

# POLICY PAGES

## Equal Rights Amendment 2023

August

---

### OVERVIEW

The Equal Rights Amendment (ERA) is an amendment to the United States Constitution proposed in the 1920s, then again 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 of the ERA argue this constitutional amendment is necessary to ensure equal rights and equal pay for women. Although these goals are laudable, 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.

In addition, the ERA advances the abortion agenda and could require taxpayer funding of abortion. It would also cement preferred treatment on the basis of sexual orientation and gender identity into the U.S. Constitution. Finally, the ERA is legally dead. The final deadline to ratify the ERA was 1982, so any attempt to ratify the ERA is futile. Adding Arizona to the list of states to ratify it would likely embroil the state in lengthy and expensive court cases.

---

### ANALYSIS

Congress passed the Equal Rights Amendment in 1972 and it was ratified by 35 states, three states short of the 38 states required for amending the U.S. Constitution. The initial deadline for ratification was 1979, but Congress extended the deadline to 1982, though it remained unratified.<sup>1</sup>

As the negative consequences of the ERA became evident, five states voted to rescind or withdraw their ratification: Nebraska (1973), Tennessee (1974), Idaho (1977), Kentucky (1978), and South Dakota (1979).<sup>2</sup>



*This publication includes summaries of many complex areas of law and is not specific legal advice to any person. Consult an attorney if you have questions about your specific situation or believe your legal rights have been infringed. This Policy Page may be reproduced without change and in its entirety for non-commercial purposes without prior permission from Center for Arizona Policy, Inc. © January 2023 Center for Arizona Policy, Inc. All rights reserved.*

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.<sup>3</sup> With this new push, Nevada (2017), Illinois (2018), and Virginia (2020) became the 36<sup>th</sup>, 37<sup>th</sup>, and 38<sup>th</sup> states to ratify the ERA.<sup>4</sup> Proponents ignore the deadlines and the five states that rescinded their ratifications, and they count Virginia as the 38<sup>th</sup> and final state necessary to certify the ERA as the 28<sup>th</sup> Amendment to the U.S. Constitution. Ongoing litigation holds the ERA at bay, even as some lawmakers continue efforts to work around the long-past deadline.

## THE ERA IS UNNECESSARY

Contrary to what proponents argue, the ERA is unnecessary. First, the U.S. Supreme Court has consistently ruled that both the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment guarantee women equal protection under the law.<sup>5</sup>

The Court made this abundantly clear in *United States v. Virginia* (1996):

Since *Reed* [1971], the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature -- equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.<sup>6</sup>

As the American Civil Liberties Union (ACLU) notes, in *Reed* “[t]he Supreme Court set a precedent upon which many significant later cases would rest when it ruled that sex-based classifications violated the Equal Protection Clause of the Fourteenth Amendment.”<sup>7</sup> That is why the ACLU’s Women’s Rights Director, Lenora Lapidus, could write, since *Reed* “it has been clearly understood that the 14th Amendment prohibits discrimination based on sex. *In decision after decision*, many authored by conservative Supreme Court justices, this principle has been reaffirmed.”<sup>8</sup> (emphasis added).

Second, countless federal, state, and local laws *already* prohibit sex discrimination, including pay discrimination. Nondiscrimination laws throughout the country, at all levels of government, prohibit sex discrimination. In addition, federal laws — like the Equal Pay Act, the Civil Rights Act, and the Lilly Ledbetter Fair Pay Act — and Arizona’s Equal Wages law<sup>9</sup> prohibit pay discrimination based on sex. Therefore, the ERA would do nothing for equal pay— it would simply authorize Congress to pass laws requiring what the law *already* demands.

## THE ERA IS ABOUT ABORTION

Admittedly, the recent push for the ERA is more about abortion than ensuring rights women. The ERA advances the abortion agenda and could require taxpayer funding of abortion. Pro-abortion organizations agree on this point:

- According to the ACLU, the ERA “could provide an addition[sic] layer of protection against restrictions on abortion . . . [and be] an additional tool against further erosion of reproductive freedom and the stereotypes restrictions on reproductive freedom reflect and engender.”<sup>10</sup>

- According to NARAL Pro-Choice America, “the ERA would reinforce the constitutional right to abortion” and “would require judges to strike down anti-abortion laws.”<sup>11</sup>
- According to National Organization for Women (NOW), “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.”<sup>12</sup>

More significantly, courts have already ruled that restrictions on abortion violate the ERA language. For instance, state courts in Connecticut and New Mexico have struck down prohibitions on taxpayer-funded abortions as violations of their state ERAs.<sup>13</sup>

Planned Parenthood used this same argumentation in a lawsuit it filed in early 2019 challenging Pennsylvania’s ban on abortion coverage in its Medicaid program.<sup>14</sup> In its brief, Planned Parenthood argued Pennsylvania’s ERA requires taxpayer funding of abortion because men receive comprehensive coverage without restriction, but the coverage ban “improperly discriminates against women based on their sex without sufficient justification” in violation of the state’s ERA. The case was dismissed based on lack of standing and any legal claim under Pennsylvania’s Constitution.<sup>15</sup>

Although proponents might contend the ERA is not about abortion, their own statements and legal arguments prove otherwise.

