

FAMILY ISSUE FACT SHEET

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HCR 2021 RATIFICATION; EQUAL RIGHTS AMENDMENT

EXECUTIVE SUMMARY

The Equal Rights Amendment (ERA) is an amendment to the United States Constitution proposed in the 1970's. The amendment reads:

Section 1: Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3: This amendment shall take effect two years after the date of ratification.

Proponents argue the ERA is necessary to ensure equal rights and equal pay for women. Although these goals are laudable, the Arizona Legislature should not ratify the ERA and become embroiled in an already ongoing legal fight.

1. The ERA is unnecessary because the Fifth and Fourteenth Amendments *already* guarantee equal protection under the law, and countless federal, state, and local laws *already* prohibit sex discrimination and unequal pay.
2. The ERA could enshrine the right to an abortion in the U.S. Constitution; state courts have already used their state ERAs to strike down abortion restrictions.
3. Ratification would actually undermine women's rights and confound the protections provided by current law.
4. The extended deadline to ratify the ERA was 1982, so any attempt to ratify the ERA is futile.
5. The required 38 states have already ratified the ERA but because the final state ratifications came decades after the deadline, the ratifications are not valid and likely to not survive ongoing litigation.

BACKGROUND

Congress passed the Equal Rights Amendment in 1972 and was ratified by 35 states, three states short of the 38 states required for ratification by the Congress-imposed extended deadline of 1982. The original deadline had been 1979.

As the negative consequences became clear, five states repealed their ratification. In 1982 a federal district court ruled in *Idaho v. Freeman* that the five states that had rescinded their

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ratifications -Idaho, Kentucky, Nebraska, South Dakota, and Tennessee – could legally do so, rendering their ratification rescindments valid. That court also ruled the original 1972 deadline was valid and effective.ⁱ

Now, long after the deadlines have passed, a new movement is pushing for ratification, claiming that there is legal precedent to ratify the amendment beyond the deadline.

Illinois ratified the expired amendment in 2018; Virginia followed suit in early 2020, bringing the total to the necessary 38 states. However, the five states that rescinded and the now 40-year-old deadline render the ERA null. Thus, it was never added to the U.S. Constitution. Adding Arizona to the list of ratifying states serves no legal purpose.

On January 6, 2020, the United States Attorney General’s Office of Legal Counsel (OLC) issued an opinion concluding the deadline for ERA ratification has expired and the amendment is no longer pending before the States.ⁱⁱ That opinion prevents the National Archives from certifying the amendment and adding it to the U.S. Constitution. Hence, the amendment can no longer be ratified.

Despite this fact, three states filed a lawsuit to force the National Archivist to publish and certify the ERA.ⁱⁱⁱ In March 2021, the U.S. District Court for the District of Columbia dismissed the case due to 1) lack of standing and 2) the fact that the deadline set by Congress expired long ago. Virginia has since withdrawn its involvement in that suit. The remaining states in the lawsuit appealed the 2021 decision.

REASONS TO OPPOSE THE ERA

1. The ERA is completely unnecessary:

- a. The Fifth and Fourteenth Amendments in the U.S. Constitution *already* provide equal protection under the law for women.
- b. Countless federal, state, and local laws *already* prohibit sex discrimination.

2. Equal Pay already is the law:

- a. Federal laws — the Equal Pay Act, the Civil Rights Act, and the Lilly Ledbetter Fair Pay Act — and Arizona’s Equal Wages law *already* prohibit pay discrimination based on sex. If the ERA is ratified, Congress could potentially pass laws requiring equal pay, but it has already done so *many times*.
- b. The laws are working as shown by the recent settlement of a gender discrimination lawsuit alleging unequal pay filed by University of Arizona female professors.

