) (accessed 6/15/20).

woman married, they became one person, the husband.²³ The wife legally ceased to exist. She could not own property, even her own wages, lacked the right to sue, was without bodily autonomy, and did not have the right to custody of her children should the couple separate. Domestic Violence²⁴ and Marital Rape were legal.²⁵

C. The First Women’s Rights Convention at Seneca Falls, New York, in 1848, Declared That Women and Men Were Equal and Listed Discriminatory Laws.

By 1840, the plea voiced by Abigail Adams still had not been heeded. That year, the spirited and brilliant Elizabeth Cady Stanton, who had read law in her father’s law office, married a prominent abolitionist. The Stantons went to London to the first World Anti-

²³ *United States v. Yazell*, 382 U.S. 341, 361, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). (J. Black dissenting, discussing the Common Law of coverture).

²⁴ Carissa R. Showden, *Domestic Violence*, SOCIAL ISSUES IN AMERICA: AN ENCYCLOPEDIA (James Ciment, ed.), 2006, 548-561, 551. (https://books.google.com/books/about/Social_Issues_in_America.html?id=ru3qBgAAQBAJ) (accessed 6/16/20).

²⁵ Matthew Hale, THE HISTORY OF THE PLEAS OF THE CROWN, 628 (1736). The Marital Rape Exemption was a complete bar to prosecution for rape for husbands who raped their wives. The 1962 Model Penal Code in the United States included the marital rape exemption by defining rape as “A male who has sexual intercourse with a female not his wife is guilty of rape. . . .” Model Penal Code § 213.1 (1962), [emphasis supplied]. North Carolina and Oklahoma were the last states to abolish the Marital Rape Exemption when the spouses were still living together — in 1993. N.C. Gen. Stat. § 14-27.34 (2019). However, Oklahoma now requires threatened or actual force or violence for spousal rape, as do some other states. Okla. Stat. Tit. 21 § 1111(B) (2019).

Slavery Convention, as Mr. Stanton was a delegate. There, Stanton met Quaker Lucretia Mott, another American abolitionist, who was also a delegate. Unfortunately, the male abolitionists refused to allow women delegates to be seated or speak. Women were relegated to a segregated women's area. Stanton was incensed that men who fought to end slavery did not care about the rights of women.²⁶

Stanton recognized many problems women had as rooted in sex-based discrimination. So, she, Mott and friends convened the first Woman's Rights Convention in 1848. They wrote a list of demands in a Declaration of Sentiments. Their only disagreement concerned the right to vote — Mott thought it was too much to ask for the right to vote, but Stanton believed the vote would give them the political power to fix many other wrongs.²⁷

Approximately 250 people attended the convention in Seneca Falls, New York.²⁸ It was radical at the time for women even to speak in public, but the speakers were mostly women. However, Frederick Douglass spoke in support of women seeking the right to vote. The convention adopted the Declaration of Sentiments, which declared that women and men were created

²⁶ Elizabeth Cady Stanton, *EIGHTY YEARS AND MORE REMINISCENCES 1815-1897* (1898), Kindle edition at Locations 857-96.

²⁷ Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joslyn Gage, *HISTORY OF WOMAN SUFFRAGE VOL I* (1881), Kindle e-book, Locations 1223-1284.

²⁸ History, *Seneca Falls Convention Begins* (<https://www.history.com/this-day-in-history/seneca-falls-convention-begins>) (accessed 6/18/20).

equal and set forth inequalities to be rectified, the first of which was the right to vote.²⁹ They included:

1. [A]n equal participation with men in the various trades, professions and commerce. [At the time, men] had close[d] against [women] all the avenues to wealth and distinction, [and in the few jobs open to women, they] receive[d] but a scanty remuneration.
2. [I]mmediate admission to all the rights and privileges which belong to them as citizens of these United States. [In essence, they sought equal rights regardless of sex. Here is the seed of the ERA, 172 years ago].
3. [O]btaining a thorough education.
4. [To be free from the] power [a husband had] to deprive [his wife] of her liberty, and to administer chastisement.³⁰

For over fifty years, Elizabeth Cady Stanton and Susan B. Anthony led the women's rights movement.³¹ Many other prominent activists worked with them, including Sojourner Truth. In 1867, she talked about

²⁹ Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joslyn Gage, *HISTORY OF WOMAN SUFFRAGE VOL I* (1881), Kindle e-book, Locations 1223-1284.

