

UNITED STATES DISTRICT COURT
DISTRICT COURT OF COLUMBIA

COMMONWEALTH OF VIRGINIA,
STATE OF ILLINOIS, STATE OF
NEVADA,
Plaintiffs,

No. 1:20-cv-242-RC

HON. RUDOLPH CONTRERAS

v

DAVID S. FERRIERO, in his official
capacity as Archivist of the United
States,
Defendant.

Michelle S. Kallen
Toby J. Heytens
Martine E. Cicconi
Jessica Merry Samuels
Zachary R. Glubiak
Office of the Attorney General
202 N. Ninth St., Richmond, VA 23219
(804) 786-7240
mkallen@oag.state.va.us
*Attorneys for Plaintiff Commonwealth of
Virginia*

Kathryn Hunt Muse
Christopher Wells
Elizabeth Roberson-Young
Office of the Attorney General
100 W. Randolph St., Chicago, IL 60601
(312) 814-3000
kmuse@atg.state.il.us
cwells@atg.state.il.us
erobersonyoung@atg.state.il.us
Attorneys for Plaintiff State of Illinois

Heidi Parry Stern Craig A. Newby
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1100
HStern@ag.nv.gov
CNewby@ag.nv.gov
Attorneys for Plaintiff State of Nevada

Vinita B. Andrapalliyal
U.S. Department of Justice
Civil Division, Federal Programs
Branch, 1100 L Street NW
Washington, DC 20005
(202) 305-0845
vinita.b.andrapalliyal@usdoj.gov
Attorneys for Defendant Ferriero

Fadwa A. Hammoud, Solicitor General
Ann M. Sherman, Deputy Solicitor General
P.O. Box 30212, Lansing, MI 48909
517-335-7628
ShermanA@michigan.gov
Attorneys for Amicus State of Michigan

**AMICUS BRIEF OF MICHIGAN SUPPORTING PLAINTIFF STATES
IN REQUESTING A DECLARATION THAT
THE EQUAL RIGHTS AMENDMENT HAS BECOME
THE 28TH AMENDMENT TO THE U.S. CONSTITUTION**

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Index of Authorities	ii
Concise Statement of Identity, Interest, and Authority of Amicus	v
Introduction	1
Statement of Facts	3
A. The Commonwealth of Virginia ratifies, and Virginia, Illinois, and Nevada file suit.	3
B. The ERA is born.	4
C. Martha Griffiths’ exceptional life.	7
D. Griffiths picks up the torch of equal rights for women in Congress.....	10
E. Griffiths advances the ERA in Congress.....	12
F. The ERA stalls as opposition mounts.....	15
Argument	17
I. The equal rights must be enshrined in the U.S. Constitution.....	17
Conclusion and Relief Requested.....	22
Certificate of Compliance	23
Certificate of Service.....	24

INDEX OF AUTHORITIES

Page

Cases

Bostock v. Clayton County, Georgia,
 ___ S. Ct. ___, 2020 WL 3146686..... 11

Carmen v. Idaho,
 459 U.S. 809 (1982) 16

Craig v. Boren,
 429 U.S. 190 (1976) 20

Frontiero v. Richardson,
 411 U.S. 677 (1973) 20

Idaho v. Freeman,
 529 F. Supp. 1107 (D.C. Idaho 1981)..... 16

Marbury v. Madison,
 5 U.S. 137 (1803) 17

McCulloch v. Maryland,
 17 U.S. 316 (1819) 17

Nat’l Organization for Women, Inc. v. Idaho,
 459 U.S. 809 (1982) 16

Statutes

1 U.S.C. § 106b..... 4

Other Authorities

“Remarks of Congresswoman Martha W Griffiths at Police Foundation on
 Women in Policing,” May 29, 1974, Griffiths’ library..... 19

2018 Alice Paul Institute, Two Modes of Ratification..... 15

Biographical Directory of the United States Congress 8

Bridget L. Murphy, *The Equal Rights Amendment Revisited*, 94 Notre Dame
 L. Rev. 937, 939–40 and n 17..... 20

