



## Secretariat of Pro-Life Activities

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### The Equal Rights Amendment (ERA)

Catholic social teaching speaks very clearly and strongly about the equality of men and women based upon their equal dignity as children of God. “In creating [humans] ‘male and female,’ God gives man and woman an equal personal dignity.” (*Catechism of the Catholic Church*, no. 2334). The bishops’ concern for just wages and the fair treatment of women goes back at least 100 years. In a February 12, 1919 statement entitled *Programs of Social Construction*, the bishops said that “women who are engaged at the same tasks of men should receive equal pay for equal amounts and qualities of work.” That being said, the USCCB has concern about a number of consequences (intended or unintended) that will arise with the proposed Equal Rights Amendment (ERA).

**Legal controversy:** The Equal Rights Amendment (ERA) to the Constitution was passed by Congress in 1972 when two-thirds of each chamber voted for the amendment. However, it failed to achieve ratification by 38 states (three-fourths) within the 7-year time limit established by Congress. While Congress did pass a 3-year extension, it is legally questionable whether the extension was valid and, in any event, no further states ratified during the “extension.” It also remains legally dubious whether ratifications after that deadline are valid (Virginia became the third to attempt to do so in January 2020) and whether states can rescind their ratification (as 5 states have done).

If the deadline and the rescissions are both bypassed, then Virginia could be counted as the 38<sup>th</sup> state to ratify. However, the legal ruling of the Department of Justice’s Office of Legal Counsel (Jan 8, 2020) prohibits the Archivist from certifying the ERA of 1972 (and thereby making it part of the Constitution) due to its determination that ratifications after the congressionally-mandated time limit are not valid. (Because they determined the 1972 ERA is no longer pending, it was unnecessary to also rule on whether states could rescind their ratifications).

**Congress:** There are also two separate attempts in Congress to enact the ERA. One is a new resolution proposing a slightly edited version of the 1972 ERA. If passed by two-thirds of each chamber, it would send the ERA to the states and restart the ratification process. In the immediate aftermath of the failure of the ERA to be enacted in 1982, both supporters and opponents have repeatedly said this is the only path available to enact it. Accordingly, a version of this resolution has been introduced repeatedly since 1982. However, the only time it received a vote was in 1983 when it came up in the House under a procedural technique used in this case specifically to prevent a vote on an abortion-neutral amendment. As a result, the bill failed to receive the necessary votes.

The second congressional effort, presumably recognizing that the ERA is unlikely to garner the two-thirds votes necessary for passage, are resolutions to retroactively remove the deadline imposed by the original 1972 ERA. If passed by simple majority, it is likely to be immediately challenged in court as surpassing congressional authority. It should also be noted that this bill does not attempt to resolve the legal controversy over the states that have attempted to rescind their ratification.

**Language:** The operating language of the 1972 ERA is extremely short: “*Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.*” However, in the almost 50 years since its initial passage, debate remains over whether it offers any new general protections or rights for women. Supporters claim the ERA would prevent discrimination,

promote equal pay, and so on. Opponents generally claim that discrimination against women is already prohibited by a multitude of federal and state laws, and that adding the ERA would change very little in real life except becoming a powerful tool against pro-life abortion laws.

**Abortion controversy:** In the early years of the ERA, proponents commonly denied concerns that the amendment would entrench and expand the legality and practice of abortion. However, in recent years, some promoters of the ERA have boldly celebrated and advocated for the ERA precisely *because* of its ability to overturn abortion laws throughout the country. In fact, some state ERAs have already been used in this way. New Mexico’s Supreme Court, for example, overturned a state “Hyde amendment” in 1998 saying, “*We conclude from this inquiry that the Department’s rule violates New Mexico’s Equal Rights Amendment because it results in a program that does not apply the same standard of medical necessity to both men and women, and there is no compelling justification for treating men and women differently with respect to their medical needs in this instance.*”<sup>1</sup>

The general argument is that since abortion is a procedure that only women undergo, the government’s decision to prohibit it, to decline to fund it, or to condition its availability on compliance with such requirements as parental notice and informed consent, is inherently discriminatory if the government does not impose those same conditions or requirements upon medical procedures that are unique to men or applicable to both men and women. It is also believed that sexual equality, as embodied in the ERA, would provide a stronger basis for a constitutional right to abortion than the nebulous “privacy” right of the 14<sup>th</sup> Amendment. Particularly at a time when *Roe v. Wade* is seen as vulnerable to being overturned (precisely because it is not grounded in the Constitution), proponents have been very clear that the ERA is *needed* to ensure abortion access and knock down current pro-life laws. For example:

- NARAL Pro-Choice America, claims: “*With its ratification, the ERA would reinforce the constitutional right to abortion by clarifying that the sexes have equal rights, which would require judges to strike down anti-abortion laws because they violate both the constitutional right to privacy and sexual equality.*”<sup>2</sup>
- National Women’s Law Center: “[*Emily*] Martin [*general counsel for NWLC*] affirmed that abortion access is a key issue for many ERA supporters: she said adding the amendment to the constitution would enable courts to rule that restrictions on abortion ‘perpetuate gender inequality.’”<sup>3</sup>
- NOW: “*...an ERA –properly interpreted – could negate the hundreds of laws that have been passed restricting access to abortion care . . . a powerful ERA should recognize and prohibit that most harmful of discriminatory actions.*”<sup>4</sup>

**Gender and Related Concerns:** In the last several years, many courts and agencies at both the state and federal levels have redefined “sex” in law to include “sexual orientation” and “gender identity.” This year the Supreme Court is expected to decide whether the federal prohibition on sex discrimination in the workplace includes sexual orientation and gender identity. If the ERA were to be ratified, many would argue that its prohibition of discrimination on the “basis of sex” extends constitutional-level protections to sexual conduct and “transgender” identities. For example:

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<sup>1</sup>*Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 844 (N.M. 1998), available at <https://nrlc.org/uploads/era/ERANewMexicoSupremeCourt.pdf>.

<sup>2</sup>NARAL email, March 13, 2019.

<sup>3</sup>Rankin, Sarah and David Crary, “Lawmakers Pledge ERA will pass in Virginia. Then what?”, Associated Press, January 1, 2020.

<sup>4</sup>Grabenhofer, Bonnie and Jan Erickson, “Is the Equal Rights Amendment relevant in the 21<sup>st</sup> Century?”, National Organization for Women, available at <https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/>.

- NOW: “*The ERA would require strict scrutiny in challenges to the many state laws that deny LGBTQIA persons equal access to public accommodations, permit discrimination in housing, employment discrimination, credit and retail services, jury service and educational programs, among others.*”<sup>5</sup>

If this is correct, the result could be a radical restructuring of settled societal expectations with respect to sexual difference and privacy. For example, the ERA could be used to argue that locker rooms and bathrooms in public facilities can no longer be reserved for members of a single sex. This would apply to a broad range of public institutions, including K-12 schools, colleges, universities, libraries, parks, hospitals, courthouses, townhalls, social welfare agencies, and government workplaces – and could compel speech by all staff to conform to “preferred pronouns.” The ERA could bolster the claim that public social services devoted to the most vulnerable of women, including homeless and domestic abuse shelters, must admit men.

Healthcare workers in public facilities could be forced to provide, and taxpayers made to pay for, “gender transition” procedures. School athletics and dormitories, and sleeping quarters in many prisons, could be forced to abandon current single-sex participation and residency criteria regardless of the privacy interests of other participants and residents. Finally, private charities that offer a broad range of services to their communities might be forced to change their facilities, speech, and practices to affirm “gender identities” or living situations contrary to their sincerely-held religious and moral beliefs.

**Religious Liberty and Conscience Protection:** The ERA could also have an impact on the ability of churches and other faith-based organizations to obtain and enforce conscience protections anytime there is a perceived conflict with the sexual nondiscrimination norms that the ERA would adopt. The ERA could likewise make it more difficult for faith-based organizations to compete on a level playing field with secular organizations in applying for and obtaining government resources to provide needed social services. For example, the government could argue that a decision not to perform an abortion or transgender surgery is sex discrimination, so that a health care provider is ineligible to receive federal funds if it declines to perform such a procedure.

January 31, 2020

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<sup>5</sup> *Ibid.*; see also Kelly, Kate, “The ERA Is Queer and We’re Here For It!”, Advocate, February 23, 2019, available at <https://www.advocate.com/commentary/2019/2/23/era-queer-and-were-here-it>.