³⁰ *Id.* (Emphasis supplied).

³¹ Elizabeth Cady Stanton, Susan B. Anthony, Matilda Joslyn Gage, Ida Husted Harper, Jane Addams, Anna Howard Shaw, Harriot Stanton Blatch, & Alice Stone Blackwell, *HISTORY OF WOMAN SUFFRAGE VOLS I-VI* (1881-1922), Kindle e-books. (Also available in one compilation, *THE COMPLETE HISTORY OF THE WOMEN'S SUFFRAGE MOVEMENT IN U.S.* (Musaicum Books 2018) Kindle Edition.

an issue that the ERA can hopefully cure — unequal pay. Truth said women do as much work as men, so they should get paid as much.³² In 1878, Stanton and Anthony had introduced in Congress the first Amendment to grant women the right to vote.³³

It was only three years after the right to vote had been won that the first ERA, chiefly written by Alice Paul, a suffragist leader,³⁴ was introduced in Congress³⁵ on December 13, 1923, by the nephew of Susan B. Anthony. It stated that “Men an (sic) women shall have equal rights throughout the United States and every place subject to its jurisdiction.”³⁶

The ERA was introduced in Congress every year for 49 years. After a new wave of women activists spurred it on, the proposed ERA passed as a joint

³² Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joslyn Gage, *HISTORY OF WOMAN SUFFRAGE VOL II* (1881), Kindle e-book, Locations 4607-17.

³³ National Archives and Records Administration, *HOW DID WOMEN Win the 19th Amendment? A Strategy for Suffrage* (45th Cong. 2nd Session, Congressional Record entry notes that Senator Aaron Sargent introduced a woman suffrage amendment, which was identical to the future 19th Amendment of 1920). (<https://artsandculture.google.com/exhibit/AgKih1D2BEbpIq?hl=en>) (accessed 6/18/20).

³⁴ Alice Paul Institute, *The Equal Rights Amendment: A Brief History* (<https://www.alicepaul.org/wpcontent/uploads/2019/05/ERA-A-History.pdf>) (accessed 6/17/20).

³⁵ H.J. Res. 75, 68th Cong. (1923) (unenacted), National Archives And Records Administration: H.J. Res. 75, *Proposing an Equal Rights Amendment to the Constitution* (<https://catalog.archives.gov/id/7452156>) (accessed 6/17/20).

³⁶ *Id.*

resolution by a supermajority, as a bi-partisan measure, of the House and the Senate on March 22, 1972.³⁷ The ERA was officially sent out to the states for ratification in 1972, with a preamble, outside the text of the proposed Amendment, that set a seven-year deadline for ratification. Thirty-five states ratified it; only three more were needed. The deadline was extended to 1982. Pet.3. (Amici incorporate by reference the Facts as set out by Petitioners. Pet.3-4). The instant case will decide whether those extra-textual deadlines were unconstitutional prohibitions on the States' powers, under Art. V and in violation of the 10th Amendment.³⁸

In the 1970's Justice Ginsburg successfully argued many cases regarding sex discrimination.³⁹

Since 1972, women's rights groups have multiplied. The day after the last Presidential Inauguration, in January 2017, millions of women and men marched all over the United States, and around the world in solidarity, demanding women's rights.⁴⁰ Those Women's Marches have become an annual event.⁴¹ The huge

³⁷ 86 STAT. 1523 (1972).

