ORAL ARGUMENT NOT YET SCHEDULED

RECORD NO. 21-5096

In the United States Court of Appeals for the District of Columbia Circuit

COMMONWEALTH OF VIRGINIA, ET AL.,

***APPELLANTS*,**

V.

DAVID FERRIERO, IN HIS OFFICIAL CAPACITY AS ARCHIVIST OF THE UNITED STATES, ET AL.,

***APPELLEES*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
CASE NO.: 1:20-CV-00242

BRIEF OF AMICI CURIAE
IN SUPPORT OF APPELLANTS SEEKING REVERSAL OF DISMISSAL OF COMPLAINT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Court Rule 28(a)(1), counsel for amici curiae, the United States Conference of Mayors, Equal Means ERA, 38 Agree for Georgia, and LARatifyERA, certifies as follows:

A. Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants.

B. Rulings Under Review. References to the ruling at issue appear in the Brief for Plaintiffs-Appellants.

C. Related Cases. To amici's knowledge, there are no related cases.

/s/ Katherine I. Funk
KATHERINE I. FUNK

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rule of Appellate Procedure 26.1, *Amici Curiae*, United States Conference of Mayors, Equal Means ERA, 38 Agree for Georgia, LARatifyERA ("the Amici"), hereby state that the Amici are not-for-profit corporations that do not have any parent corporations and do not issue stock.

/s/ Katherine I. Funk
KATHERINE I. FUNK

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INTERESTS OF THE AMICI[1]

The ratification of the Equal Rights Amendment (ERA) is an issue of extraordinary importance to the Amici. As this case presents questions of the validity of the ERA, the decision of this Court will impact women's rights and equality between the sexes. Amici have all directed extensive efforts and resources towards the passage of the ERA and thus have a strong interest in the outcome of the case.

The United States Conference of Mayors is the official non-partisan organization of cities with populations of 30,000 or more. There are more than 1,400 such cities in the country today. Cities are represented in the Conference by their chief elected official, the mayor. The Conference of Mayors advocates on a daily basis for a number of issues that are important to cities and important to our nation's mayors. In 1977, it adopted policy in support of the ERA, calling it necessary to ensure protection of women's rights. In 2019, the Conference reaffirmed that policy and pledged to play an active role in ensuring its full ratification. For more than five decades, the Conference of Mayors has been committed to achieving equality of all people.

Equal Means ERA is a nonpartisan group of women and men who have come together to support South Carolina's ratification of the ERA to the U.S. Constitution.

[1] Counsel authored the brief in whole, and no person contributed money to the preparation of the brief.

Equal Means ERA feels that the ratification of the ERA is a moral issue requiring political action: one that looks forward to a legal system in which every person will be judged on the basis of individual merit, so that all people have the power to make full use of their political and economic capabilities. Equal Means ERA believes that by recognizing the law, dignity, and worth of every one of its citizens, the state of South Carolina and the country as a whole would empower the infinite talents of more than half of its citizens – who happen to be women.

38 Agree for Georgia is a non-partisan organization formed with the goal of helping Georgia become the 38th state to ratify the ERA. 38 Agree for Georgia believes that the United States needs a constitutional guarantee of equality to protect against current threats to the significant advances in women's rights achieved over the past half century, and it urges that the ratification of the ERA would improve the standing of the U.S. globally with respect to equal justice under the law.

LARatifyERA is a coalition of organizations dedicated to Louisiana ratifying the ERA. LARatifyERA believes that the ratification of the ERA is a long-overdue remedy to the inequality faced by girls and women over the past two hundred years, and that any democracy that fails to include women in its founding document is a failed democracy.

