



United States Conference of Catholic Bishops

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Dear Members of Congress,

Catholic teaching speaks very clearly and strongly about the equality of men and women. “In creating [humans] ‘male and female,’ God gives man and woman an equal personal dignity.” (*Catechism of the Catholic Church*, no. 2334). The bishops’ explicit concern for just wages and the fair treatment of women goes back at least 100 years. In a February 12, 1919, statement entitled the *Bishops’ Program of Social Reconstruction*, 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.” Moreover, recent Popes like St. John Paul II and Francis have spoken powerfully about the need to do more to address unjust inequities between women and men¹, and we encourage you in seeking out constructive ways to address them.

That being said, we are writing to you to express our concern with a number of consequences that will arise from the proposed Equal Rights Amendment (ERA) and therefore also with the proposed resolutions that would change the dates associated with ratification.

One consequence would be the likely requirement of federal funding for abortions. At least two states have construed their own equal rights amendments, with language analogous to that of the federal ERA, to *require* government funding of abortion.² Both supporters and opponents of abortion believe that the federal ERA would have this effect, as well as restrain the ability of federal and state governments to enact other measures regulating abortion, such as third-trimester or partial birth abortion bans, parental consent, informed consent, conscience-related exemptions, and other provisions. While in the early years of the ERA debate some considered these abortion threats to be remote or “scare tactics,” abortion advocates in recent years have freely admitted that they intend to use the ERA to litigate such abortion claims and anticipate that such cases would be successful.³ Many pro-ERA campaigns and organizations claim that codifying *Roe v. Wade* (and going further

¹ See, e.g., Pope St. John Paul, II, *Letter to Women* (June 29, 1995) (insisting on “real equality” between men and women in terms of “equal pay for equal work,” fairness for working mothers, equality between spouses and parents, and the “recognition of everything that is part of the rights and duties of citizens in a democratic State”) http://www.vatican.va/content/john-paul-ii/en/letters/1995/documents/hf_jp-ii LET_29061995_women.html; Pope Francis, General Audience (Apr. 29, 2015) (calling for Christians to demand equal pay for women because the “disparity is an absolute disgrace!”), http://www.vatican.va/content/francesco/en/audiences/2015/documents/papa-francesco_20150429_udienza-generale.html.

² See *New Mexico Right to Choose v. Johnson*, 975 P.2d 841 (N.M. 1998), and *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986).

³ See e.g., NARAL: *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.*” NARAL email, March 13, 2019; 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.’” Sarah Rankin and David Crary, “Lawmakers Pledge ERA will pass in Virginia. Then what?”, Associated Press, January 1, 2020; NOW: “...an ERA –properly interpreted – could negate the hundreds of laws that have been passed restricting access to abortion care.” Bonnie Grabenhofer and Jan Erickson, “Is the Equal Rights Amendment relevant in the 21st Century?”, National Organization for Women, <https://now.org/resource/is-the-equal-rights-amendment-relevant-in-the-21st-century/>.

than *Roe*) is one of the purposes of the ERA and is exactly what is intended by “equality” for women.⁴

Advocates have argued that laws forbidding sex discrimination also forbid discrimination based on “sexual orientation,” “gender identity,” and other categories. To take one example, it is argued that bans on sex discrimination set out in the Affordable Care Act and Title VII, respectively, require health care professionals to perform, and secular and religious employers to cover, “gender transition surgery.” Last year, the Supreme Court ruled in *Bostock v. Clayton County* that the sex discrimination provisions of Title VII apply to “sexual orientation” and “transgender status,” but left many questions unanswered. In fact, the 2020 House Judiciary Committee report on H.J. Res. 79, a resolution purporting to remove the ERA’s ratification deadline, stated “the ERA’s prohibition against discrimination ‘on account of sex’ could be interpreted to prohibit discrimination on the basis of sexual orientation or gender identity.” These claims heighten our concern about a federal constitutional provision that, in broad fashion, purports to forbid the abridgement of rights based on sex. The consequences of how this is interpreted would impact how Americans must treat and speak about gender in public schools at every level, hospitals, government workplaces, social welfare agencies, and more.

A third area the ERA is likely to negatively impact is the ability of churches and other faith-based organizations to obtain and utilize conscience protections whenever there is a claimed 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 qualifying for government funds to provide needed social services. For example, the government could argue that a decision not to perform an abortion or gender-related surgery is sex discrimination, so that a health care provider is ineligible to receive federal funds if it declines to perform or refer for such a procedure.

If the ERA were intended to have a more *limited* scope, it is unclear why federal and state law, which *already* forbids sex discrimination in so many areas, is not already adequate to that task. Courts generally do not construe constitutional provisions to mean nothing or to add nothing to the law. Since the equal protection clause already subjects sex discrimination to a rigorous constitutional test, the ERA presumably is intended to do something more. And that “something more” is an opening for proponents to argue that that ERA has applications such as those described above. There is little question that the ERA would unleash a generation or more of litigation to determine its meaning likely resulting in some, if not all, of the consequences described here.

However, apart from the concerns over its effects, there is also a strong argument that the current amendment, as purported to have been ratified by a number of states, is “dead.” Among the defects: (a) the amendment was not ratified by the requisite number of states in the 7-year time frame that Congress prescribed for its ratification, (b) the prescribed deadline was subsequently attempted to be extended by a mere majority (not a 2/3) vote in Congress, an attempt that was ruled unconstitutional,⁵ (c) some states rescinded their ratifications prior to the deadline, and (d) the Supreme Court in 1982 dismissed a case involving the deadline extension and rescissions as

⁴“Why We Need the Equal Rights Amendment (stating that “If the ERA is ratified it would codify into law ... *Roe v. Wade*”), <https://www.equalrightsamendment.org/why?fbclid=IwAR1EFj2ZMCXJ3MBJHGPI6KDS4JKJIG585nktFhM2KXJX7rChZNHfZxHIdiA>.

⁵ *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), *vacated as moot*, *National Organization for Women v. Idaho*, 459 U.S. 809 (1982).

moot, accepting representations by the Acting Solicitor General that the ERA had failed ratification under either deadline, with or without rescissions.⁶ On January 6, 2020, the U.S. Department of Justice's Office of Legal Counsel issued an opinion in which it concluded that, because the deadline for ratification has expired, the ERA is no longer pending before the states and that Congress in 2020 may not retroactively change the deadline or otherwise resurrect the expired proposal.

For these reasons, we urge you to oppose, on both procedural votes and votes on passage, S.J. Res. 1, H.J. Res. 17, and any other measure intended to advance inclusion of the 1972 ERA language into the U.S. Constitution.

Sincerely,



Most Reverend Joseph F. Naumann
Archbishop of Kansas City, KS
Chairman, Committee on Pro-Life Activities



Most Reverend Paul S. Coakley Archbishop
of Oklahoma City
Chairman, Committee on Domestic Justice
and Human Development



Most Reverend David A. Konderla
Bishop of Tulsa
Chairman, Subcommittee for the
Promotion and Defense of Marriage

⁶ *National Organization for Women v. Idaho*, *supra* note 5.