<i>Chronology of the Equal Rights Amendment</i>	15
Dear Colleague ltr, 6/17/1970, Griffiths' personal library	13
Emily George, <i>Martha W. Griffiths</i> 1 (1982)	passim
<i>Equal Rights Amendment for Women Passed by Congress</i> , N.Y. Times: The Learning Network, March 22, 2012	20
ERA, <i>History of the Equal Rights Amendment</i>	5, 6, 7, 16
ERA, <i>Two Modes of Ratification</i> , 2018 Alice Paul Institute	1, 2
Erin Blakemore, <i>Why the fight Over the Equal Rights Amendment Has Lasted Nearly a Century</i> , November 26, 2018	6, 14, 15
Fabiola Cineas, <i>The Equal Rights Amendment May Have Found Its Moment</i> , The New Republic, January 16, 2020.....	2
Griffiths to Caroline Bird, February 6, 1968, in Griffiths papers, Bentley Library, Univ. of Michigan	10
Harold Jackson, <i>Martha Griffiths</i> , The Guardian, April 28, 2001	9
History, Art, & Archives, U.S. House of Representatives.....	8, 9, 11
Interview with Marguerite Rewalt, former member of President's Commission on the Status of Woman and the Citizens' Advisory Council, January 25, 1978.....	12
Jordan M. Ragusa & Nathaniel A. Birkhead, <i>Parties, Preferences, and Congressional Organization: Explaining Repeals in Congress from 1877 to 2012</i> , 68 Pol. Res. Q. 745 (2015)	20
Los Angeles Times, Elaine Woo, <i>Pioneering Politician Pushed ERA, Sex Bias Ban Through Congress</i> , April 25, 2003	7, 9, 18
Martha Griffiths, Oral History Interview, 29 October 1979, U.S. Association of Former Members of Congress, Manuscript Room, Library of Congress, Washington, D.C.	8
Maya Salam, <i>What is the Equal Rights Amendment and Why Are We Talking About It Now?</i> , New York Times, In Her Words, February 22, 2019.....	3
Nikki Schwab, <i>Ginsburg: Make ERA Part of the Constitution</i> , US News & World Report, April 18, 2014, quoting Ruth Bader Ginsburg on a taping of the Kalb Report	21

Rachnia Choudhry, *The Debate Over the ERA Continues*, Huffpost, updated Dec. 6, 2017 14

Scott Crass, Martha Griffiths: Mother of the ERA and Title VII, *The Moderate Voice*, Jul 6, 2013..... 14

Statement by Nahanni Rous, “*Episode 12: A New ERA for the ERA*,” Jewish Women’s Archive 17

U.S. Congress, Senate, Committee on the Judiciary, *The Equal Rights Amendment Hearings Before the Subcommittee on Constitutional Amendments (S.J. Res. 61)*, 91st Cong., 2d sess. (1970)..... 13

U.S., Congress, House, 93rd Cong., 1st sess, June 4 and 20 1973, Congressional Record 119:17823-7 and 20552-3 18, 19

Rules

LCvR 7(o)(1) v

Constitutional Provisions

Civil Rights Act..... 11

Title VII of the 1964 Civil Rights Act 10, 11

U.S. Const. amend XIX..... 4

U.S. Const. amend. XIV..... 6, 20

U.S. Const. art. V..... 4

**CONCISE STATEMENT OF IDENTITY, INTEREST,
AND AUTHORITY OF AMICUS**

Amicus, the State of Michigan, submits this brief under Local Civil Rule 7(o)(1) to support the plaintiffs, the States of Virginia, Illinois, and Nevada, in opposing the motion to dismiss filed by the defendant Archivist of the United States.

Michigan would like to see the work of Martha Griffiths, a Michigan hero who worked tirelessly for sex equality and who championed the ERA, come to fruition. And Michigan has an interest in ensuring that its residents receive the highest level of protection from discrimination on the basis of sex—a goal that can be achieved by ensuring that the ERA’s guarantee of equality is enshrined in our nation’s most treasured document: the United States Constitution.

INTRODUCTION



“This movement [for equality] is like a tidal wave. And when it’s passed, men and women both are going to turn into human beings.”

*Martha Griffiths*¹

A diverse coalition of lawmakers, activists, and ordinary citizens hopes our nation is poised to finally turn what was once the twentieth amendment into the twenty-eighth. That result would be victory at the end of a long march to equality—one in which Michigan’s Martha Griffiths took some of the first instrumental steps, hoping to ensure equality for generations to come.

The Equal Rights Amendment (ERA) consists of one simple sentence: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” It is remarkable that this straightforward and important proposition has been the source of so much delay and controversy. It is time to put culture wars aside and collectively focus on the essence of that sentence.

¹ 2018 Alice Paul Institute, available at <https://www.equalrightsamendment.org/toolkit/sm-post-griffiths-quote>

Griffiths, one of Michigan's heroes, certainly understood its essence. Known as the "Mother of the ERA," she was an eagle braving the billows as she pushed the ERA through Congress in the early 70's. Since then, many women have stood on Griffiths' shoulders, hoping to see her important work come to fruition.

In 1978, now Supreme Court Justice Ruth Bader Ginsburg wrote in the *Harvard Women's Law Journal*: "With the Equal Rights Amendment, we may expect Congress and the state legislatures to undertake in earnest, systematically and pervasively, the law revision so long deferred. And in the event of legislative default, the courts will have an unassailable basis for applying the bedrock principle: All men and women are created equal." ERA, *Two Modes of Ratification*, 2018 Alice Paul Institute.² And recently, Carroll Foy, a member of the Virginia House of Delegates, stood before the Virginia Legislature as the ERA ratification came up for vote, and said, "I stand with 160 million women and girls throughout this country waiting for their constitutional equality." Fabiola Cineas, *The Equal Rights Amendment May Have Found Its Moment*, *The New Republic*, January 16, 2020.