3. The ERA likely would enshrine the right to an abortion in the U.S. Constitution:

- a. State courts in Connecticut and New Mexico have used their state ERA's to strike down prohibitions on taxpayer-funded abortions. *See Doe v. Maher*, 40 Conn. Sup. 394 (1986); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998).
- b. On January 16, 2019, Planned Parenthood filed a lawsuit in Pennsylvania challenging the state's ban on abortion coverage in its Medicaid program, arguing it violates the state's ERA because men receive comprehensive coverage without restriction, but women do not because they can get pregnant. *Allegheny Reproductive Health Center, Planned Parenthood et al. v. Pennsylvania Department of Human Services, et al.*
- c. In "Is the Equal Rights Amendment Relevant in the 21st Century?", the National Organization for Women (NOW) states that "an ERA –properly interpreted – could negate the hundreds of laws that have been passed restricting access to abortion care and contraception. Denial of legal and appropriate medical care for women – and only women – is sex discrimination and a powerful ERA should recognize and prohibit that most harmful of discriminatory actions."
- d. In a March 13, 2019 fundraising email from NARAL Pro-Choice America, Jennifer Warburton— Director of Government Relations— wrote, "In order to protect our reproductive freedom today it's essential we pass the newly re-introduced bill to ratify the ERA. With its ratification, the ERA would reinforce the constitutional right to an abortion by clarifying that the sexes have equal rights, which would require judges to strike down anti-abortion laws because they violate the constitutional right to privacy and sexual equality."

4. The congressionally imposed deadline to ratify the ERA was 1982:

- a. Any attempt to ratify the ERA is a futile exercise. Congress put a deadline on the ratification for a reason and it cannot be simply set aside. When the ratification deadline passed, the U.S. Supreme Court dismissed all cases related to the ERA because they became moot. *Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809, 809 (1982). Even Justice Ruth Bader Ginsburg, a historical proponent of the ERA, admits the ERA needs to be "put back in the political hopper and we [need to] start over again collecting the necessary states to ratify it."^{iv}

- b. In December 2019, Alabama, Louisiana, and South Dakota filed in federal district court to prevent the “illegal” ratification of the ERA, to uphold the rule of law, and to protect the progress made in women’s rights.
- c. Multiple federal lawsuits have been filed against the Archivist of the United States, David Ferriero, who would certify a ratification. In response, Ferriero sought guidance on a legal opinion from the Office of Legal Counsel, United States Attorney General. That January 2020 opinion concluded, “that Congress had the constitutional authority to impose a deadline on the ratification of the ERA, and, because that deadline has expired, the ERA Resolution is no longer pending before the States.” Challengers are appealing a related court ruling as stated above.
- d. If Arizona ratifies the ERA, it will likely embroil Arizona in lengthy and expensive court cases.

TALKING POINTS

1. **The ERA is dead. It died in 1982 and Congress cannot reach back 40 years and extend it now.** The U.S. Justice Department’s Office of Legal Counsel confirmed the validity of the 1982 deadline in its opinion concluding the amendment is no longer pending before the states. A court ruling in 2021 agreed the long-past deadline was effective, rendering the recent ratifications invalid.
2. **The ERA is unnecessary. The U.S. Supreme Court has consistently ruled women are protected from discrimination under the 14th Amendment.** Several state and federal laws also ensure equal pay. The University of Arizona recently faced a lawsuit based on those very laws. The system is working.
3. **The recent push to force the ERA into the U.S. Constitution has nothing to do with equality, and everything to do with abortion.** If ratified, the amendment could be used to enshrine abortion into the U.S Constitution and force taxpayers to pay for it - something almost no American agrees with. This is already happening on a state level. Abortion activists have used state ERAs in New Mexico and Connecticut to rollback abortion regulations and bill taxpayers.
4. **The ERA uses the term, “sex” instead of “women.” Because “sex” discrimination has recently come to mean all so-called “gender identities,” women would have no distinction whatsoever.** No distinction in sports, no distinction in private spaces like locker rooms, restrooms, or domestic violence shelters, and more. Women and girls would lose their own sexual identities in the eyes of the law – undoing protections women have worked decades to achieve.

CONCLUSION

The Arizona Legislature should not ratify the Equal Rights Amendment. The Fifth and Fourteenth Amendments already guarantee equal protection under the law, and countless federal,

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state, and local laws already prohibit sex discrimination and unequal pay. Further, ratification would actually undermine women's rights and confound the protections provided by current law. Moreover, the ERA could enshrine the right to an abortion in the U.S. Constitution, and it would likely embroil Arizona in lengthy, expensive, and ultimately futile litigation because the ratification deadline expired in 1982.

ⁱ <https://law.justia.com/cases/federal/district-courts/FSupp/529/1107/2355452/>

ⁱⁱ <https://www.justice.gov/olc/file/1232501/download>

ⁱⁱⁱ Virginia v. Ferriero, 466 F. Supp. 3d 253, available at https://www.govinfo.gov/content/pkg/USCOURTS-dcd-1_20-cv-00242/pdf/USCOURTS-dcd-1_20-cv-00242-1.pdf

^{iv} <https://thehill.com/people/ruth-ginsburg>