



# United States Conference of Catholic Bishops

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## The Equal Rights Amendment (ERA)

Catholic teaching speaks very clearly and strongly about the equality of men and women. “In creating [humans] ‘male and female,’ God gives man and woman an equal personal dignity.” *Catechism of the Catholic Church*, no. 2334. The bishops’ explicit concern for just wages and the fair treatment of women goes back at least 100 years. In a February 12, 1919, statement entitled *Bishops’ Program of Social Reconstruction*, the bishops said that “women who are engaged at the same tasks as men should receive equal pay for equal amounts and qualities of work.” Moreover, recent popes like St. John Paul II and Francis have spoken powerfully about the need to do more to address unjust inequities between women and men.<sup>1</sup> For the needs of those in challenging circumstances in particular, whom many of our ministries serve, just last fall we called lawmakers to radical solidarity and offered numerous policy recommendations to provide women and their families meaningful assistance and support.<sup>2</sup> That all being said, the USCCB has concern about a number of consequences, and their ultimate impacts on religious freedom, that will likely arise from the proposed Equal Rights Amendment (ERA) to the Constitution.

**Language:** The operating language of the ERA, as proposed by Congress and submitted to the states in 1972, is extremely short: “*Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.*” However, in the almost 50 years since its initial passage by Congress, debate remains over the meaning of this provision. Supporters claim the ERA would prevent discrimination, promote equal pay, and so on. But discrimination against women is already prohibited by a multitude of federal and state laws, and is covered by the Constitution’s Equal Protection Clause under precedent that was developed *after* the ERA was submitted to the states.<sup>3</sup> Supporters now also assert that adding the ERA would become, among other things, a powerful tool against pro-life abortion laws.

**Abortion controversy:** In the early years of the ERA, proponents commonly denied concerns that the amendment would entrench and expand the legality and practice of abortion. However, in recent years, some promoters of the ERA have boldly celebrated and advocated for the ERA precisely *because* of its ability to overturn abortion laws throughout the country. In fact, some state ERAs have already been used in this way. New Mexico’s Supreme Court, for example, overturned a state “Hyde amendment” in 1998 saying, “*We conclude from this inquiry that the Department’s rule violates New Mexico’s Equal Rights Amendment because it results in*

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<sup>1</sup> See, e.g., Pope St. John Paul II, *Letter to Women* (June 29, 1995) (insisting on “real equality” between men and women in terms of “equal pay for equal work,” fairness for working mothers, equality between spouses and parents, and the “recognition of everything that is part of the rights and duties of citizens in a democratic State”) [https://www.vatican.va/content/john-paul-ii/en/letters/1995/documents/hf\\_jp-ii\\_let\\_29061995\\_women.html](https://www.vatican.va/content/john-paul-ii/en/letters/1995/documents/hf_jp-ii_let_29061995_women.html); Pope Francis, General Audience (Apr. 29, 2015) (calling for Christians to demand equal pay for women because the “disparity is an absolute disgrace!”), [https://www.vatican.va/content/francesco/en/audiences/2015/documents/papa-francesco\\_20150429\\_udienza-generale.html](https://www.vatican.va/content/francesco/en/audiences/2015/documents/papa-francesco_20150429_udienza-generale.html).

<sup>2</sup> October 2022 letter of four bishop chairmen, available at <https://www.usccb.org/resources/letter-congress-regarding-policies-support-women-and-families-october-26-2022>.

<sup>3</sup> See *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

*a program that does not apply the same standard of medical necessity to both men and women, and there is no compelling justification for treating men and women differently with respect to their medical needs in this instance.”*<sup>4</sup>

The general argument is that since abortion is a procedure that only women undergo (more recent views on gender by many proponents notwithstanding), the government’s decision to prohibit it, to decline to fund it, or to condition its availability on compliance with such requirements as parental notice and informed consent, is inherently discriminatory if the government does not impose those same conditions or requirements upon medical procedures that are unique to men or applicable to both men and women. It is thus argued that sexual equality, as embodied in the ERA, would encompass a constitutional right to abortion. As *Roe v. Wade* was seen as vulnerable (and has now been overturned in *Dobbs v. Jackson Women’s Health Organization* precisely because the former was not grounded in the Constitution), proponents were very clear that the ERA is *needed*, in their view, to ensure abortion access and knock down current pro-life laws. For example:

- ACLU: “*The Equal Rights Amendment could provide an additional layer of protection against restrictions on abortion... [it] could be an additional tool against further erosion of reproductive freedom...*”<sup>5</sup>
- Alice Paul Institute: “*If the ERA is ratified it would codify into law ... Roe v. Wade*”<sup>6</sup>
- NARAL Pro-Choice America: “*With its ratification, the ERA would reinforce the constitutional right to abortion by clarifying that the sexes have equal rights, which would require judges to strike down anti-abortion laws because they violate both the constitutional right to privacy and sexual equality.*”<sup>7</sup>
- National Women’s Law Center: “[*Emily*] Martin [*general counsel for NWLC*] affirmed that abortion access is a key issue for many ERA supporters: she said adding the amendment to the constitution would enable courts to rule that restrictions on abortion ‘perpetuate gender inequality.’”<sup>8</sup>
- NOW: “*...an ERA –properly interpreted – could negate the hundreds of laws that have been passed restricting access to abortion care . . . a powerful ERA should recognize and prohibit that most harmful of discriminatory actions.*”<sup>9</sup>
- ERA activist-attorney Kate Kelly (in response to the question, “Would the ERA as it is written codify *Roe v. Wade*?”): “My hope is that what we could get with the ERA is FAR BETTER than *Roe*.”<sup>10</sup>

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<sup>4</sup> *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 844 (N.M. 1998). See also *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986); *Allegheny Reproductive Health Center v. Penn. Dep’t of Human Services* (appeal pending before Pennsylvania supreme court).

<sup>5</sup> ACLU, letter to the U.S. House of Representatives, Mar. 16, 2021.

<sup>6</sup> Alice Paul Institute, “Why We Need the Equal Rights Amendment,” 2018, available at <https://www.equalrightsamendment.org/why>.

<sup>7</sup> NARAL, email to advocates, Mar. 13, 2019.

<sup>8</sup> Rankin, Sarah and David Crary, “Lawmakers Pledge ERA will pass in Virginia. Then what?”, Associated Press, Jan. 1, 2020.

<sup>9</sup> Grabenhofer, Bonnie and Jan Erickson, “Is the Equal Rights Amendment relevant in the 21<sup>st</sup> Century?”, National Organization for Women, available at <https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/>.

<sup>10</sup> Kelly, Kate. Twitter post. Jan. 24, 2021, 5:57 PM.

**Gender and Related Concerns:** In the last several years, many courts and agencies at both the state and federal levels have reinterpreted discrimination on the basis of “sex” in law to include “sexual orientation” and “gender identity” or “transgender status.” In its 2020 ruling in *Bostock v. Clayton County*, the Supreme Court construed sex as used in Title VII to forbid workplace discrimination on the basis of sexual orientation and transgender status. If the ERA were to be ratified, many would argue that its prohibition of discrimination “on account of sex” extends constitutional-level protections to sexual conduct and “transgender” identities. For example:

- NOW: “*The ERA would require strict scrutiny in challenges to the many state laws that deny LGBTQIA persons equal access to public accommodations, permit discrimination in housing, employment discrimination, credit and retail services, jury service and educational programs, among others.*”<sup>11</sup>

The result could be a radical restructuring of settled societal expectations with respect to sexual difference and privacy. For example, the ERA could be asserted as a basis for arguing that school athletics and dormitories, and sleeping quarters in many prisons, must abandon current single-sex participation and residency criteria regardless of the privacy interests of other participants and residents. Similarly, locker rooms, showers, and restrooms in public facilities would arguably no longer be reserved for members of a single sex. This might not only be true with regard to persons who self-identify as transgender, but across the board for both sexes, since sex separation could be scrutinized on the same level as racial segregation. This would apply to a broad range of public institutions, including K-12 schools, colleges, universities, libraries, parks, hospitals, courthouses, prisons, townhalls, social welfare agencies, and government workplaces. The ERA could also be asserted as a basis for compelling people’s speech, such as to conform to “preferred pronouns.” The ERA could bolster the claim that public social services devoted to the most vulnerable of women, including homeless and domestic abuse shelters, must admit men. Healthcare workers in public facilities could be forced to provide, and taxpayers made to pay for, “gender transition” procedures, including on children.

**Religious Liberty and Conscience Protection:** The ERA might also force private charities that offer a broad range of services to their communities to change their facilities, speech, and practices to promote abortion, or to affirm “gender identities” or living situations, contrary to their sincerely-held religious and moral beliefs. In such cases, the ERA could have an impact on the ability of churches and other faith-based organizations to obtain and utilize conscience protections anytime there is a perceived conflict with the sexual nondiscrimination norms that the ERA would adopt. This is because, as a constitutional amendment, the ERA would trump any conflicting statutory protections and, when there is a tension between two constitutional amendments such as would be the case with the First Amendment and the ERA, the more recent, it would be argued, takes precedence. In such a scenario, the unanimous 2021 Supreme Court decision in *Fulton v. City of Philadelphia*, protecting faith-based foster care

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<sup>11</sup> Grabenhofer, *supra*. See also Kelly, Kate, “The ERA Is Queer and We’re Here For It!”, Advocate, Feb. 23, 2019, available at <https://www.advocate.com/commentary/2019/2/23/era-queer-and-were-here-it>.

agencies' ability to honor children's right to a mother and a father, could come out very differently.

The ERA could likewise make it more difficult for faith-based organizations to compete on a level playing field with secular organizations in applying for and obtaining public resources to provide needed social services. For example, the government could argue on a constitutional level that a decision not to perform an abortion or transgender surgery is sex discrimination, so that a health care provider is ineligible to receive generally available federal funds (including Medicare and Medicaid reimbursements) for its healing work if it declines to perform such a procedure.

**Possible Setbacks for Women in the Workplace and Education:** Because the ERA only applies to sex discrimination by the government and not expressly to the private sector, it may not be helpful on issues like unequal pay or sexual harassment in the workplace, or other important issues like violence against women. In fact, the ERA could be deemed to prohibit government policies designed to benefit women.

There are several federal and state programs designed to promote women's advancement in the workplace and in education that might be deemed to be unconstitutional if the ERA were adopted. These include government efforts to increase women's participation in STEM fields, corporate management, and business ownership. Other government distinctions that are designed to promote the interests of women—such as single-sex educational settings, dormitories, or even prisons—may be deemed to conflict with the ERA as presently drafted. Conversely, some currently argue that the ERA's enforcement provision could empower Congress to compel certain arrangements (such as quotas) in the name of equity in the private sector. With such counterintuitive and incompatible potentialities, the meaning and impact of the ERA in these varying regards is too uncertain to be meaningfully understood.

**Legal controversy:** Lastly, there is also a strong argument that the current amendment is procedurally "dead." The ERA was passed by Congress in 1972 when two-thirds of each chamber voted for the amendment. However, it failed to achieve ratification by 38 states (three-fourths) within the 7-year time limit established by Congress. While Congress did purport to pass, before the deadline, a 39-month extension, it was legally doubtful whether the extension was valid and, in any event, no further states ratified during the "extension."<sup>12</sup> It is extremely doubtful that "ratifications" after the deadline have any legal effect, with or without the retroactive blessing of Congress. Also disputed is the effect of rescissions that were passed by at least four states before the deadline.

With these rescissions, and the now-passed deadline, Virginia's eventual legislative action in 2020 could not be the "38th ratification." Furthermore, the legal ruling of the Department of Justice's Office of Legal Counsel (Jan. 6, 2020), rightly prevented the Archivist from certifying the ERA of 1972 (and thereby making it part of the Constitution) due to the former's determination that ratifications after the congressionally-mandated time limit are not valid. (Because they determined the 1972 ERA is no longer pending, it was unnecessary to also

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<sup>12</sup> See *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), *vacated as moot*, *National Organization for Women v. Idaho*, 459 U.S. 809 (1982).

rule on whether states could rescind their ratifications). This is the subject of litigation currently pending before the U.S. Court of Appeals for the D.C. Circuit, in which the district court below ruled the deadline valid.<sup>13</sup>

The present congressional effort is notably not to reintroduce the ERA and begin the process again as many legal experts have recommended, including most famously Ruth Bader Ginsburg,<sup>14</sup> as the only constitutional path forward. Instead, Congress is considering a resolution that purports to ignore the deadline imposed by the original 1972 ERA and the rescissions. If passed by a simple majority, the resolution would be challenged as surpassing congressional authority, likely because it would be passed with only simple majorities (instead of the 2/3 required for a constitutional amendment) and because the previous congressionally-enacted date change was struck down. It should also be noted that this resolution does not attempt to resolve the legal controversy over the states that have attempted to rescind their ratification.

For all of the foregoing reasons, the resolution before Congress to attempt to recognize the ERA as a ratified amendment to the Constitution of the United States should be opposed. Meaningful solutions for women in need and for their children should, instead, be prioritized.

February 2023

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<sup>13</sup> *Virginia v. Ferriero*, 525 F.Supp.3d 36 (D. D.C. 2021), *on appeal*, No. 21-5096 (D.C. Cir.).

<sup>14</sup> Gresko, Jessica, "Ginsburg: Equal Rights Amendment backers should start over," Associated Press, Feb. 10, 2020, available at <https://apnews.com/article/3510fbca261198d9ea63c30db2aa2033>.