These visible women are but the tip of the iceberg. They, and so many more from all walks of life, remind us that whatever thorny political and personal controversies may have attached themselves to the ERA over the years, the Amendment is rooted in one fundamental and bipartisan principle, widely shared

² Available at <https://www.equalrightsamendment.org/pathstoratification>

by ordinary Americans³: Men and women should have equal rights under the law. And in this poignant moment in history, when the 38th State has just ratified the ERA, the need for the amendment remains as compelling as when it was first introduced and when Griffiths fought hard to keep it alive. Because the ideal of equal treatment defines us as a nation, sex equality must be enshrined in the U.S. Constitution—as a permanent part of our nation’s future.

STATEMENT OF FACTS

A. The Commonwealth of Virginia ratifies, and Virginia, Illinois, and Nevada file suit.

In January 2020, in a landmark vote, Virginia became the 38th state to ratify the ERA. Then, in late January 2020, the attorney general of Virginia, along with those of the two states that ratified the ERA immediately prior to Virginia—Illinois and Nevada—filed this lawsuit to have this Court recognize the constitutional amendment as the 28th Amendment. The complaint alleges that the United States Constitution now declares, once and for all, that equality of rights under the law shall not be denied or abridged on account of sex. *Commonwealth of Virginia v Ferriero*, Case No. Case No. 1:20-cv-242-RC, D.C. Cir. 2020. It explains that at the

³ According to a NY Times article, some 80% of Americans mistakenly believe the ERA is already part of the Constitution. Maya Salam, *What is the Equal Rights Amendment and Why Are We Talking About It Now?*, New York Times, In Her Words, February 22, 2019, available at <https://www.nytimes.com/2019/02/22/us/equal-rights-amendment-what-is-it.html>. Recent polling by the ERA Coalition/Fund for Women’s Equality, shows that around 94% of Americans support the ERA. <http://www.eracoalition.org/wp-content/uploads/2019/09/ERA-Polling-Press-Release-1.pdf>.

moment Virginia ratified, the process set forth in Article V of the U.S. Constitution was complete. *Id.*, Doc. 1, p 1. And it laments that “[f]or nearly 150 years, our Nation’s foundational document did not acknowledge the existence of women.” *Id.* These three states ask this Court for an order (1) directing the Archivist of the United States to perform his purely ministerial duty under 1 U.S.C. § 106b to “cause the amendment to be published, with his certificate, specifying . . . that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States,” and (2) declaring that the Equal Rights Amendment has become the 28th Amendment to the U.S. Constitution. *Id.* Griffiths would have been elated.

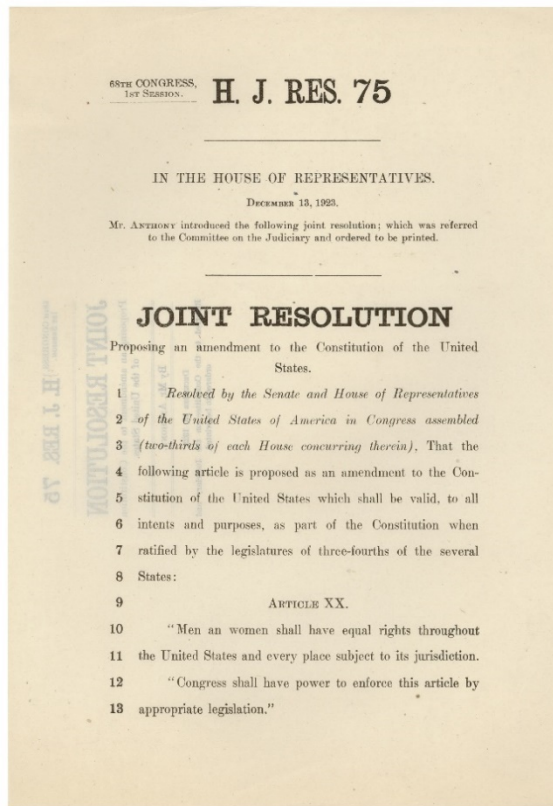
B. The ERA is born.

The Equal Rights Amendment has a long history—too long. That history began even before the Nineteenth Amendment solidified women’s right to vote. The ERA’s history begins in 1923, the year woman suffrage leader Alice Paul⁴ first introduced the Amendment in Congress.

Earlier that year Paul had introduced the text of the Amendment (then called the Lucretia Mott Amendment) at the 75th anniversary of the 1848 Woman’s Rights Convention in Seneca Falls, New York. Paul believed that in order to achieve freedom from legal sex discrimination, the country needed an Equal Rights Amendment that would affirm the equal application of the Constitution to all

⁴ Paul, a Quaker, came to believe that women had to be protected by the right to vote, and then by an amendment to the Constitution. She died in 1977 without ever having seen her life’s work come to fruition.

citizens. ERA, *History of the Equal Rights Amendment*.⁵ At that time, the text of the amendment was: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.”



