

No. 21-5096

IN THE
**United States Court of Appeals
for the District of Columbia Circuit**

COMMONWEALTH OF VIRGINIA, *et al.*,
Plaintiffs-Appellants,

v.

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

ALABAMA, LOUISIANA, NEBRASKA,
SOUTH DAKOTA, and TENNESSEE.
Intervenors-Appellees,

On Appeal from the United States District Court
for the District of Columbia, No. 1:20-cv-00242-RC
Before the Honorable Rudolph Contreras

**BRIEF FOR *AMICI CURIAE* GENERATION RATIFY AND TEN
OTHER YOUTH-LED ORGANIZATIONS IN SUPPORT OF
PLAINTIFFS-APPELLANTS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* certify the following:

1. **Parties and *Amici*.** With the exception of Generation Ratify, Gen-Z for Change, iFeminist, InnovateX, Montgomery County Students for Change, Pride Liberation Project, The Feminist Front, The Greater Good Initiative, The Homegirl Project, The Pad Project, and Youth Against Sexual Violence, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants.

2. **Ruling Under Review.** Reference to the ruling at issue appears in the Brief for Plaintiffs-Appellants.

3. **Related Cases.** Reference to related cases appears in the Brief for Plaintiff-Appellants.

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INTERESTS OF GENERATION RATIFY AND OTHER GROUPS AS *AMICI CURIAE*¹

Amici are youth-focused organizations dedicated to equality for all persons regardless of gender, gender identity, sexual orientation, race, or ethnicity.

Generation Ratify is a youth-led movement to ratify the Equal Rights Amendment and build a coalition of young people that advocates for gender equality.

Gen-Z for Change is an organization that leverages social media to promote civil discourse and political action within Generation Z.

iFeminist empowers students by encouraging them to research unknown and underrepresented women in history to change the narrative regarding women's contributions to society.

InnovateX is a nonprofit organization that increases accessibility to personal finance and entrepreneurial opportunities for students of all socioeconomic backgrounds.

¹ All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person, other than *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Montgomery County Students for Change (“MoCo4Change”) is a student-led advocacy group dedicated to fighting for marginalized groups through innovative activism.

Pride Liberation Project is a student-led grassroots coalition organizing for inclusive schools through lobbying, testifying, and educating their community.

The Feminist Front is a youth-based, intersectional feminist organization dedicated to fighting against white supremacist cis heteropatriarchy.

The Greater Good Initiative is a youth-led policy think-tank with the mission of promoting youth engagement and mobilization in the policymaking process.

The Homegirl Project is a youth-led organization dedicated to the empowerment of young women and nonbinary individuals as changemakers in their communities.

The Pad Project is a nonprofit whose mission is to create and cultivate local and global partnerships to end period stigma and to empower women and all menstruators worldwide.

Youth Against Sexual Violence is a nationwide, youth-led organization dedicated to combatting sexual violence through systemic reform.

Collectively, these organizations educate youth, advocate for legislative change, and mobilize young people to support the Equal Rights Amendment (the “ERA”).

Amici have a vital interest in ensuring that the ERA is declared part of the Constitution, and that the Archivist publishes the Amendment. *Amici*’s members are intimately familiar with the denial of equal rights based on gender, sexual orientation, and race, and support constitutional protections that bolster congressional authority to further gender equality.

INTRODUCTION

On July 4, 1776, the Founders declared in the Declaration of Independence that “all men are created equal.” Since then, these words have grown to encompass a view of equality broader than white, property-owning men—even though the Constitution’s text does not fully reflect that fact. In 1970, Representative Shirley Chisholm spoke in support of the ERA, explaining that “there were no black Founding

Fathers, there were no Founding Mothers—a great pity, on both counts. It is not too late to complete the work they left undone.”²

The only provision of our Constitution that explicitly protects against discrimination based on sex is the Nineteenth Amendment, which gave women the right to vote. No longer should any generation be governed by a Constitution that does not guarantee equality of the sexes. Gender equality deserves a place in the Constitution to ensure equality to all people regardless of gender.

This brief urges the Court to declare the ERA to be a part of our Constitution, and to direct the Archivist to publish the Amendment as such. In supporting the States’ effort to resolve the century-long movement to guarantee gender equality in the Constitution, we urge the Court to recognize the importance of the ERA to young and diverse individuals.

Amici recognize that the ERA serves two critical purposes: (i) an expressive function in affirming gender equality as among our nation’s highest values; and (ii) a vehicle for substantive judicial protection of

² Rep. Shirley Chisholm, *For the Equal Rights Amendment* (Aug. 10, 1970), <https://bit.ly/30PCiha>.

gender equality under the law—including in education, economic life, and in prevention of gender-based violence—as well as a basis for legislative actions to enforce those protections. Both as an expression of our country’s values and as a means for change, the Amendment will further young Americans’ interests in guaranteeing gender equality.

ARGUMENT

I. **Young Advocates Have Long Played a Central Role in Ratifying the ERA.**

Amici’s support for ratification of the ERA builds on more than a century of youth advocacy. Young people helped draft the ERA, testified before Congress, marched in the streets for its passage, and supported successful ratification by the States.

Amici’s members are largely high school and college students. They follow in the tradition of generations of youth who led the ERA movement since its inception as an outgrowth of the women’s suffrage movement. The movement included young advocates, such as Mabel Ping-Hua Lee, a 16-year-old who led a parade of suffragists in 1912.³ The well-known

³ Nat’l Park Serv., *Dr. Mabel Ping-Hua Lee*, <https://bit.ly/30MTP9t> (last visited Jan. 7, 2022).

architect of the ERA and founder of the National Woman's Party—Alice Paul—joined the movement at age 22.⁴ Anita Pollitzer, who succeeded Paul as chair, was arrested in her early twenties for protesting for women's suffrage outside the White House.⁵ Burnita Matthews joined the fight as a 25-year-old law student and regularly picketed the White House on behalf of women's suffrage.⁶

When the ERA was introduced in Congress in 1923, it attracted youth support, including from young members of the National Woman's Party who “invade[d] the offices of the senators and congressmen from their states, to ask them to vote for Equal Rights.”⁷ By 1924, Myrtle Cain—then the youngest woman state legislator at 30—traveled the country rallying support for the ERA; other youth followed suit.⁸

⁴ Alice Paul Institute, *National Woman's Party*, <https://www.alicepaul.org/nwp/> (last visited Jan. 7, 2022).

⁵ Jennifer Nelson, *Anita Pollitzer*, Jewish Women's Archive (Feb. 27, 2009), <https://bit.ly/3fxkE5S>.

⁶ Linda Greenhouse, *Burnita S. Matthews Dies at 93; First Woman on U.S. Trial Courts*, N.Y. Times (Apr. 28, 1988), <https://nyti.ms/3hyau6P>.

⁷ *A Group of Young Members of the National Woman's Party before the Capitol*, Library of Congress (1923), <https://bit.ly/2UQF8hS>.

⁸ *Myrtle Cain, the Youngest Woman Legislator in the Country*, Library of Congress (1924), <https://bit.ly/2V6UM9h>; *Equal Rights Envoys of the National Woman's Party Who Motored to Rapid City Where the*

Young people continued this fight for decades until the ERA gained widespread support in the 1970s.⁹ They maintained critical roles, supporting the ERA in schools, co-authoring articles about the ERA's impact (later cited by Congress),¹⁰ testifying before Congress about sex-based discrimination in education,¹¹ and serving on presidential task forces that recommended ratification.¹²

In 1972, Representative Elizabeth Holtzman, a vocal ERA proponent, became the then-youngest woman elected to Congress at 31. She defeated 84-year-old Emanuel Celler, then the most senior House

Delegation, Consisting Principally of Western Women, Saw President Coolidge and Asked His Aid for the Equal Rights Amendment Now Pending In Congress, Library of Congress (July 1927), <https://bit.ly/3hDJAKW>.

⁹ See Jane Mansbridge, *Why We Lost the ERA* 8–10 (1986) (discussing support for movement from 1920s through 1970s, particularly among Republicans); see, e.g., 79 Cong. Rec. 9305 (July 18, 1946) (Sen. Guffey of Pennsylvania) (listing association for graduate students pursuing business degrees and National Association of Colored Women “[a]mong the national organizations endorsing the amendment”).

¹⁰ See 92 Cong. Rec. 35032 (Oct. 5, 1971) (Sen. Bayh of Indiana); 98 Cong. Rec. 32644 (Nov. 15, 1983) (Sen. Garn of Utah).

¹¹ 92 Cong. Rec. 35785 (Oct. 12, 1971) (Rep. Edwards of California).

¹² President's Task Force on Women's Rights and Responsibilities, *A Matter of Simple Justice* (Apr. 1970), <https://bit.ly/3fwruIN>.

member, who had opposed the Amendment since its introduction.¹³ Representative Holtzman presided over hearings in the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights and worked with Republican Margaret Heckler to establish a bipartisan Congresswomen's Caucus, which organized in support of the Amendment.¹⁴ When the House voted on the ERA deadline extension in 1978, every woman in the House supported it.¹⁵

Young people have also supported the ERA by participating in advocacy groups and public demonstrations. In 1971, 33-year-old Dorothy Pitman Hughes co-founded the Women's Action Alliance and toured the country with Gloria Steinem to "galvanize grassroots support for the movement and to help establish feminism as intersectional and mainstream."¹⁶ In 1973, 26-year-old Margaret Sloan co-founded the

¹³ Julie C. Suk, *We the Women: The Unstoppable Mothers of the Equal Rights Amendment* at 114–15 (2020).

¹⁴ U.S. House of Representatives, *Organizational Efforts*, <https://bit.ly/3hBtG3C> (last visited Jan. 7, 2022).

¹⁵ Julie C. Suk, *supra*, at 114–15.

¹⁶ Dorothy Pitman Hughes, Speech to U.S. Naval Academy (May 4, 1972), <https://bit.ly/2AHk5Yj>; *Women's Liberation, Recovering Democracy Archives*, <https://bit.ly/2Axgg89> (last visited Jan. 7, 2022); Jennifer

National Black Feminist Organization, which also supported ratification.¹⁷

On August 26, 1970, the National Organization for Women (“NOW”) organized the Women’s Strike for Equality.¹⁸ Tens of thousands marched for equality, including college and high school students, and intergenerational families—grandmothers, mothers, and daughters alike.¹⁹ In 1971, thousands of young women marched in New York to “press their demands for equality with men in every aspect of American life.”²⁰ And in 1975, women marched in New York for International Women’s Day, demanding ratification. Observers noted that the march was “mostly” attended by “exuberant young people,” chanting “E.R.A., All

Baumgardner & Amy Richards, *Manifesta: Young Women, Feminism, and the Future* at 74 (2010).

¹⁷ Jael Silliman et al., *Undivided Rights: Women of Color Organizing for Reproductive Justice* 63 (2d ed. 2016); Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Movement* 196 (2011).

¹⁸ Sascha Cohen, *The Day Women Went on Strike*, TIME (Aug. 26, 2015), <https://bit.ly/30L8T7H>.

¹⁹ Warren K. Leffler, *Women’s Strike Day, 1970*, U.S. News & World Report Magazine/Library of Congress (Aug. 26, 1970), <https://bit.ly/2YB4hOM>; Linda Charlton, *Women March Down Fifth in Equality Drive*, N.Y. Times (Aug. 27, 1970), <https://nyti.ms/3hz63bR>.