³⁸ Amended Complaint, Pet.App.39a.

³⁹ Sandra Pullman, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU 100 YEARS. (<https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff>) (accessed 9/29/20).

⁴⁰ Kaveh Waddell, *The Exhausting Work of Tallying America's Largest Protest*, THE ATLANTIC, Jan. 23, 2017 (<https://www.theatlantic.com/technology/archive/2017/01/womens-march-protest-count/514166/>) (accessed 6/18/20).

⁴¹ Alaa Elassar, *What You Need to Know About Today's Women's March*, CNN, Jan. 18, 2020 (<https://www.cnn.com/2020/01/18/us/>

numbers protesting for women's rights, including the ERA and the Me Too movement in support of ending sexual violence, are proof that the ERA is a nationally important issue. The length of time that women's rights activists have been trying to gain full equal citizenship for women hopefully will encourage this Honorable Court to realize that the opportunity to heal this wound and strengthen our Democracy is now, and it may not return in our lifetimes.

III. WOMEN WILL CONTINUE TO BE DEPRIVED OF FULL CITIZENSHIP UNDER THE CONSTITUTION WITHOUT THE ERA.

A. Without Political Equality, Women have a Massive Struggle to Achieve Equality in Society.

Our country is ready for the ERA. A 2020 Pew Poll found that 78% of adults approve of the ERA, including a majority of men and women.⁴² Nevertheless, the pervasive *de facto* social inequality of women hurts their ability to achieve real political equality,⁴³ and without political equality, including women not having parity in our state legislatures and in Congress due to

national-womens-march-explainer-trnd/index.html) (accessed 6/18/20).

⁴² Pew poll of 3,143 United States adults in March and April, 2020. (<https://www.pewsocialtrends.org/2020/07/07/a-century-after-women-gained-the-right-to-vote-majority-of-americans-see-work-to-do-on-gender-equality/>) (accessed 9/29/20).

⁴³ See Francis Fukuyama, *Poverty, Inequality, and Democracy: Dealing with Inequality*, 22 JOURNAL OF DEMOCRACY, 3 (July 2011), 79-89 (<https://muse.jhu.edu/article/444760/pdf>) (accessed 6/15/20).

systemic gender bias, it is a massive struggle for women to achieve equality in our society.

Despite constituting half the population,⁴⁴ women are woefully outnumbered by men in the halls of power:⁴⁵ In the current Congress, women comprise 23.2% of the House of Representatives and 26% of the Senate,⁴⁶ and women comprise approximately 25-35% of the state legislatures.⁴⁷ There was an historic outcome in the Nevada state legislature in the 2018 election. For the first time in United States history,

⁴⁴ United States Census Bureau, *Quick Facts, Population Estimates as of July 1, 2019*. (Women made up 50.8% of the U.S. population in 2019) (<https://www.census.gov/quickfacts/fact/table/US/PST045219#PST045219>) (accessed 6/15/20).

⁴⁵ Pippa Norris and Ronald Inglehart, *Women and Democracy: Cultural Obstacles to Equal Representation*, 12 JOURNAL OF DEMOCRACY 3 (July 2001), 126-40.

⁴⁶ Center for American Women in Politics, *Current Numbers, Women in the U.S. Congress* (2020) (<https://cawp.rutgers.edu/current-numbers>) (accessed 6/16/20).