## **THE ERA FORCES THE LGBT AGENDA ON AMERICANS**

When Congress penned the ERA in 1972, it would never have occurred to members that the term “sex” would mean anything other than male or female. Women were the focus of the proposed equal rights, not a man who claims the title of woman.

But because the word “woman” is not in the ERA, and the term “sex” is now often interpreted to include males who “identify” as women, the transgender movement would be enshrined into the U.S. Constitution, should it ever be ratified.

LGBT activists lobby for the ratification based on the fact it would make sexual orientation and gender identity protected classes under the law. That would blur the lines between men and women, forcing restrooms, locker rooms, showers, and other private spaces to be open to both males and females.

Advocate magazine called for the passage of the ERA over the Equality Act because of its permanence, “The ERA ... is a permanent anchor that once cemented into the U.S. Constitution will be practically immovable.”<sup>16</sup>

The Ethics and Religious Liberty Commission cites the U.S. Supreme Court ruling in *Bostock v Clayton County* (6/15/2020) as reason to foresee the ERA’s ultimate erasure of distinctions between male and female. The Court ruled in *Bostock* that sex discrimination includes sexual orientation and gender identity in Title VII of the Civil Rights Act. ERLC stated, “Approval of the amendment would supercharge the efforts to reinterpret sex in a way that privileges the

preferences of gay and transgender men over the rights of biological women – and make it nearly impossible to challenge such laws that specifically protect women.”<sup>17</sup>

## **THE ERA IS LEGALLY DEAD**

The self-imposed Congressional ERA ratification deadlines of 1979 and 1982 have long passed. Therefore, 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. The thirty-five states that initially ratified the amendment did so with the deadline in mind. In addition, when the deadline passed in 1982, the U.S. Supreme Court dismissed all cases related to the ERA because it held the cases to be moot, suggesting the controversy was over.<sup>18</sup>

Known as the “three-state strategy,” proponents contend the ERA can still go into effect because “(1) Congress has the constitutional authority to propose, alter, or terminate any limits on the ratification of amendments pending before the states; (2) all existing ratifications remain in effect and viable; (3) rescissions of ratification passed by some states are invalid.”<sup>19</sup> However, as should be obvious, these three propositions are legally suspect and would be challenged in court.<sup>20</sup>

On January 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.<sup>21</sup> 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.

In any case, if Arizona ever ratifies the ERA and becomes the 39th state to ratify, it would likely embroil Arizona in lengthy and expensive court cases already underway.

## **PENDING LITIGATION AND LEGISLATION**

After Virginia’s vote to ratify, three states Attorneys General filed suit over the delay in certifying the ERA as the 28<sup>th</sup> Amendment to the U.S. Constitution. A federal judge ruled the states lacked standing and the ratification votes came too late - 40 years passed the valid deadline.<sup>22</sup>

In addition, ERA proponents lost a similar case in Boston based on lack of standing. The U.S. Supreme Court in October 2020 denied a direct petition to hear that case. Plaintiffs also appealed their case to the U.S. Court of Appeals for the First Circuit.<sup>23</sup>

Lawmakers in the U.S. House narrowly passed a resolution aimed at affirming the ERA’s ratification by retroactively rescinding the 1982 deadline. Republicans blocked a procedural measure on a joint resolution to do the same in April of 2023. The battle will not end with a congressional resolution, should it pass, as retroactively changing a congressionally imposed deadline would no doubt be challenged in court, as would ignoring the states that have rescinded their ratifications.

## TALKING POINTS

- **The ERA is unnecessary because the Fifth and Fourteenth Amendments already guarantee equal protection under the law for men and women.** There are no constitutional rights that men have that women do not also have.
- **The ERA is unnecessary because countless federal, state, and local laws already prohibit sex discrimination, including pay discrimination.**
- **The ERA is not about equal pay. Several federal and state laws already require equal pay for women.** The Arizona Board of Regents recently agreed to pay \$190,000 to three former college deans to settle their gender discrimination lawsuit filed under these types of laws.<sup>24</sup> Clearly, current laws are working. Equal pay is a red herring.
- **The ERA is really about abortion. Even pro-abortion activists admit it, and have used state ERAs to convince courts to require taxpayer funded abortions.** Pro-abortion organizations like the ACLU, NARAL Pro-Choice America, and NOW have all made public statements lauding the ERA for advancing their pro-abortion agenda.
- **Because some courts see the term “sex” as including gender identity, the ERA would erase differences between males and females, forcing girls and women to share private spaces like showers and locker rooms with biological males.**
- **The ERA is legally dead; the deadline for ratification passed in 1982.** 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. The National Archives is prohibited from adding the ERA to the U.S. Constitution, and lawsuits are already underway elsewhere. If Arizona was ever to become the 39th state to ratify, it would embroil the state in lengthy and expensive court cases.

---

## 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, state, and local laws already prohibit sex discrimination, including pay discrimination. Moreover, the ERA would advance a pro-abortion agenda, and would likely embroil Arizona in lengthy and expensive court cases already underway elsewhere. In addition, the ERA would enshrine LGBT preferred treatment into the U.S. Constitution and ultimately lead to the erasure of male and female distinctions.