²⁰ Grace Lichtenstein, *6,000 March on Fifth Avenue to Protest Sex Bias*, N.Y. Times (Aug. 27, 1971), <https://nyti.ms/30NL3Z1>.

the Way.”²¹ In 1978, 100,000 people and 300 organizations joined NOW’s March for Equality in Washington, D.C., including the American Association of University Women and Girl Scouts of America.²²

Unsurprisingly, a 1975 Gallup poll indicated that the ERA garnered greatest support from young people: over two-thirds of people under 30 supported the Amendment, compared with 51 percent of people over 50.²³ In the 1970s, high school and college students joined long-time members of the women’s movement to pack the House during debate on the ERA.²⁴ A decade later, NOW “conduct[ed] campaigns on 450 campuses to increase participation.”²⁵ By the 1990s, students in 12

²¹ Judy Klemesrud, *March and Rally Celebrate First International Women’s Day*, N.Y. Times (Mar. 9, 1975), <https://nyti.ms/30P8EZ6>.

²² Leslie Bennetts, *Supporters of the Equal Rights Amendment Gathering for March in Washington Sunday*, N.Y. Times (July 7, 1978), <https://nyti.ms/30OdtC7>.

²³ Nadine Brozan, *58% in Gallup Poll Favor Equal Rights*, N.Y. Times (Apr. 10, 1975), <https://nyti.ms/2Y5kiNY>.

²⁴ Eileen Shanahan, *Equal Rights Amendment Passed by House, 354–23*, N.Y. Times (Oct. 13, 1971), <https://nyti.ms/3e714Nm>.

²⁵ Nadine Brozan, *NOW at 20: Reassessment in a New Era*, N.Y. Times (Dec. 1, 1986), <https://nyti.ms/2zEenpJ>.

States had created high school chapters of NOW.²⁶ Members of NOW referred to these 1990s “high school feminists as ‘E.R.A.’s babies’—daughters of women who were on the frontlines.”²⁷

Most recently, young activists, like *amici*, working in coalitions of people of different genders, gender identities, sexual orientations, religions, races, and ethnicities, supported ratification by the last three States.

In Nevada, Senator Pat Spearman—a Black former pastor, military veteran, and first openly gay member of the Nevada legislature—co-led the effort for ratification.²⁸ She was joined by the bill’s co-sponsor, Yvanna Cancela, a daughter of Cuban immigrants who began her political career as an organizer of immigrant workers, and became the youngest woman in the Nevada Senate.²⁹

²⁶ Melinda Henneberger, *In the Young, Signs That Feminism Lives; Piqued by High School Harassment*, N.Y. Times (Apr. 27, 1994), <https://nyti.ms/2N3g2rR>.

²⁷ *Id.*

²⁸ Fabiola Cineas, *The Equal Rights Amendment May Have Found Its Moment*, New Republic (Jan. 16, 2020), <https://bit.ly/2YKMsgp>.

²⁹ Carrie N. Baker, *Nevada Says ERA Yes*, Ms. Magazine (June 12, 2017), <https://bit.ly/2Ayk74T>; Yvanna Cancela, *About Yvanna* (2019), <https://bit.ly/30MAe9o>.

Similarly, a young and diverse coalition of legislators led the charge in Illinois and Virginia. Christian Mitchell, a Black, 32-year-old Illinois state representative, was “critical in the fight to pass ERA,” as was Representative Juliana Stratton, a Black woman who now serves as Illinois’s lieutenant governor.³⁰ In Virginia, leading advocates included “lawmakers like [Jennifer] Carroll Foy, Hala Ayala, Jennifer McClellan, all women of color; and Danica Roem, the first openly transgender person seated in a state legislature.”³¹

These legislators were buoyed by support from young activists, including *amici* and peer grassroots organizations,³² who represent a broader, growing movement of youth who overwhelmingly support

³⁰ Bernard Schoenburg, *Rep. Christian Mitchell Named Interim Executive Director of State Democratic Party*, State Journal Register (July 10, 2018), <https://bit.ly/2YFBLM2>; Bill Chappell, *One More to Go: Illinois Ratifies Equal Rights Amendment*, NPR (May 31, 2018), <https://n.pr/3hzctrw>.

³¹ Fabiola Cineas, *supra*.

³² *Virginia, We’ve Made History*, VARatifyERA, <https://varatifyera.org/> (last visited May 5, 2020); *VARatifyERA: Election Result Good News for Women, Girls Across Virginia*, Augusta Free Press (Nov. 5, 2019), <https://bit.ly/2Bc2tni>.

ratification.³³ The coalition's devotion to an inclusive vision of gender equality rekindled the ratification fight.

II. The ERA Will Help Advance Gender Equality for Young People.

Gender-based inequalities persist today in access to equal education and economic opportunities and freedom from gender-based violence. The ERA would advance interests important to young people, like *amici*, both as a vehicle for substantive change and as a symbol of equality.

A constitutional prohibition against denial or abridgment of equal rights on the basis of sex will serve as an important structural backstop against backsliding on gender equality. First, the Amendment will reinforce and strengthen the suspect nature of legal sex-based categorizations,³⁴ enhancing the ability to bring challenges to

³³ See also Yellow Roses, <http://theyellowrosesera.org> (last visited Apr. 16, 2020); *Gloria Steinem in Conversation With Feminist Activists The Yellow Roses on the Equal Rights Amendment*, Teen Vogue (Sept. 6, 2017), <https://bit.ly/2YJEYdd>; Kathy Frankovic, *Equal Rights Amendment: Ratify Now or Start Over?*, YouGov (Feb. 21, 2020), <https://bit.ly/3hvXezw>.