H.J. Res 75 joint resolution, proposed the ERA (National Archives).

In 1927, the National Woman’s Party traveled to Rapid City, South Dakota to ask President Coolidge to support the ERA.⁶

⁵ Available at <https://www.equalrightsamendment.org/the-equal-rights-amendment>

⁶ Library of Congress, available at <https://www.loc.gov/item/mnwp000332/>



National Woman's Party on their way to Rapid City, South Dakota.
Library of Congress

Then, in 1943 Paul proposed an amendment that slightly changed the wording to “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” The Amendment was renamed the “Alice Paul Amendment.” ERA, *History of the Equal Rights Amendment*.⁷ The new wording was similar to the verbiage used in the Fourteenth Amendment and was designed to ensure that the new amendment would not remove existing protections for women. Erin Blakemore, *Why the fight Over the Equal Rights Amendment Has Lasted Nearly a Century*, November 26, 2018.⁸ Notably, in the early 1940's both major political parties, Republicans and Democrats, included

⁷ Available at <https://www.equalrightsamendment.org/the-equal-rights-amendment>

⁸ Available at <https://www.history.com/news/equal-rights-amendment-fail-phyllis-schlafly>

support for the ERA as part of their political platforms. ERA, *History of the Equal Rights Amendment*.⁹

Despite this bipartisan support, the Amendment remain neglected in the 40's and 50's, re-energizing in the 1960's as women were organizing to demand full rights as citizens and persons. *Id.* The ERA—rather than the right to vote—became the symbol of women's struggle for equality. *Id.* Nevertheless, it took fiery and outspoken Griffith, a Michigan Democratic representative, to push the ERA through Congress. Los Angeles Times, Elaine Woo, *Pioneering Politician Pushed ERA, Sex Bias Ban Through Congress*, April 25, 2003.¹⁰



C. Martha Griffiths' exceptional life.

It was fitting that Griffiths played this role. She rose from humble beginnings, and it was her life circumstances—in particular, the struggles,

⁹ Available at <https://www.equalrightsamendment.org/the-equal-rights-amendment>

¹⁰ Available at <https://www.latimes.com/archives/la-xpm-2003-apr-25-me-griffiths25-story.html>

foresight, and courage of the strong women in her life—that inspired her to pursue equal rights for women. She watched her mother take on extra jobs and take in boards to pay for her daughter’s college tuition—knowing without an education her daughter would eventually be dependent on her future husband. Emily George, *Martha W. Griffiths* 1, 3 (1982) (citing Martha Griffiths, Oral History Interview, 29 October 1979, U.S. Association of Former Members of Congress, Manuscript Room, Library of Congress, Washington, D.C.: 3–4). And she was impacted by her paternal grandmother, who broke barriers by raising three children after the death of her husband and eventually putting them through college at a time when few children were educated beyond the eighth grade. History, Art, & Archives, U.S. House of Representatives; George, *supra*, at 2.

Griffiths received a BA in political science from University of Missouri at Columbia, married Hicks G. Griffiths, and, with her husband attended and graduated from the University of Michigan Law School. She was elected to the Michigan state house of representatives from 1948 to 1952, and later to Congress, where she served 10 terms Congresses (January 3, 1955, through December 31, 1974). Biographical Directory of the United States Congress; George, *supra*, at 5.

Hers was a political career of firsts: the first woman to be sent to Congress by Michigan voters since the State joined the union in 1837; the first woman to serve on the powerful House Committee on Ways and Means; and the first woman to ever hold the post of lieutenant governor of Michigan (she served two four-year

terms). Harold Jackson, *Martha Griffiths*, *The Guardian*, April 28, 2001.¹¹ At the close of her career, she would be the first woman in Michigan to have served in all three branches of state government. Elaine Woo, *Martha Griffiths, 91; Pioneering Politician Pushed ERA, Sex Bias Ban Through Congress*, *LA Times*, April 25, 2003. On the occasion of her death in 2003, former President Gerald Ford, who had served with Griffiths in the House, supported her ERA campaign and had dubbed the ERA “a monument to Martha,” said, of her “She was smart, she knew the rules, and she had deep convictions.” *Id.*; George, *supra*, at 168.

Despite these achievements—impressive in any day, but especially at that time—Griffiths’ path was not an easy one. For starters, her first foray into politics was unsuccessful, having lost her first bid for a seat in the Michigan house of representatives in 1946. History, Art, & Archives, U.S. House of Representatives. And although she captured the Democratic nomination for a seat in the U.S. Congress in 1952, she lost the general election by a narrow margin. *Id.*

After this tough loss, Griffiths served a short stint as a judge in Detroit Recorder’s Court before another run for Congress. This time, Griffiths succeeded and began her nearly 20 years of service in Congress.