---

<sup>1</sup>THOMAS H. NEALE, CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 1 (2019). Available at <https://fas.org/sgp/crs/misc/R42979.pdf>.

<sup>2</sup>*Id.* at 29.

<sup>3</sup>Organizations advocating for the ratification of the ERA include, [National Organization for Women \(NOW\)](#), [American Civil Liberties Union \(ACLU\)](#), [Equality Now](#), and [NARAL Pro-Choice America](#), to name a few.

<sup>4</sup>Nevada ratifies Equal Rights Amendment decades past deadline, (2017, March, 22). *Las Vegas 8 News Now*; <https://www.8newsnow.com/news/nevada-ratifies-equal-rights-amendment-decades-past-deadline/>  
Brendan O'Brien, B. (2018, May, 30). Illinois passes Equal Rights Amendment, more than three decades after deadline, *Reuters*; Chappell, B. (2020, January 15). *NPR*, <https://www.npr.org/2020/01/15/796754345/virginia-ratifies-the-equal-rights-amendment-decades-after-deadline>

<sup>5</sup>The U.S. Supreme Court approaches due process claims under the Fifth Amendment— which applies to the federal government— “precisely the same as to equal protection claims under the Fourteenth Amendment,” which applies to the states. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

<sup>6</sup>Cornell Law School, *United States v. Virginia*, 518 U.S. 515, 532 (1996) <https://www.law.cornell.edu/supct/html/94-1941.ZO.html>

<sup>7</sup>The ACLU and Women’s Rights: Proud History, Continuing Struggle (2002, March 12). *ACLU* <https://www.aclu.org/other/aclu-and-womens-rights-proud-history-continuing-struggle>.

<sup>8</sup>Lapidus, L.M. (2011, January 6). The Constitution Protects Women Despite Justice Scalia’s Views, *ACLU* (<https://www.aclu.org/blog/smart-justice/mass-incarceration/constitution-protects-women-despite-justice-scalias-views>).

<sup>9</sup>*A.R.S. §23-341(A)* reads, “[N]o employer shall pay any person in his employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for the same quantity and quality of the same classification of work.”

<sup>10</sup>Letter from the ACLU to Steven Cohen, Chair House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, and Mike Johnson, Ranking Member Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, regarding the Equal Rights Amendment (2019, May 8)

[https://www.aclu.org/sites/default/files/field\\_document/2019.5.8\\_aclu\\_statement\\_for\\_the\\_record\\_equal\\_rights\\_amendment-final.pdf](https://www.aclu.org/sites/default/files/field_document/2019.5.8_aclu_statement_for_the_record_equal_rights_amendment-final.pdf).

<sup>11</sup>ERA Y-E-S, *NARAL Pro-Choice America*

[https://web.archive.org/web/20190903200533/https://www.prochoiceamerica.org/campaign/era\\_yes/](https://web.archive.org/web/20190903200533/https://www.prochoiceamerica.org/campaign/era_yes/).

<sup>12</sup>Grabenhofer, B., Is the Equal Rights Amendment Relevant in the 21st Century?, *National Organization for Women* <https://web.archive.org/web/20190903224944/https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/>.

<sup>13</sup>*Doe v. Maher*, 40 Conn. Sup. 394, 449 (1986); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998).

<sup>14</sup>Allegheny Reproductive Health Center, et. all v. PA Department of Human Services et. all (2020, October 14). [http://www.pacourts.us/assets/opinions/Commonwealth/out/26MD19\\_3-26-21.pdf?cb=1](http://www.pacourts.us/assets/opinions/Commonwealth/out/26MD19_3-26-21.pdf?cb=1)

<sup>15</sup>*Id.* at p. 27-28;

<sup>16</sup>Kelly, K. (2022, March 22). Why the ERA is as critical to the LGBTQ+ folks as the Equality Act, *Advocate Magazine* <https://www.advocate.com/commentary/2022/3/22/why-passing-era-critical-lgbtq-folks-equality-act>.

<sup>17</sup>Why opposing the Equal Rights Amendments is pro-woman (2023, March 17). *ERLC* <https://erlc.com/resource-library/articles/why-opposing-the-equal-rights-amendment-is-pro-woman/>

<sup>18</sup>*Nat’l Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982).

<sup>19</sup>NEALE, *supra* note 1, at 4.

<sup>20</sup>For an in-depth discussion of the legal issues involved with the ratification of the ERA, *see id.* at 18-31.

<sup>21</sup><https://www.justice.gov/olc/file/1232501/download>

<sup>22</sup>Marr, C. (2021, March 17). House Votes to Remove Deadline for Equal Rights Amendment, *Bloomberg* <https://news.bloomberglaw.com/daily-labor-report/house-votes-to-nix-equal-rights-amendment-ratification-deadline?context=search&index=1>

<sup>23</sup>*Id.*

<sup>24</sup>Arizona board agrees to pay \$190k in gender pay settlement, (2019, August 1) *AP News* <https://apnews.com/4e9cf524f87944ba89f8f5761a433cdc>.