³⁴ See, e.g., Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 Colum. J. Gender & L. 419, 432 (2008).

discriminatory laws and practices.³⁵ Second, a constitutional amendment will be more difficult to undermine than legislation.³⁶ As then-law professor Ginsburg wrote, “[i]n the event of legislative default, the courts will have an unassailable basis for applying the bedrock principle: All men and all women are created equal.”³⁷ Third, the ERA will empower Congress to take additional steps to enforce the prohibition against denial of equal rights based on sex. Rather than acting via piecemeal legislation,³⁸ the Amendment will allow Congress to pass more robust protections for gender equality, which need not be limited to

³⁵ Some scholars argue that the taxes on menstrual hygiene violate the Equal Protection Clause. See Erwin Chemerinsky & Jennifer Weiss-Wolf, *Taxing Tampons Isn't Just Unfair, It's Unconstitutional*, L.A. Times (July 11, 2019), <https://lat.ms/2UQTI96>. This argument would be strengthened under the Equal Rights Amendment. Martha F. Davis, *supra*, at 419, 432 (legal challenges under strict scrutiny have a nearly 30 percent higher chance of success than those under intermediate scrutiny).

³⁶ To repeal an amendment, another constitutional amendment must be ratified. See, e.g., U.S. Const. amend. XXI (repealing the Eighteenth Amendment).

³⁷ Ruth Bader Ginsburg, *The Equal Rights Amendment is the Way*, 1 Harv. Women's L.J. 19, 21 (1978).

³⁸ See, e.g., *United States v. Morrison*, 529 U.S. 598, 617, 627 (2000) (invalidating the civil remedy provision in the Violence Against Women Act because Congress exceeded its authority under the Commerce and Equal Protection clauses).

cisgender, heterosexual women. An inclusive prohibition “should prohibit denial of equal rights to individuals of all gender identities and sexual orientation,”³⁹ thus providing a foundation to build a future of equal opportunity.

Moreover, the Amendment will serve an expressive function. Much like the Founders elevated the rights to freedom of speech and religion in the First Amendment, the ERA will enshrine gender equality among our nation’s highest values. It will send the message to our nation’s young people that women beyond the gender binary are equal members of society.

A. The ERA Will Advance Equal Opportunity in Education.

Gender inequality in American education dates back to before our country’s founding. Prominent women during the Revolutionary War, like Abigail Adams, advocated for equal education of girls.⁴⁰ During the 1970s and 1980s, eliminating gender-based discrimination in education

³⁹ See, e.g., *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (holding that an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII).

⁴⁰ Lisa Moore et al., “Letter to John Adams June 30, 1778,” in *Transatlantic Feminisms in the Age of Revolutions* 168 (2012).

was a major focus of congressional debate on the ERA.⁴¹ As Representative Bella Abzug of New York explained in 1971, sex discrimination is “so pervasive in our every level of educational system,” “shap[ing] the aspirations of young girls when their personalities and expectations are most malleable.”⁴²

These concerns still ring true today. Archaic gender-based stereotypes continue to hinder access to meaningful education for girls and LGBTQIA+ youth, like *amici*. For example, some prominent education advocates still rely on gender-based stereotypes when training public school teachers, pigeonholing young people and creating self-fulfilling prophecies.⁴³ A 2011 study found that girls tend to have more

⁴¹ See, e.g., 92 Cong. Rec. 35312 (Oct. 6, 1971) (Rep. Abzug of New York) (“Females first learn in the classroom that they can aspire to no better than second-class citizenship. . . . The formative influence on young minds of societal expectations cannot be exaggerated.”); 98 Cong. Rec. 32672 (Nov. 15, 1983) (Rep. Hall of Indiana) (“Boys are taught to be leaders and achievers; girls are taught to be mothers, housewives, secretaries and receptionists.”).

⁴² 92 Cong. Rec. 35312.

⁴³ See ACLU, *Boys’ Brains Vs. Girls’ Brains: What Sex Segregation Teaches Students*, <https://bit.ly/3e8tXsL>; ACLU, *Preliminary Findings of ACLU: “Teach Kids, Not Stereotypes” Campaign* (2012), <https://bit.ly/2N6u7VE>; Helen Thomas, *Girls Here, Boys There*, Greensboro News & Record (June 22, 2002), <https://bit.ly/3JHBE99>

negative attitudes about their capabilities in math because of parents' and teachers' gender-biased attitudes, which play a critical role in performance and pursuit of math-related careers.⁴⁴ And although women's participation in higher education and the work force has increased significantly over the last 100 years, participation in STEM subjects and careers remains disproportionately low.⁴⁵ The ERA would empower Congress to remedy unequal opportunities in this area and communicate to students their equal worth and potential.

Outdated gender-based stereotypes also are embodied in laws and policies in schools nationwide.⁴⁶ For example, ten States have adopted

(“When the government promotes separate schools based on gender, it raises serious concerns about educational equality.”).

⁴⁴ Elizabeth A. Gunderson et al., *The Role of Parents and Teachers in the Development of Gender-Related Math Attitudes*, 66 *Sex Roles* 153, 153 (2012).

⁴⁵ See AAUW, *The STEM Gap: Women and Girls in Science, Technology, Engineering and Math*, <https://bit.ly/3daTFeJ>.

⁴⁶ School dress codes also perpetuate harmful gender stereotypes and undermine equal access to education. Some schools still require female students to wear skirts; at least one such policy is the subject of ongoing litigation. See *Peltier v. Charter Day Sch., Inc.*, 8 F.4th 251 (4th Cir. 2021) (reversing district court, upholding school dress code), *reh'g en banc granted*, No. 20-1001 (L), 2021 WL 4892153 (4th Cir. Oct. 19, 2021). Other schools enforce mandatory skirt lengths, ban shirts that show collarbone, and/or prohibit hairstyles often worn by students of color,

laws restricting participation in school sports based on the sex listed on a student's birth certificate.⁴⁷ Even more States may follow: as of November 2021, 27 States have introduced similar regulations.⁴⁸

These laws are grounded in harmful stereotypes about gender and can have detrimental effects on a student's wellbeing, which is particularly relevant to high school and college students like *amici*. Participating in sports programs helps a student develop personal connections, improve health, expand community networks, and improve

among other gender-biased restrictions. *See, e.g.*, Brenda Álvarez, Nat'l Educ. Ass'n, *Girls Fight Back Against Gender Bias in School Dress Codes* (Jan. 6, 2016), <https://bit.ly/3zrhWd5>. When schools enforce these dress codes, it is often to the detriment of a girl's ability to learn. *See* Nat'l Women's Law Ctr., *Dress Coded: Black Girls, Bodies, and Bias in D.C. Schools* (2018), <https://bit.ly/3eSSgwx>. Students are pulled from class, sent home, or even suspended for violating school dress codes. *See* Brenda Álvarez, *supra*.

⁴⁷ *See* Adriana Rezal, *States Restricting How Transgender Students Play Sports*, U.S. News (Dec. 1, 2021), <https://www.usnews.com/news/best-states/articles/2021-12-01/these-states-restrict-how-transgender-students-participate-in-school-sports>.

⁴⁸ *See id.* Even in States without these restrictive laws, bans on trans students using locker rooms aligned with their gender identity may discourage or prevent trans students from playing sports. *See* Joseph Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* at 40 (2020), https://www.glsen.org/sites/default/files/2020-10/NSCS-2019-Full-Report_0.pdf.

academic achievement.⁴⁹ For trans students, who are at greater risk of feeling isolated, sports offer a vital opportunity to connect with other students.⁵⁰ Laws that prevent trans students from joining a team consistent with their gender identity deny them an equal educational experience and further underscore the urgent need for the ERA.

Inability to access menstrual hygiene products poses another barrier to equal educational opportunities. Only four States require public schools to provide menstrual products.⁵¹ A recent study found that nearly 13 percent of girls missed school, nearly 24 percent left school

⁴⁹ See, e.g., Kelsey Logan & Steven Cuff, *Organized Sports for Children, Preadolescents, and Adolescents*, 143(6) *Pediatrics* 1, 4–8 (2019), <https://pediatrics.aappublications.org/content/pediatrics/143/6/e20190997.full.pdf>; see Ryan D. Burns et al., *Sports Participation Correlates with Academic Achievement: Results from a Large Adolescent Sample within the 2017 U.S. National Youth Risk Behavior Survey*, 127(2) *Perceptual & Motor Skills* 448, 448–67 (2020).

⁵⁰ See Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 *Seton Hall J. Sports & Ent. L.* 1, 48 (2011).

⁵¹ See ACLU, *The Unequal Price of Periods: Menstrual Equity in the United States* at 6 (2019), <https://bit.ly/37FeJZB>.

early because they lacked access to menstrual hygiene products, and over 17 percent reported a negative effect on their ability to learn.⁵²

Marginalized students often are most harmed by these barriers. For many low-income menstruating students, tampons or pads—at \$7–10 per box—are unaffordable. A recent study in schools on the Pine Ridge Indian Reservation found that the most economically disadvantaged students might miss as much as a week of school each month.⁵³ This lost instruction time has a long-term effect on students' education.

These barriers to access are compounded by existing structures of inequality in federal assistance programs and regulations. Medicaid, federal food stamps, and the Special Supplemental Nutrition Program for Women, Infants, and Children do not cover menstrual products, instead grouping them as prohibited purchases along with cosmetics, alcohol, and

⁵² Christopher A. Cotropia, *Menstruation Management in United States Schools and Implications for Attendance, Academic Performance, and Health*, 6 *Women's Reprod. Health* 289, 289 (2019).

⁵³ See Eleanor Goldberg, *Why Many Native American Girls Skip School When They Have Their Periods*, HuffPost (updated Aug. 29, 2017), <https://bit.ly/2N1yMrRsu>.

tobacco.⁵⁴ Moreover, 34 States tax menstrual products, while other necessities, such as groceries, or even non-necessities, like lip balm in Virginia, or Mardi Gras beads in Louisiana, are tax-free.⁵⁵

B. The ERA Will Further Economic Equality.

Equal opportunity in the workplace is another core goal of the ERA movement. Members of Congress have focused on how the ERA would reduce employment discrimination and advance equal pay.⁵⁶ In 1982, Representative William Ratchford of Connecticut explained, “[t]oday in the workplace, women across the Nation earn only 59 cents for each dollar men earn in the same jobs.”⁵⁷ Nearly 40 years later, women in the

⁵⁴ See U.S. Dep’t of Agric., Facts About SNAP, <https://www.fns.usda.gov/snap/facts> (last visited Jan. 7, 2022).

⁵⁵ See Tax Free Period, Interactive Map, <https://www.taxfreeperiod.com/home> (last visited Jan. 7, 2022); Eleanor Goldberg, *supra*. Some states have eliminated the so-called “pink tax” in recent years. See, e.g., Aaron C. Davis, *The ‘Tampon Tax’ Fight has Reached D.C.*, Wash. Post (Apr. 4, 2016), <https://wapo.st/2BdFPeo>. New York previously exempted medical necessities, including Viagra and Rogaine, but not menstrual products. See Nicole Puglise, *New York Lifts ‘Tampon Tax’: ‘It Is a Matter of Social and Economic Justice’*, Guardian (July 21, 2016), <https://www.theguardian.com/us-news/2016/jul/21/new-york-lifts-tampon-tax>.

⁵⁶ See, e.g., 97 Cong. Rec. 16118 (July 14, 1982) (Rep. Ratchford of Connecticut).

⁵⁷ *Id.*

United States are paid on average 82 cents for each dollar paid to men.⁵⁸ Although the pay gap has narrowed since 1980, it has plateaued for the last 15 years.⁵⁹

The persistent pay gap, especially among women of color, evinces the need for constitutional protection. Today, Black women are paid on average 63 cents for every dollar paid to white men; Native American women are paid 60 cents to the dollar; and Latina women are paid 55 cents to the dollar.⁶⁰ The ERA would help reduce this continuing wage gap.⁶¹ Diverse advocates have long championed the ERA's protections—such as Shirley Chisholm, Patsy Takemoto Mink, Henrietta Johnson, Patricia Saiki, Barbara Jordan, Walter Fauntroy, and many others—who understood that “[d]iscrimination against women in our country is

⁵⁸ Nat'l P'ship for Women & Families, *Fact Sheet: America's Women and the Wage Gap* at 1 (Mar. 2021), <https://bit.ly/3fKa5wv>.

⁵⁹ Amanda Barroso & Anna Brown, *Gender Pay Gap in U.S. Held Steady in 2020*, (Mar. 25, 2020), <https://pewrsr.ch/2USizJX>.

⁶⁰ See Nat'l P'ship for Women & Families, *supra*, at 1.

⁶¹ Christopher Brown, *100 Years After Women Earned Right to Vote, Will Va. Legislators Pass Equal Rights Amendment?*, WHSV.com (Dec. 11, 2019), <https://bit.ly/37DncfS> (“[A]dding the amendment to the Constitution would be the anchor when it comes to passing equal pay legislation.”).

compounded by the decadence of racism,” and that the ERA provides a vital opportunity to uplift minority women.⁶²

LGBTQIA+ individuals are also paid less than their heterosexual and cisgender counterparts. Earnings for male-to-female transgender workers fall by nearly one-third after gender transitions.⁶³ Similarly, women in same-sex couples without a college degree and disabled individuals are at increased likelihood of living in poverty compared to women in married, opposite-sex couples and men.⁶⁴ These pay gaps are particularly pronounced for non-white, same-sex couples.⁶⁵ As transgender legislator and ERA advocate Danica Roem explained, “[t]he

⁶² 98 Cong. Rec. 32790 (Nov. 15, 1983) (Del. Fauntroy of the District of Columbia); *see also* 92 Cong. Rec. 35314 (Oct. 6, 1971) (Rep. Shirley Chisholm of New York); Zoë Read, *Equal Rights Amendment One Step Closer in Delaware*, WHYY.org (Jan. 10, 2019), <https://bit.ly/3ecYaqp>; *Patricia F. Saiki Papers*, University of Hawai‘i at Mānoa, <https://bit.ly/2Y77h6m> (last visited Jan. 7, 2022); Nat’l Org. for Women, *Chronology of the Equal Rights Amendment, 1923–1996*, <https://bit.ly/37O5fLX> (noting that every Black legislator in Florida, Illinois, North Carolina, and Oklahoma voted for ratification in 1982).

⁶³ Catherine Rampell, *Before That Sex Change, Think About Your Next Paycheck*, N.Y. Times (Sept. 25, 2008), <https://is.gd/bPqQGw>.

⁶⁴ Ctr. for Am. Progress, *Paying an Unfair Price: The Financial Penalty for LGBT Women in America* at 4 (2015), <https://bit.ly/3d7ORXl>.

⁶⁵ *See id.*

word ‘women’ is conspicuously absent from the ERA, which instead forbids discrimination on the basis of ‘sex.’ . . . It holds ample potential to protect all marginalized genders—binary and non-binary alike—and sexual minorities.”⁶⁶

These numbers are not occupational choices. Lower pay for women exists across all industries, regardless of education level or parental status.⁶⁷ And the pay gap only widens with age.⁶⁸

Indeed, economic challenges facing women are often greater because women continue to confront societal gender stereotypes, resulting in greater responsibility for household tasks than men.⁶⁹ More than 75 percent of caregivers are women, who already spend significantly more time on caretaking than men.⁷⁰

⁶⁶ Danica Roem & Kate Kelly, *The Equal Rights Amendment Can’t Be Defeated by Anti-Trans Scare Tactics*, Teen Vogue (Jan. 16, 2020), <https://bit.ly/2N7xFXK>.

⁶⁷ Nat’l P’ship for Women & Families, *supra*.

⁶⁸ See Amanda Barroso & Anna Brown, *supra*.

⁶⁹ See Sarah Thébaud et al., *Good Housekeeping, Great Expectations: Gender and Housework Norms*, Sage J. (2021), <https://doi.org/10.1177/0049124119852395>.

⁷⁰ Courtney Connley, *How Women Could Be Uniquely Impacted by the Coronavirus*, CNBC Make It (Mar. 18, 2020), <https://cnb.cx/2Y9P34r>; see Shruti Jolly et al., *Gender Differences in Time Spent on Parenting and*

Recent events have highlighted how easily the economic gains made by women can be reversed. The devastating economic effects of the COVID-19 pandemic have been felt especially by women, who make up 85 percent of nurses, 75 percent of primary caregivers, and 62 percent of minimum and low-wage workers.⁷¹ The industries hit hardest by the pandemic, namely leisure, hospital, education, and healthcare, are “disproportionately nonwhite and female.”⁷²

A recent study found that “women, particularly those without a college degree, suffered more job losses than men.”⁷³ At the same time,

Domestic Responsibilities by High-Achieving Young Physician-Researchers, Ann. Intern. Med. (2014), <https://bit.ly/37DWELJ>; Aliya Hamid Rao, *Even Breadwinning Wives Don't Get Equality at Home*, The Atlantic (May 12, 2019), <https://bit.ly/2N56TPz>.

⁷¹ Marianne Schnall, *Putting A Gender Lens On COVID-19: Thought Leaders Weigh In*, Forbes (Apr. 17, 2020), <https://bit.ly/2NcccMZ>.

⁷² Alisha Haridasani Gupta, *For the First Time in Decades, This Recession Is a 'Shecession'*, N.Y. Times (May 9, 2020), <https://nyti.ms/37DX4Sj>; Anu Madgavkar et al., McKinsey Global Inst., *COVID-19 and Gender Equality: Countering the Regressive Effects* (July 15, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects> (“[W]omen’s jobs are 1.8 times more vulnerable to [the COVID-19] crisis than men’s jobs.”).

⁷³ Jenness Miller, *COVID-19 Has Hit Women Hard, Especially Working Mothers*, USC News (June 18, 2020), <https://news.usc.edu/171617/covid-19-women-job-losses-childcare-mental-health-usc-study/>.

when schools and daycares closed, women, including those in heterosexual, dual-career couples, disproportionately took on caretaker roles.⁷⁴ These effects are particularly pronounced for women of color, who have been disproportionately disadvantaged by the pandemic.⁷⁵

C. The ERA Will Help Curb Gender-Based Violence.

Promoting gender equality has been significant to efforts in preventing gender-based violence.⁷⁶ Indeed, constitutionally enshrined equality is critical in light of the scores of gender-based violent incidents

⁷⁴ Marianne Schnall, *supra*; Jenness Miller, *supra* (finding “one-third of working mothers in two-parent households reported they were the only ones providing care for their children, compared to one-tenth of working fathers”); McKinsey & Co., *Seven Charts That Show COVID-19’s Impact on Women’s Employment* (Mar. 8, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/seven-charts-that-show-covid-19s-impact-on-womens-employment>; *see also* McKinsey & Co., *Women in the Workplace 2021*, Ex. 4, <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace> (reporting that women are more burned out than men in the workforce).

⁷⁵ Jocelyn Frye, Ctr. for Am. Progress, *On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color* (Apr. 23, 2020), <https://ampr.gs/2N8qLl0>.

⁷⁶ WHO, *Promoting Gender Equality to Prevent Violence Against Women* at 4 (2009), https://www.who.int/violence_injury_prevention/violence/gender.pdf (confronting entrenched beliefs and cultural norms stemming from gender-based inequities is thought to reduce gender-based violence).

in schools, among transgender individuals, and in connection with the COVID-19 pandemic.

Although past decades have seen passage of important legislation such as Title IX, sexual harassment and assault continue to stand in the way of female students, cisgender and transgender alike, both at the grade school and university levels. Fifty-six percent of girls in grades 7–12 have reported experiencing sexual harassment in school,⁷⁷ and one in nine female high school students have reported experiencing dating violence.⁷⁸ In the 2015–2016 school year alone, more than 40 percent of reported harassment incidents in K–12 schools were gender-based; 63 percent of those targeted girls.⁷⁹ At the same time, 75 percent of transgender youth reported feeling unsafe at school,⁸⁰ and 85 percent of

⁷⁷ Catherine Hill & Holly Kearl, AAUW, *Crossing the Line: Sexual Harassment in Schools* at 2 (2011), <https://bit.ly/3fvvd9l>.

⁷⁸ AAUW, *Sexual Misconduct in Schools*, <https://bit.ly/3fuflUx> (last visited Jan. 7, 2021).

⁷⁹ Office for Civil Rights, U.S. Dep’t of Educ., *2015–16 Civil Rights Data Collection: School Climate and Safety* at 5, 7 (revised May 2019), <https://bit.ly/2URxUKD> [hereinafter U.S. Dep’t of Educ., *School Climate & Safety Data*].

⁸⁰ Nat’l Ctr. for Transgender Equality, *Issues: Youth & Students*, <https://bit.ly/2YEyH2J>; Human Rights Watch, *“Like Walking Through a*

LGBTQIA+ students in grades 6–12 reported verbal harassment.⁸¹ Indeed, transgender high school students have reported disproportionately higher rates of violence than their cisgender counterparts.

This trend continues in universities. In one survey, over 23 percent of female undergraduate students reported experiencing sexual assault,⁸² while another revealed that gender-nonconforming college students experienced the greatest incidence of sexual assault (19 percent) when compared to rates of reported assaults among cisgender females (17 percent) and males (4.4 percent).⁸³ What is more, one study has shown that even those designated to protect students on campus, such as school resource officers (*i.e.*, sworn law enforcement personnel employed by schools), have been arrested for committing sex-related crimes against

Hailstorm”: *Discrimination Against LGBT Youth in US Schools*, (Dec. 7, 2016), <https://bit.ly/2CbMENT>.

⁸¹ Nat’l Women’s Law Ctr., *The Next Generation of Title IX: Harassment and Bullying Based on Sex* (June 2012), <https://bit.ly/3fpNtku>.

⁸² U.S. Dep’t of Educ., *School Climate & Safety Data* at 5, 7.

⁸³ Hayley Munguia, *Transgender Students Are Particularly Vulnerable To Campus Sexual Assault*, *FiveThirtyEight* (Sept. 22, 2015), <https://fivethirtyeight.com/features/transgender-students-are-particularly-vulnerable-to-campus-sexual-assault/>.

female adolescents, with 56 percent of these reported crimes occurring with students at those officers' schools.⁸⁴

The effects of sexual assault and harassment on victims endure beyond the initial trauma. Victims of sexual assault and harassment in grade school are more likely to miss class, get lower grades, or drop out.⁸⁵ Similarly, sexual assault before entering college correlates with lower college GPAs, while sexual assault or harassment during college correlates with lower academic outcomes, lower academic interest, and higher stress.⁸⁶

In supporting the ERA in 1982, then-Representative Jerry Brown of California explained, “women have begun to understand just how vulnerable they still are as nearly every program, every advance, has been attacked or weakened,” including the Women’s Education Equity

⁸⁴ Philip Matthew Stinson Sr. & Adam M. Watkins, *The Nature of Crime by School Resource Officers: Implications for SRO Programs*, <https://journals.sagepub.com/doi/pdf/10.1177/2158244014521821>.

⁸⁵ Jodi Lipson, AAUW Educ. Found., *Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School* at 43 (2001), <https://bit.ly/2UUaHrk>.

⁸⁶ Victoria Baynard et al., *Academic Correlates of Unwanted Sexual Contact, Intercourse, Stalking, and Intimate Partner Violence: An Understudied but Important Consequence for College Students*, 35(21–22) *J. Interpers. Violence* 4375, 1, 3, 11 (2020), <https://bit.ly/2CeAyDQ>.

Act, Title IX family planning, and the ERA.⁸⁷ Representative Brown's statement translates readily to the present day. Despite the prevalence of sexual assault in schools, the federal government issued regulations within the past few years weakening schools' obligations to address sexual misconduct under Title IX.⁸⁸ It also took steps to rescind federal guidance that had articulated protections for transgender students under Title IX.⁸⁹ Although some of these efforts have since been reversed, the notion that gender-based protections can be stripped away underscores the need for constitutional security.

The correlation between gender-based inequality and violence has also played out among States. In 2015, a national survey of transgender participants reported that 45 percent had been attacked once, 25 percent twice, 13 percent three times, and 16 percent four or more times—all

⁸⁷ 97 Cong. Rec. 16120 (July 14, 1982) (Rep. Brown of California).

⁸⁸ U.S. Dep't of Educ., *Summary of Major Provisions of the Department of Education's Title IX Final Rule and Comparison to the NPRM* (May 6, 2020), <https://bit.ly/3fwUFLL>.

⁸⁹ See Dear Colleague Letter, U.S. Dep't of Educ. (Feb. 22, 2017), <https://bit.ly/38bssI4>.

within the span of one year.⁹⁰ And just as violence against transgender individuals—particularly against those of color⁹¹—has risen over the last few years, States have recognized legal defenses that exacerbate, rather than reject, gender-based violence. Indeed, the once-disdained “gay panic defense” has found new life in the “trans panic defense,” whereby a defendant charged with murdering a transgender victim claims that discovery of the victim’s assigned sex at birth caused the defendant to panic and lose self-control.⁹² Some defendants have even invoked this defense to support claims of temporary insanity, diminished capacity, and self-defense.⁹³ The failure of 35 States to ban the trans panic defense further undermines the illegitimacy of gender-based violence.⁹⁴

⁹⁰ Cynthia Lee, *The Trans Panic Defense Revisited*, 57 Am. Crim. L. Rev. 1411, 1423 (2020).

⁹¹ Nat’l Ctr. for Transgender Equality, *The Report of the 2015 Transgender Survey* at 204 (2015), <https://perma.cc/Z6RK-LL6X> (explaining that Black and Latina transgender women, “were nearly four times as likely to report that they were attacked with a gun”).

⁹² Cynthia Lee, *supra*, at 1424–25.

⁹³ *Id.*

⁹⁴ Movement Advancement Project, *Gay/Trans Panic Defense Bans*, https://www.lgbtmap.org/equality-maps/panic_defense_bans (last visited Jan. 7, 2022).

The urgent need for the ERA to help thwart gender-based violence cannot be overstated in light of the COVID-19 pandemic. Over the last few years, millions have isolated at home, leading to a rise in reported partner violence. One study, which focused on effects of COVID-19, demonstrated that 74 percent of individuals who reported experiencing domestic violence were women.⁹⁵ Another study, based on patients at Brigham and Women's Hospital, showed that radiology scans and injuries consistent with domestic abuse from March to May 2021 exceeded totals for the same time period from 2018–2019 combined.⁹⁶ Indeed, rates of domestic violence skyrocket when viewed through the lens of marginalized communities. As explained by Erika Sussman, executive director of the Center for Survivor Advocacy and Justice: “While one in three white women report having experienced domestic violence [during the pandemic], the rates of abuse *increased dramatically*

⁹⁵ Clare E.B. Cannon et al., *COVID-19, Intimate Partner Violence, and Communication Ecologies*, 65(7) *Am. Behav. Sci.* 992, 998 (2021), <https://journals.sagepub.com/doi/pdf/10.1177/0002764221992826>.

⁹⁶ Jeffrey Kluger, *Domestic Violence Is a Pandemic Within the COVID-19 Pandemic*, *TIME* (Feb. 3, 2021), <https://time.com/5928539/domestic-violence-covid-19/>.

to about 50% and higher for those marginalized by race, ethnicity, sexual orientation, gender identity, citizenship status, and cognitive physical ability.”⁹⁷ That trend of increased violence in marginalized communities has been particularly borne by women and girls in the Asian American and Pacific Islander community, who have reported hate incidents 2.2 times as often as Asian American men during the pandemic.⁹⁸

These alarming trends of violence—whether in schools or in homes—underscore a clear point: cisgender and transgender girls are directly affected by social and legal norms that tolerate violence and gender stereotypes that continue those cycles of violence. And while there is no magic wand that can undo centuries of gender-based violence,

⁹⁷ *Id.* (emphasis added).

⁹⁸ Drishti Pillai, Aggie J. Yellow Horse, & Russell Jeung, *The Rising Tide of Violence and Discrimination Against Asian American and Pacific Islander Women and Girls*, https://stopaapihate.org/wp-content/uploads/2021/05/Stop-AAPI-Hate_NAPAWF_Whitepaper.pdf; see also Harmeet Kaur, *Fetishized, Sexualized and Marginalized, Asian Women Are Uniquely Vulnerable to Violence*, <https://www.cnn.com/2021/03/17/us/asian-women-misogyny-spa-shootings-trnd/index.html> (explaining how violence against Asian and Asian American women has been perpetuated by historical stereotypes that they are “submissive, hypersexual and exotic”).

the ERA, in both its enforcement mechanism and expressive function, places a significant weight on the scales of justice.

CONCLUSION

Young people have played a critical role in the movement for the ERA for more than a century. *Amici* remain leaders in the movement to certify the States' ratification of the Amendment. We stand on the shoulders of our predecessors, supporting the fight for an express constitutional guarantee of gender equality to show our nation's youth that women are equally valued members of American society.

Accordingly, the judgment of the district court should be reversed.

January 10, 2022

Respectfully submitted,

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Dated: January 10, 2022

/s/ Beth S. Brinkmann
Beth S. Brinkmann

CERTIFICATE OF SERVICE

I hereby certify that on the tenth day of January, 2022, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: January 10, 2022

/s/ Beth S. Brinkmann
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