¹¹ Available at <https://www.theguardian.com/news/2003/apr/29/guardianobituaries.haroldjackson>

D. Griffiths picks up the torch of equal rights for women in Congress.

Griffiths' early days in Washington were difficult. She struggled being both a woman in Congress and a junior member of that body. (She jokingly told a friend she felt like "a fragile little goldfish among the barracuda." George, *supra*, at 36.) She soon found that the issues that most frustrated her concerned the unequal treatment of women.

Griffiths' first major contribution came in 1964 when she pushed for sex discrimination to be added to a landmark civil rights bill pertaining to racial discrimination. She helped frame the sex discrimination amendment to Title VII of the 1964 Civil Rights Act and is credited with prompting the new Equal Employment Opportunity Commission to enforce the act more vigorously. *Id.* at 147–52.

Griffiths explained why she added the word "sex" to the bill:

When I looked at the bill, I realized that the [Judiciary] committee had never really considered the rights of Negro women at all, or, if they had, they had simply believed that they would get approximately the rights of white women. I made up my mind that all women were going to take one giant step forward, so I prepared an amendment that added "sex" to the bill.

George, *supra*, at 149, Griffiths to Caroline Bird, February 6, 1968, in Griffiths papers, Bentley Library, Univ. of Michigan.

A leading member of the House Judiciary Committee later confirmed Griffiths' suspicions. In speaking to colleagues some years later, he said: "This was the first example, the first instance, the first time that most of us got an indication of sex discrimination in this country. We hadn't really heard about it before."

George, *supra*, at 143, Interview with Don Edwards, Washington, D.C. January 27, 1978.

Griffiths then brilliantly maneuvered the passage of the 1964 Civil Rights Act:

The chairman of the powerful Rules Committee, Democrat Howard Smith of Virginia, was preparing to make his own sexual discrimination amendment to the bill, in hopes of making the bill so controversial as to derail the entire Civil Rights Act. Griffiths, realizing that Smith would easily bring 100 southern votes if he introduced the amendment on the floor, held back on introducing the amendment herself. When Smith made the argument in the well of the House, Members erupted in laughter and jeers.⁷ [The reason for the laughter was that, during the debate, Smith read a letter from a constituent noting there were 2.6 million “extra females” than men. Smith said the constituent asked Congress to correct that discrepancy by passing legislation equalizing the number of males. Scott Crass, *Martha Griffiths: Mother of the ERA and Title VII*, *The Moderate Voice*, July 6, 2013.] Griffiths immediately took to the floor to make her case: “I presume that if there had been any necessity to point out that women were a second-class sex, the laughter would have proved it,” she scolded colleagues. The chamber fell silent. With a southern bloc voting for the amendment and Griffiths’s own efforts to line up votes, the measure was passed and added to the act.

Records of the U.S. House of Representatives, National Archives and Records Administration.

That day the Civil Rights Act passed the House by a vote of 168 to 133—a testament to Griffiths’ persuasiveness. *Id.* It was signed into law that same year. Recently, in deciding a landmark Title VII case, the Supreme Court noted: “In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964.” *Bostock v. Clayton County, Georgia*, ___ S. Ct. ___, 2020 WL 3146686 at *3.

E. Griffiths advances the ERA in Congress.

Griffiths' second major contribution was her historic role in shepherding the ERA from the hall of Congress to the States for their ratification. That role began on June 11, 1970, when she filed a discharge petition to force the Equal Rights Amendment (ERA) out of the Judiciary Committee for a vote by the full House. Records of the U.S. House of Representatives, National Archives and Records Administration. (Up until then, the ERA had never been presented to the full house.)

In 1969, as the fifteenth anniversary of women's suffrage drew near, the president of the National Women's Party (NWP) approached Griffiths and asked her to sponsor the amendment. Griffiths was convinced it would take more than NWP backing to convince Emmanuel Celler, then Chairperson of the House Judiciary Committee, that he should put the ERA on the Floor after some 50 years. George, *supra*, at 168–69.

By early May of 1970, it looked like things might move. Senator Burch E. Bayh, Chairman of the Subcommittee on Constitutional Amendments, agreed to sponsor the ERA in the Senate and called for hearings. *Id.* at 169 (citing Interview with Marguerite Rewalt, former member of President's Commission on the Status of Woman and the Citizens' Advisory Council, January 25, 1978). Griffiths testified before Bayh's subcommittee, explaining the Supreme Court's ambivalence on equal rights, and pointing out that an amendment would awaken "the nine sleeping Rip Van Winkles." "I seek justice," Griffiths said—"not in some distant tomorrow, not by some study commission," but "now while I live." *Id.* at 170 (citing U.S. Congress,

Senate, Committee on the Judiciary, *The Equal Rights Amendment Hearings Before the Subcommittee on Constitutional Amendments (S.J. Res. 61)*, 91st Cong., 2d sess. (1970), p. 24).

But in the end, Celler did not put the amendment up for hearing. So, once again, Griffiths showed her uncanny ability to outmaneuver her opponents. She delivered the discharge petition to the clerk of the House, commenting that it was “well past time” for the Supreme Court and Emanuel Celler to “face up to the modern world.” *Id.* (citing U.S. Congress, House, 91st Cong, 2d sess., June 11, 1970, *Cong. Record* 116:5437; Dear Colleague ltr, 6/17/1970, Griffiths’ personal library).

91st Congress House of Representatives No. 5

Motion to Discharge a Committee from the Consideration of a Joint Resolution
(Date whether 1st, 2nd, 3rd, 4th, or 5th session)

June 11, 1970
(Date)

To the Clerk of the House of Representatives:

Pursuant to Clause 4 of Rule XXVII (see rule on page 1), I,
Martha W. Griffiths
(Name of Member), move to discharge the
Committee on the Judiciary
(Name of Committee)

from the consideration of the Joint Resolution
(Title, joint resolution, or resolution)

~~XXXXXXXXXXXXXXXXXXXX~~ H.J. Res. 264 ~~XXXXXXXXXXXXXXXXXXXX~~
(Number, if a bill) (Number, if a joint resolution) (Number, if a resolution)

entitled, a Joint Resolution Proposing an amendment to the
(Title, joint resolution, or resolution) (Title)

Constitution of the United States relative to equal rights for
men and women.

which was referred to said committee January 16, 1969
(Date of referral)

in support of which motion the undersigned Members of the House of Representatives after their signatures, to wit:

1. [Signature]	12. William Z. Clay
2. [Signature]	13. James J. Flaherty
3. [Signature]	14. James D. Jones
4. [Signature]	15. Richard L. Allen
5. [Signature]	16. Henry Hyde
6. [Signature]	17. Robert C. Byrd
7. [Signature]	18. James H. Brown
8. [Signature]	19. Alton S. Jones
9. [Signature]	20. Howard Callaway
10. [Signature]	21. [Signature]
11. [Signature]	22. [Signature]

Discharge petition, The National Archives

The discharge petition is rarely used, as it requires signatures by a majority of representatives. But Griffiths was plucky enough to use it, even though it was only the eighth time in 20 years that this little-used parliamentary tactic had been

at employed. The petition passed overwhelmingly—332 to 22. George, *supra*, at 171–72.

According to the Congressional Record, by 1970, “ ‘Presidents Eisenhower, Kennedy, Lyndon Johnson, and Nixon were all on record as having endorsed an equal rights amendment.’ ” Erin Blakemore, *Why the Fight Over the Equal Rights Amendment Has Lasted Nearly a Century*, November 26, 2018.¹²

During debate on the ERA, Celler launched an attack on the floor, arguing, “Neither the national women’s party nor the delightful, delectable, and dedicated gentlelady from Michigan can change nature. They cannot do it.” Griffiths replied, “Before I leave this earth, I would like to know they have given women the same benefits and promotions as men.” Crass, *supra*.¹³

Although the Senate failed to pass it that legislative session, Griffiths reintroduced it the following year, and it passed the House on October 12, 1971, and the Senate on March 22, 1972, with wide bipartisan support. Rachnia Choudhry, *The Debate Over the ERA Continues*, Huffpost, updated Dec. 6, 2017.¹⁴ It was sent to the States on March 22, 1972. The amendment would need three-fourths of the 50 states (a total of 38) to become law. Within the first year, the ERA rapidly received 22 of the necessary 38 state ratifications.

¹² Available at <https://www.history.com/news/equal-rights-amendment-fail-phyllis-schlafly>

¹³ Available at <https://themoderatevoice.com/martha-griffithsmother-of-era-and-title-vii/>

¹⁴ Available at https://www.huffpost.com/entry/the-debate-over-the-era-c_b_3787109

F. The ERA stalls as opposition mounts.

At this point opposition to the ERA began to organize.¹⁵ Only eight states ratified in 1973, three in 1974, one in 1975, and none in 1976. 1977 saw the first congressionally funded National Women's Conference in Houston, Texas. Two-thousand delegates, from every State, called for ratification of the ERA.¹⁶



Martha Griffiths speaking at the 1977 Equal Rights Ratification Assembly, part of the 1977 National Woman's Conference in Texas, 11/18/19¹⁷

In addition to that slowing of support, between 1972 and the 1979 five states voted to rescind their ratification of the ERA—Nebraska, Tennessee, Idaho, Kentucky, and South Dakota. 2018 Alice Paul Institute, *Two Modes of Ratification*.¹⁸ Litigation ensued in a federal district court in Idaho, resulting in the

¹⁵ See Blakemore, *supra* (providing a detailed discussion of the anti-ERA movement).

¹⁶ *Chronology of the Equal Rights Amendment*, available at <https://now.org/resource/chronology-of-the-equal-rights-amendment-1923-1996>.

¹⁷ DocsTeach, available at <https://www.docsteach.org/documents/document/Griffths-ratification-assembly>. Records of Temporary Committees, and Boards, Nat'l Archive identifier 7452294.

¹⁸ Available at <https://www.equalrightsamendment.org/pathstoratification>.