Equal Means ERA, 38 Agree for Georgia, and LARatifyERA are located in states that have not ratified the ERA. They have an important interest in ensuring

that the ratification of the ERA by the other 38 states becomes a part of the U.S. Constitution so that the citizens of the southern states of South Carolina, Georgia, and Louisiana have constitutional protections on the basis of sex. Seventy members represented by the Conference of Mayors are located in Georgia, Louisiana, and South Carolina. *See* https://www.usmayors.org/mayors/meet-the-mayors/. Hundreds of mayors are in the 26 states that do not have constitutional protections in their state constitutions. *See infra* notes 3 & 4. These mayors have a special interest in ensuring the ratification of the ERA is valid so that their citizens have federal constitutional protections on the basis of sex.

All Amici assert that this Court's ruling on the pending issues before it has the potential to affect the safety and equality of women and men across the country. Amici support the Plaintiff States in seeking an order that the ERA is valid and part of the U.S. Constitution.

ARGUMENT

I. INTRODUCTION

This case presents a constitutional matter of great importance. Adding the duly ratified ERA to the Constitution will guarantee the rights held by all citizens, men and women alike, by prohibiting discrimination on the basis of sex. This brief presents three arguments to provide context for the importance of a valid ERA. One, the United States will join the vast majority of nations that already include such

protections in their constitutions. Two, governmental actions that treat men and women differently will be presumptively unconstitutional unless the government can show the law or policy is necessary to achieve a compelling interest. And three, the ERA will ensure that rights on the basis of sex will be stronger, consistently applied, and permanently held.

II. WITH THE RATIFICATION OF THE ERA, THE U.S. JOINS OTHER NATIONS IN GUARANTEEING EQUALITY FOR WOMEN.

The ratification of the ERA brings the United States into the international norm of guaranteeing protections on the basis of sex and is in keeping with U.S. efforts encouraging other countries to guarantee equal rights to women. With the required 38 states, the American citizens have expressed their intent to outlaw discrimination on the basis of sex in line with the vast majority of the rest of the world's countries. The constitutions of numerous nations provide for equal rights on the basis of sex. (*See* Appendix A.) The United States is the only industrialized country that does not specifically mention equality on the basis of sex in its Constitution. With the ratification of the ERA, the United States joins all other industrialized countries and numerous less-industrialized nations in guaranteeing equality in their constitutions. Even constitutions of countries that the United States *sanctions* for various human rights issues (e.g., Cuba, Iran, Sudan, Syria, and Venezuela) contain equality-of-sex clauses.

Although the United States Constitution does not contain an equality-of-sex clause and thus has been an outlier, the United States government has promoted the development of equality clauses in the constitutions of other countries. The example of South Sudan is instructive.

In South Sudan, the United States has an extensive history in providing aid funds. *South Sudan: History*, USAID FROM THE AM. PEOPLE, (May 11, 2020), https://www.usaid.gov/south-sudan/history. After the signing of the Comprehensive Peace Agreement in 2005, funds were used to assist with the functionality of the Southern Sudan Government. *Id*. To help assist with writing a new constitution, the U.S. Agency for International Development (USAID) partnered with the Sudanese Institute for the Development of Civil Society. Warren Ryan, *A Constitution for Sudan*, USAID FROM THE AM. PEOPLE FRONTLINES (Jan./Feb. 2012), https://2012-2017.usaid.gov/news-information/frontlines/democracy-human-rights-governance/constitution-sudan. USAID's partnership to assist in writing a new constitution for South Sudan resulted in a constitution with an important provision prohibiting sex-based discrimination. South Sudan's constitution includes this provision prohibiting sex-based discrimination:

> (1) Women shall be accorded full and equal dignity of the person with men.
> (2) Women shall have the right to equal pay for equal work and other related benefits with men.
> (3) Women shall have the right to participate equally with men in public life.

Transitional Const. of Republic of S. Sudan, 2011 rev. 2013, Pt. 2, Art. 16.

In addition to joining all other industrialized nations (and less-industrialized nations like South Sudan) with a valid ERA as part of the U.S. Constitution, the United States could now ratify the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Convention), which specifically calls on countries to establish equal rights between men and women in all areas of life. One hundred eighty-nine countries have ratified this treaty. Sudan, