

**(ORAL ARGUMENT NOT YET SCHEDULED)**

No. 21-5096

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In the  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Commonwealth of Virginia; State of Illinois; State of Nevada,  
Plaintiffs-Appellants,

v.

David Ferriero, in his official capacity as Archivist of the United States,  
Defendant-Appellee,

State of Alabama; State of Louisiana; State of Nebraska; State of South  
Dakota; State of Tennessee,

Intervenors for Defendant-Appellee.

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Appeal from the United States District Court  
for the District of Columbia  
Honorable Rudolph Contreras

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**AMICUS BRIEF OF MICHIGAN SUPPORTING  
PLAINTIFFS-APPELLANTS AND REQUESTING REVERSAL**

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Dated: January 10, 2022

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**CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW,  
AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

The parties to this appeal are the Plaintiffs-Appellants, the Commonwealth of Virginia, the State of Illinois, and the State of Nevada; Defendant-Appellant, David Ferriero, in his official capacity as Archivist of the United States; and Intervenor-Defendants-Appellees, the State of Alabama, the State of Louisiana; the State of Nebraska, the State of South Dakota, and the State of Tennessee.

The ruling under review is that of the United States District Court for the District of Columbia in *Virginia v. Ferriero, et al.*, 525 F. Supp. 3d 36 (DC Cir. 2021), issued March 5, 2021, granting Defendant Archivist's motion to dismiss for lack of jurisdiction. (Joint Appendix pp. 311–347.)

This case has not been before this Court or any other court except the district court. Undersigned counsel knows of no related cases.

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## **GLOSSARY OF ABBREVIATIONS**

ERA                      Equal Rights Amendment

NWP                     National Women's Party

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

Amicus, the State of Michigan, submits this brief under Circuit Rule 29 to support the plaintiff States of Virginia, Illinois, and Nevada in this appeal.

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<sup>1</sup>

A diverse coalition of lawmakers, activists, and ordinary citizens hopes our nation is poised to recognize that what was once the twentieth amendment has finally become 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.

Section 1 of 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

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<sup>1</sup> <https://www.loc.gov/item/93506765/> (photo); 2018 Alice Paul Institute, <https://www.equalrights amendment.org/toolkit/sm-post-griffiths-quote>

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.

Griffiths 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.<sup>2</sup> Since then, many women have stood on her shoulders, hoping to see her work come to fruition.

One such woman was the late Supreme Court Justice Ruth Bader Ginsburg, who, in 1978, 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.<sup>3</sup> Another is Carroll Foy, a member of the Virginia House of Delegates who recently 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.”

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<sup>2</sup> Former President Gerald Ford, who served with Griffiths in the House and supported her ERA campaign, also dubbed the ERA “a monument to Martha.” Emily George, *Martha W. Griffiths* 1, 168 (1982).

<sup>3</sup> <https://www.equalrightsamendment.org/pathstoratification>

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. Many women 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 by ordinary Americans<sup>4</sup>: 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.

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<sup>4</sup> 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>. And many mistakenly think the ERA is already a part of the Constitution. See Maya Salam, *What is the Equal Rights Amendment and Why Are We Talking About It Now?*, NYTimes, In Her Words, February 22, 2019, <https://www.nytimes.com/2019/02/22/us/equal-rights-amendment-what-is-it.html>

## 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 suit to have the United States District Court for the District of Columbia recognize the constitutional amendment as the 28th Amendment. *Commonwealth of Virginia v Ferriero*, Case No. 1:20-cv-242-RC, D.C. Cir. 2020. The complaint laments that “[f]or nearly 150 years, our Nation’s foundational document did not acknowledge the existence of women.” *Id.*

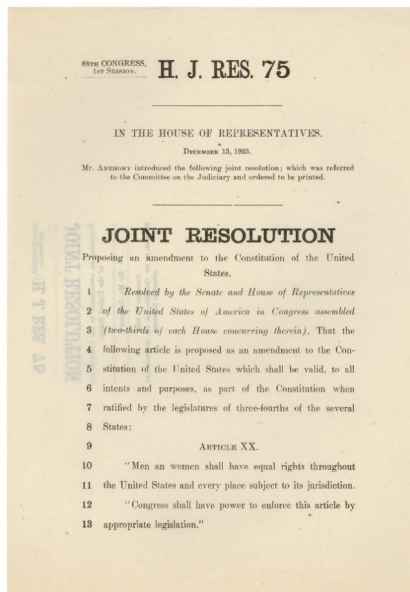
These three states now ask this Court to reverse the district court decision. Griffiths would have been elated with this request.

### **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. Indeed, it began in 1923, the year woman

suffrage leader Alice Paul<sup>5</sup> 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 citizens. ERA, *History of the Equal Rights Amendment*.<sup>6</sup> 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).

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<sup>5</sup> 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.

<sup>6</sup> <https://www.equalrightsamendment.org/history>

In 1927, the National Woman's Party traveled to Rapid City, South Dakota to ask President Coolidge to support the ERA.<sup>7</sup>



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 new wording was similar to the verbiage used in the Fourteenth

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<sup>7</sup> Library of Congress, <https://www.loc.gov/resource/mnwp.159003/>

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.<sup>8</sup> The Amendment was renamed the “Alice Paul Amendment.” ERA, *History of the Equal Rights Amendment*.<sup>9</sup>

Notably, in the early 1940’s both major political parties, Republicans and Democrats, included support for the ERA as part of their political platforms. *Id.*<sup>10</sup> Even so, the Amendment languished 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 Griffiths, a Michigan Democratic representative, to push the ERA through Congress. Elaine Woo, *Pioneering Politician Pushed ERA, Sex Bias Ban Through Congress*, LA Times, April 25, 2003.<sup>11</sup>

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

<sup>9</sup> <https://www.equalrightsamendment.org/history>

<sup>10</sup> <https://www.equalrightsamendment.org/history>

<sup>11</sup> <https://www.latimes.com/archives/la-xpm-2003-apr-25-me-griffiths25-story.html>

### C. Martha Griffiths' exceptional life.

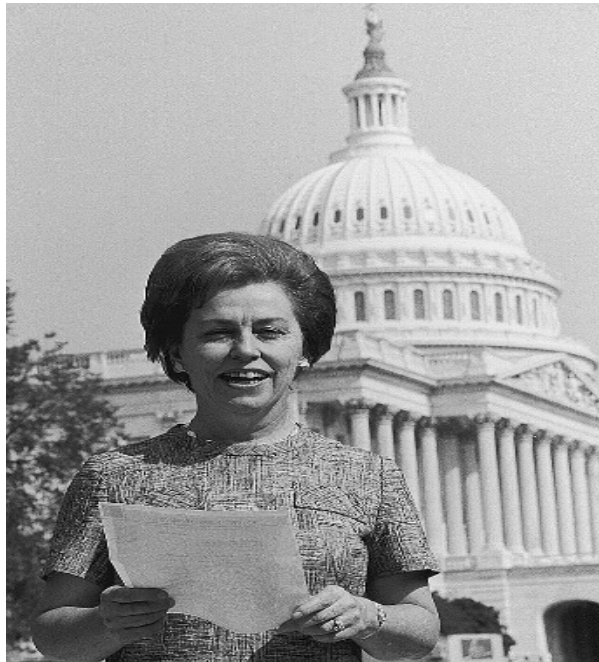
It was fitting that Griffiths played this role. She rose from humble beginnings, and it was her life circumstances—in particular, the struggles, foresight, and courage of the strong women in her life—that inspired her to pursue equal rights for women. She watched her mother take on extra jobs and take in boarders to pay for her daughter's college tuition—knowing that without an education her daughter would eventually be dependent on her future husband. George, *supra*, at 1, 3 (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<sup>12</sup>; George, *supra*, at 2.

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<sup>1212</sup> <https://history.house.gov/People/Detail/14160>



Griffiths received a BA in political science from the 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. Biographical Directory of the United States Congress; George, *supra*, at 5.



Griffiths (D-MI), Washington, D.C.<sup>13</sup>

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<sup>13</sup> Photograph by Warren K. Leffler, August 12, 1970, U.S. News & World Report Collection, Prints and Photographs Division, Library of Congress,  
[https://www.archives.gov/legislative/features/griffiths?\\_ga=2.43981606.209877662.1641244792-1811878576.1581628964](https://www.archives.gov/legislative/features/griffiths?_ga=2.43981606.209877662.1641244792-1811878576.1581628964)

Griffiths' 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 at the close of her career, 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.

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 Michigan's Detroit Recorder's Court before another run for Congress. This time, Griffiths succeeded and began her nearly 20 years of service in Congress. *Id.*

**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 when she pushed for sex discrimination to be added to Title VII of the 1964 Civil Rights Act, the landmark civil rights bill pertaining to racial discrimination. 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 Act. Democrat Howard Smith of Virginia, the chairman of the powerful Rules Committee, had been preparing to make his own sexual discrimination amendment to the bill, in hopes of making the bill so controversial as to derail the entire Act. Records of the U.S. House of Representatives, National Archives and Records Administration. Griffiths realized that Smith would easily bring 100 southern votes if he introduced the amendment on the floor, so she wisely held back on introducing the amendment herself. *Id.* When Smith made the argument in the well of the House, "Members erupted in laughter and jeers."<sup>7</sup> *Id.* 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 wasted no time in taking the floor to capitalize on the moment and make her case. “I presume,” she scolded her colleagues, “that if there had been any necessity to point out that women were a second–class sex, the laughter would have proved it.” Records of the U.S. House of Representatives, National Archives and Records Administration, Griffiths, Martha.<sup>14</sup> With that, the chamber fell silent. *Id.* The southern bloc ended up voting for the amendment and those votes, combined with Griffiths’ earlier efforts to line up votes, saw the measure passed and added to the Act—a testament to Griffiths’ persuasiveness. *Id.* The House and Senate eventually passed the Act and it was signed into law that year. *Id.*

Recently, the U.S. Supreme Court, in deciding a landmark Title VII case, emphasized the significance of the Act, noting the following: “In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964.” *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1737 (2020).

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<sup>14</sup> [https://history.house.gov/People/Listing/G/GRIFFITHS,-Martha-Wright-\(G000471\)/](https://history.house.gov/People/Listing/G/GRIFFITHS,-Martha-Wright-(G000471)/)

### **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.

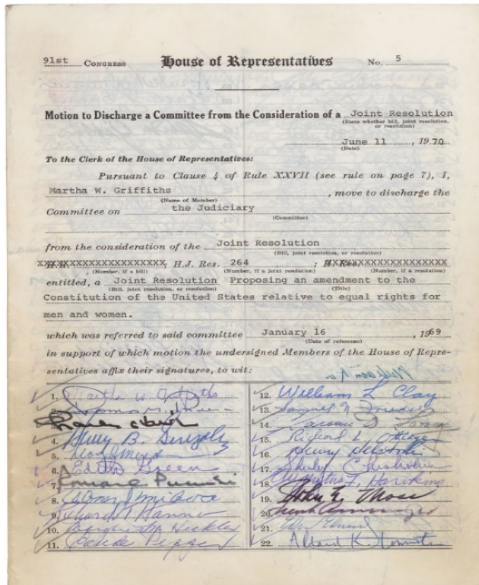
In 1969, as the fifteenth anniversary of women's suffrage drew near, the president of the National Woman's Party (NWP) approached Griffiths and asked her to sponsor the amendment. But Griffiths was convinced it would take more than NWP backing to convince Emmanuel Celler, then Chairperson of the House 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 the President's Commission on the Status of Women 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 filed a discharge petition to force the ERA out of the Judiciary Committee for a vote by the full House of Representatives. Records of the U.S. House of Representatives, National Archives and Records Administration, Griffiths, Martha. (Up until then, the ERA had never been presented to the full House.) The discharge petition is rarely used, as it requires signatures by a majority of House members. But Griffiths was plucky enough to use this parliamentary tactic. And when she delivered the discharge petition to the clerk of the House, she commented that it was “well past time” for the Supreme Court and 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). The petition passed overwhelmingly—332 to 22. George, *supra*, at 171–72.



Discharge petition,  
The National Archives

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.” To this 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*.<sup>15</sup>

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*

<sup>15</sup> <https://themoderatevoice.com/martha-griffithsmother-of-era-and-title-vii/>



*Continues*, Huffpost, updated Dec. 6, 2017.<sup>16</sup> 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.

#### **F. The ERA stalls as opposition mounts.**

At this point opposition to the ERA began to organize. *See* Blakemore, *supra*. Only eight states ratified in 1973, three in 1974, one in 1975, and none in 1976. And between 1972 and 1979, five states—Nebraska, Tennessee, Idaho,<sup>17</sup> Kentucky, and South Dakota—voted to rescind their ratification of the ERA. 2018 Alice Paul Institute.

But support mounted as well. 1977 saw the first congressionally funded National Women’s Conference in Texas. Two-thousand delegates, from every State, called for ratification of the ERA.<sup>18</sup>

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<sup>16</sup> [https://www.huffpost.com/entry/the-debate-over-the-era-c\\_b\\_3787109](https://www.huffpost.com/entry/the-debate-over-the-era-c_b_3787109)

<sup>17</sup> In a decision the U.S. Supreme Court later vacated as moot, an Idaho federal district court ruled that Idaho’s rescission effectively nullified its prior ratification and that the same was true for any other State that had properly certified its action of recission. *Idaho v. Freeman*, 529 F. Supp. 1107, 1150, 1154 (D.C. Idaho 1981); *Nat’l Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982); *Carmen v. Idaho*, 459 U.S. 809 (1982).

<sup>18</sup> *Chronology of the Equal Rights Amendment*, <https://now.org/resource/chronology-of-the-equal-rights-amendment-1923-1996>.



Martha Griffiths speaking at the 1977 Equal Rights Ratification Assembly, Nat'l Woman's Conference 11/18/19<sup>19</sup>

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, and since then has been reintroduced before *every* session of Congress. ERA, *History of the Equal Rights Amendment*.<sup>20</sup>

In March of 2017, Nevada became the 36th state to ratify. In 2018, Illinois became the 37th State. On January 27, 2020, the state of Virginia made history by becoming the 38th State to ratify the ERA.

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<sup>19</sup><https://www.docsteach.org/documents/document/griffiths-ratification-assembly>. Records of Temporary Committees, and Boards, Nat'l Archive identifier 7452294

<sup>20</sup> <https://www.equalrightsamendment.org/history>

## 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.<sup>21</sup> It is not surprising that

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

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 . . . 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 this.

She likewise understood the perils wrought by differing sets of values that relegated one sex to subordinate status. 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. Griffiths changed all those laws. Elaine Woo,

*Martha Griffiths, 91; Pioneering Politician Pushed ERA, Sex Bias Ban Through Congress, April 25, 2003.*<sup>22</sup>

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 Durocher 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, “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.

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

Griffiths was widely known as a champion of benefit equality for both sexes. 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. 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.<sup>23</sup> And sex discrimination has yet to garner strict scrutiny. *See Frontiero v. Richardson*, 411 U.S. 677 (1973) (determining that strict scrutiny should be applied to sex-based classification under the Equal Protection Clause, but only based on nonbinding plurality); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that classifications based on sex were subject to intermediate scrutiny).<sup>24</sup> Some, including the late Justice Scalia, have opined that the Equal Protection Clause does not even contemplate sex discrimination. *Equal Rights Amendment for Women*

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<sup>23</sup> 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., Vol. 94, Issue 2, Art. 10, p. 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.

<sup>24</sup> 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. Murphy, *supra*, at p. 946.

*Passed by Congress*, NYTimes: The Learning Network, March 22, 2012.<sup>25</sup>

In contrast, 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 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.<sup>26</sup>

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<sup>25</sup> <https://learning.blogs.nytimes.com/2012/03/22/march-22-1972-equal-right-amendment-for-women-passed-by-congress/>

<sup>26</sup> <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 reverse the decision of the United States District Court for the District of Columbia and declare that the Equal Rights Amendment has become the 28th Amendment to the U.S. Constitution.

Respectfully submitted,

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Dated: January 10, 2022

## CERTIFICATE OF COMPLIANCE

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

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I certify that on January 10, 2022, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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