Court ruling that Idaho’s “rescission of its ratification of the twenty-seventh amendment effectively nullified its prior ratification” and Idaho could not be “counted as a ratifying state.” *Idaho v. Freeman*, 529 F. Supp. 1107, 1150, 1154 (D.C. Idaho 1981). The Judge compelled proper entry of Idaho’s act of rescission, including return of the prior certificate of ratification. *Id.* The Court went further, indicating that “[t]he same is true for any other State which has properly certified its action of rescission to the Administrator of the General Services.” *Id.* But that decision was later vacated and the underlying complaints dismissed as moot. *See Nat’l Organization for Women, Inc. v. Idaho*, 459 U.S. 809 (1982); *Carmen v. Idaho*, 459 U.S. 809 (1982). (The validity of rescission is a legal issue in this case.)

As the original 1979 deadline approached, Congress granted an extension until June 30, 1982. But when 1982 rolled around, the ERA was still three states short of the necessary 38 states for full ratification. On July 14, 1982, the ERA was reintroduced into Congress. (Since then, it has been introduced before every session of Congress.) ERA, *History of the Equal Rights Amendment*.¹⁹

In March of 2017—35 years after its original attempt to rescind its ratification—Nevada became the 36th state to ratify. In 2018, Illinois became the 37th State to ratify. And on January 27, 2020, the state of Virginia made history by becoming the 38th State to ratify the ERA.²⁰

¹⁹ Available at <https://www.equalrightsamendment.org/the-equal-rights-amendment>.

²⁰ The states that have not yet ratified the ERA are: Alabama, Arizona, Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma,

ARGUMENT

I. The equal rights must be enshrined in the U.S. Constitution.

The elimination of sex inequality is a fundamental expression of who we are as people—of who we are as Americans—and of the united nation we continually aspire to be. Equality in law is one of the hallmark promises of America. That is why the ERA must be enshrined in our Constitution. It is fundamental. And it belongs in our fundamental law. *See Marbury v. Madison*, 5 U.S. 137, 180 (1803) (“[T]hat in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.”). As with other first principles, this law of the equality of the sexes is perennially important, never wanes in relevance, and commands our constant vigilance.

Worldwide, every Constitution adopted since World War II has some form of an equal rights amendment, including Constitutions the United States has had a hand in drafting.²¹ It is not surprising that many countries have adopted some form of the ERA, since the act, in its simplicity, espouses a basic social, intellectual, and moral truth. What *is* surprising is that our country has not done so.

Over 200 years ago, in *McCulloch v. Maryland*, Chief Justice Marshall famously wrote, “[W]e must never forget it is a Constitution we are expounding . . .

South Carolina, and Utah, although there are efforts in North Carolina, Tennessee, and Florida to ratify the ERA.

²¹ Statement by Nahanni Rous, “*Episode 12: A New ERA for the ERA*,” Jewish Women’s Archive. Available at <https://jwa.org/podcasts/canwetalk/episode-12-a-new-era-for-the-era/transcript>.

intended to endure for ages to come” 17 U.S. 316, 407, 415 (1819). The ERA is in keeping with that sentiment, a testament to both the enduring and evolving nature of the Constitution. Griffiths understood that, along with the perils wrought by differing sets of values that relegated one sex to subordinate status. She worked her whole life—on behalf of both males and females—to combat sex inequality.

For example, while working in Washington, she discovered that when a woman covered by Social Security died, her dependent children were ineligible for benefits, but a man’s dependents were. She also discovered that women had to pay taxes on money left by their husbands, but no man had to pay taxes on what his wife left. And she found that, if a man divorced his wife after 20 or 30 years of marriage, the wife was not entitled to any Social Security payments. She changed all those laws. Elaine Woo, *Martha Griffiths, 91; Pioneering Politician Pushed ERA, Sex Bias Ban Through Congress*, April 25, 2003.²²

She also helped to open Little League Baseball to girls. “Let me assure you,” she told Congress, “that if Billy Martin of the Detroit Tigers or Leo Durochar of the Houston Astros had a chance to sign a woman who hit home runs like Hank Aaron, fielded like Al Kaline, or pitched like Wilbur Woods, they would do their best to get that woman’s name on a contract.” George, *supra*, at 185 (citing U.S., Congress, House, 93rd Cong., 1st sess, June 4 and 20 1973, Congressional Record 119:17823-7 and 20552-3). She also pushed to allow women on police forces. *Id.* (citing Griffiths,

²² Available at <https://www.latimes.com/archives/la-xpm-2003-apr-25-me-griffiths25-story.html>

“Remarks of Congresswoman Martha W Griffiths at Police Foundation on Women in Policing,” May 29, 1974, Griffiths’ library). And in the same vein, she ensured a minimum wage for domestic workers, *id.* (citing Congressional Record 119:18342), and worked to eliminate pervasive sexism in credit institutions and higher education), George, *supra*, at 185–86.