⁴⁷ Center for American Women in Politics, *Current Numbers, State Legislature* (2020). (<https://cawp.rutgers.edu/state-by-state>) (accessed 6/16/20) (The percentages of women in the state legislatures in 2020 are: AL 15.7%; AK 36.7%; AZ 38.9%; AR 25.2%; CA 31.7%; CO 44.0%; CT 32.1%; DE 24.2%; FL 29.4%; GA 30.5%; HI 31.6%; ID 31.4%; IL 36.2; IN 25.3%; IA 29.3%; KS 28.5%; KY 23.9%; LA 18.1%; ME 37.6%; MD 39.9%; MA 29%; MI 36.5%; MN 31.8%; MS 16.1%; MO 24.4%; MT 30.7%; NE 28.6%; NV 52.4%; NH 34.0%; NJ 30.8%; NM 36.6%; NY 31.5%; NC 25.9%; ND 22.0%; OH 27.3%; OK 21.5%; OR 42.2%; PA 26.9%; RI 37.2%; SC 16.5%; SD 24.8%; TN 15.2%; TX 24.3%; UT 26.0%; VT 40.6%; VA 29.3; WA 40.8%; WV 13.4%; WI 26.5%; WY 15.6%) (Emphasis supplied).

women constituted a state legislative majority.⁴⁸ Yet, there has never been a female President or Vice-President of the United States, despite former Secretary of State Hillary Clinton winning the popular vote in 2016.⁴⁹

B. Poverty Rates of Women and Children Are Linked to Pervasive Sex-Based Discrimination.

The continuing relegation of women to a lesser status than fully equal has contributed to women being overwhelmingly over-represented among the poor and the less educated, while under-represented in the board rooms and as top executives in most industries and leadership positions, including most universities, schools, and the professions.⁵⁰ For example, women still hold a minority of tenure-track and high-level faculty positions in higher education.⁵¹

⁴⁸ Kira Sanbonmatsu, *Women's Underrepresentation in the U.S. Congress*, DAEDALUS (Winter 2020) 40.

⁴⁹ Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN POLITICS, Dec. 22, 2016. (<https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html>) (accessed 9/30/20).

⁵⁰ The American Association of University Women, *Barriers and Bias-The Status of Women in Leadership, 2016* (Report available at <https://www.aauw.org/app/uploads/2020/03/Barriers-and-Bias-nsa.pdf>) (accessed 6/18/20); Jena McGregor, *After Years of 'Glacial' Change, Women Now Hold More than 1 in 4 Corporate Board Seats*, THE WASHINGTON POST, July 17, 2019 (<https://www.washingtonpost.com/business/2019/07/17/after-years-glacial-change-women-now-hold-more-than-corporate-board-seats/>) (accessed 6/18/20).

⁵¹ Paula J. Caplan, *Balancing Career and Family*, THE PORTABLE MENTOR: EXPERT GUIDE TO A SUCCESSFUL CAREER IN PSYCHOLOGY. Mitchell Prinstein and Marcus Patterson, eds.), Cambridge, UK: Cambridge University Press (scheduled for 2020 publication).

The hope is that the ERA will be a means to end the truly institutionalized sexism that has faced women throughout our country's history.

Women have a higher poverty rate than men.⁵² Many factors contribute to poverty, but the ERA can ameliorate several. Women still earn only about 82% of what men earn for equal work.⁵³ “In middle-skill occupations, workers in jobs mainly done by women earn only 66% of [what] workers [earn] in jobs mainly done by men.”⁵⁴ Current laws are not sufficient, or this disparity would not exist. “Women represent nearly two-thirds of the workforce in low-paid jobs.”⁵⁵ Studies show that if women had equal pay for equal work, women's poverty rate would decrease by more than half for women and their families, and it would add billions of dollars to the economy.⁵⁶

Over a woman's lifetime, this can amount to a loss of hundreds of thousands of dollars. As a result of an analysis of women's and men's earnings over time, in this instance from 2001 through 2015, it was found

⁵² National Women's Law Center, *NWLC Resources on Poverty, Income, and Health Insurance in 2017* (<https://nwlc.org/resources/nwlc-resources-on-poverty-income-and-health-insurance-in-2017/>) (accessed 6/16/20).

⁵³ Institute on Women's Policy Research: *Pay Equity & Discrimination* (<https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination/>) (accessed 6/16/20).

⁵⁴ *Id.*

⁵⁵ National Women's Law Center, *Women in Low-Paid Jobs* (<https://nwlc.org/resources/when-hard-work-is-not-enough-women-in-low-paid-jobs/>) (accessed 6/16/20).

⁵⁶ Institute on Women's Policy Research, *Pay Equity & Discrimination*, *supra*, note 53. (Emphasis supplied).

that women made only 49% of what men made.⁵⁷ Inequality due to discrimination based on sex can significantly impair women's ability to acquire wealth, hurting them in terms of their retirement and social security distributions and their ability to gain wealth by other means, such as purchasing a home rather than renting.⁵⁸ The lower earnings compared to men also affect the ability of women-led households to save, making women more vulnerable to personal and economic crises.⁵⁹ Equal pay for men and women will likely not be achieved at the current rate of improvement until 2059.⁶⁰ Inequality due to discrimination based on sex means substantial dollars in lost earning potential resulting in women (particularly single mothers) stuck in poverty simply because they are female.

Women's lower pay rates also hurt two-parent families. Two salaries are often necessary to keep a family in the middle class. Further, family roles and structures have changed such that equality for women in earning capacity is more important now than ever.

⁵⁷ Institute on Women's Policy Research, *Still a Man's Labor Market: The Slowly Narrowing Gender Wage Gap* (<https://iwpr.org/publications/still-mans-labor-market/>) (accessed 6/17/20)

⁵⁸ The World Bank, *Unrealized Potential: The High Cost of Gender Inequality in Earnings*, May 30, 2018. (<https://www.worldbank.org/en/topic/gender/publication/unrealized-potential-the-high-cost-of-gender-inequality-in-earnings>) (accessed 6/18/20).

⁵⁹ Courtney Connley, *The Coronavirus Pandemic Further Highlights Why Women Workers Need Equal Pay*, CNBC (Mar. 31, 2020) (<https://www.cnbc.com/2020/03/31/how-the-pay-gap-hurts-low-wage-women-workers-impacted-by-the-coronavirus.html>) (accessed 6/18/20).

⁶⁰ Institute on Women's Policy Research, *Pay Equity & Discrimination*, *supra* at note 53.

Women alone are sometimes the breadwinner while fathers stay home to care for children. There are less rigid roles for husbands and wives, fathers and mothers, which require equality regardless of who does what in a family.⁶¹

Statistics show that women have not achieved parity in numerous professions and fields of employment. Further progress is needed in integrating women into professions and industries done primarily by men, for example construction⁶² and STEM jobs⁶³ (Science, Technology, Engineering, and Mathematics).

IV. THE ENTIRE COUNTRY WILL BENEFIT BY THE VALIDATION OF THE ERA.

The United States will reap the benefits of full equality of women by increasing the resources the country has to draw on for collective security and economic and social benefits.⁶⁴ Women will finally be valued as full citizens, and their protection and rights will not be subject to political cycles.

⁶¹ Sarah Jane Glynn, Center for American Progress, *Breadwinning Mothers Continue to Be the U.S. Norm* (May 10, 2019). (<https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/>) (accessed 6/18/20).

⁶² Ariane Hegewisch, Institute on Women's Policy Research, *Women Gain Jobs in Construction Trades but Remain Underrepresented in the Field*, Institute on Women's Policy Research, Mar. 28, 2019 (<https://iwpr.org/publications/women-jobs-construction-under-represented/>) (accessed 6/18/20).

⁶³ Institute on Women's Policy Research, *STEM Innovation* (<https://iwpr.org/issue/employment-education-economic-change/stem-innovation/>) (accessed 6/16/20).

⁶⁴ Mukand & Rodri, *supra*, at note 10.

Women should have equal opportunities based on their abilities and talents and not be held back because of their sex and lack of protection under our Constitution and laws. Our country loses potential leaders in science, medicine, education, entrepreneurship, and government every day we limit opportunities based on sex. With the strength of the ERA, it is likely that many of the lingering insidious social inequalities women still face, vestiges from the British Common Law, will more swiftly be changed for the generations currently alive.