Significantly, although Griffiths devoted great energy to the elimination of sexual bias against women, she was also concerned with legislation that worked to the disadvantage of men. An example of her dedication to fair play was her attempt to break down stereotypic roles by introducing a bill to permit fathers in the delivery room during the birth of their children. George, *supra*, at 185. Griffiths was widely known as a champion of benefit equality for both sexes. A long-term counsel on Social Security matters noted, “When she said equality, she meant equality.” *Id.* at 110.

Despite her hopes, hard work, and ingenuity, equality of the sexes did not happen in Griffiths’ lifetime. But the groundwork has been set, and as a nation we have grown into an understanding of the importance of sex equality under the law that transcends past political divides. We also have a better understanding of the negative effects of sex *inequality* under the law—which touch our policies, our institutions, and even our interpersonal relationships. The time is now to embrace in our most treasured document the fundamental value espoused by the ERA: people are equal under the law.

There have been many gains for equality over the past 50 years—largely arrived at both through legislation and coverage by the Equal Protection Clause of the Fourteenth Amendment. But this piecemeal approach is inadequate to protect the fundamental value at stake with sex equality. Legislation can easily be repealed.²³ And sex discrimination has yet to garner strict scrutiny.²⁴ See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (only a nonbinding plurality determining that strict scrutiny should be applied to sex-based classification under the Equal Protection Clause); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that classifications based on sex were subject to intermediate scrutiny).

Moreover, the late Justice Scalia opined that the Equal Protection Clause does not even contemplate sex discrimination. *Equal Rights Amendment for Women Passed by Congress*, N.Y. Times: The Learning Network, March 22, 2012.²⁵

²³ Political researchers studied the repeal of federal legislation over a 115-year span (from 1877 to 2012) and noted that at least 89 partial or complete repeals of federal legislation occurred during this time period. Bridget L. Murphy, *The Equal Rights Amendment Revisited*, 94 Notre Dame L. Rev. 937, 939–40 and n 17 (citing the work of Jordan M. Ragusa & Nathaniel A. Birkhead, *Parties, Preferences, and Congressional Organization: Explaining Repeals in Congress from 1877 to 2012*, 68 Pol. Res. Q. 745 (2015)). In addition, Congress has alternative ways of “undoing” existing legislation or fundamentally changing the import of legislation existing statutes, including “adjusting an agency’s funding or choosing to ignore procedures for the agency’s supplementation of a program.” *Id.* at 748.

²⁴ Notably, the purpose of these amendments was to elevate the status of African-American *men* to that of their white counterparts—not to recognize women’s equality with men. Bridget L. Murphy, *The Equal Rights Amendment Revisited*, 94 Notre Dame L. Rev., Vol 94, Issue 2, Art. 10, p. 946.

²⁵ Available at www.history.com/this-day-in-history/equal-rights-amendment-passed-by-congress

The ERA provides a solid bedrock for equality under the law. As Justice Ginsburg explained to an audience at the National Press Club in 2014:

“The ERA,” she said, “means that women are people, equal in stature before the law. I think we have achieved that through legislation, but legislation can be repealed, it can be altered. That principle belongs in our constitution. So I would like my granddaughters when they pick up the constitution, to see that that notion—that women and men are persons of equal stature—I’d like them to see that that is a basic principle of our society.”

Nikki Schwab, *Ginsburg: Make ERA Part of the Constitution*, US News & World Report, April 18, 2014, quoting Ruth Bader Ginsburg on a taping of the Kalb Report.²⁶

²⁶ Available at <https://www.usnews.com/news/blogs/washington-whispers/2014/04/18/justice-ginsburg-make-equal-rights-amendment-part-of-the-constitution>

CONCLUSION AND RELIEF REQUESTED

For the reasons stated in this brief, the State of Michigan respectfully requests that this Court declare that the Equal Rights Amendment has become the 28th Amendment to the U.S. Constitution.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud
Solicitor General

/s/ Ann M. Sherman (P67762)
Ann M. Sherman (P67762)
Deputy Solicitor General

Attorneys for Amicus State of Michigan
P.O. Box 30212
Lansing, MI 48909
517-335-7628
HammoudF1@michigan.gov
ShermanA@michigan.gov

Dated: July 2, 2020

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This amicus brief complies with LCvR 7(o)(4) as it does not exceed 25 pages. This document is 22 pages.
2. This document complies with the typeface requirements of LCvR 5.1(d) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 12-point Century Schoolbook.

/s/ Ann M. Sherman
Ann M. Sherman (P67762)
Deputy Solicitor General

Attorney for Amicus State of Michigan
P.O. Box 30212
Lansing, MI 48909
517-335-7628
ShermanA@michigan.gov

CERTIFICATE OF SERVICE

I certify that on July 2, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Ann M. Sherman
Ann M. Sherman (P67762)
Deputy Solicitor General

Attorney for Amicus State of Michigan
P.O. Box 30212
Lansing, MI 48909
517-335-7628
ShermanA@michigan.gov