The beloved Justice Ginsburg (aka “The Notorious RBG”) persevered; like a superhero, through illness and adversity, she kept fighting for us. The least we, and this Honorable Supreme Court, can do to honor her lifetime of fighting for equal citizenship is to make it a reality — now — not after another century when our great-granddaughters could still be waging this battle. We should hope that instead, they learn about this landmark case that gave them the opportunities that so many will take for granted.



CONCLUSION

The *Amici Curiae* respectfully pray that this Honorable Supreme Court will grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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OCTOBER 2, 2020

APPENDIX

EIGHTY DIVERSE AMICI CURIAE

1. Activism Caucus of The Association For Women In Psychology
2. Albuquerque Center for Peace and Justice
3. Alice Paul Institute
4. Allies Reaching for Equality
5. American Association of University Women – Michigan Chapter
6. American Association of University Women of Florida
7. Campus Safety Advocacy Group
8. Coalition to Abolish Slavery and Trafficking (CAST)
9. CODEPINK
10. Culture Reframed
11. Democrats Abroad
12. Dr. Bronner’s Family Foundation
13. Driftwood Kitchen Design
14. Elizabeth Cady Stanton Trust
15. ERA Minnesota
16. ERA Task Force Albuquerque Chapter of NOW
17. ERA-NC Alliance
18. Fairfax County Commission for Women
19. Fiduciary Trust International
20. Flora’s Refuge and Resource

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21. Florida NOW
22. FOR FREEDOMS
23. Fuerza Mundial Global
24. Fund for Women Artists, Inc. dba WomenArts
25. Global Indigenous Council
26. Hollywood NOW
27. Houston Women's March On
28. Indivisible Worcester, Maryland
29. Institute on Violence, Abuse and Trauma
30. International Brotherhood of Teamsters (Human Rights and Diversity Commission)
31. Isle Of Wight County Humane Society
32. Joseph Mellicker and Judith Scheuer, New York, NY.
33. Kuta Intellectual Property Law, LLC
34. KWH Law Center for Social Justice and Change
35. L.I.N.D.A. Organization
36. MadMoms Fight For Justice
37. Michigan ERAMerica
38. Michigan Woman Forward
39. Mid County Psychological Associates
40. Moms Fight Back
41. Moms in Office
42. National Coalition Against Violent Athletes
43. National Congress of Black Women, Inc.

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44. National Equal Rights Amendment Alliance
45. National Girls Health and Justice Institute
46. National Organization for Women-Seattle Chapter
47. National Women's Political Caucus
48. New Jersey Crime Victims' Law Center
49. Niskanen Center
50. Northern New Jersey NOW
51. Nurtured Parent
52. Organic Consumers Association
53. Pass ERA
54. Picture Social Justice
55. Real Estate Advisors Group
56. Republican Women for Progress
57. Rethinking Eve, LLC
58. ROADwomen
59. SAG-AFTRA
60. Santa Fe NOW
61. Senior Care Options, Inc.
62. Southwest Voter Registration Education Project (SVREP)
63. Sustainable Marin
64. Southwest Voter Registration Education Project (SVREP) Action Fund
65. The New Mexico [chapter of] Old Lesbians Organizing for Change (NMOLOC)
66. The Woman's Club of Olympia

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67. The Women's Coalition
68. Trafficking in America Task Force
69. TransLatin@ Coalition
70. Turning Point Suffragist Memorial Organization
71. United Church of Christ
72. United States Hispanic Leadership Institute
73. Veterans For Peace
74. Virginia Sexual and Domestic Violence Action Alliance
75. William C. Velasquez Institute (WCVI)
76. Wisdom Lotus Foundation Inc
77. Women NC
78. Women's Equal Rights Legal Defense and Education Fund
79. Women's National History Alliance
80. Zonta Club of Kenmore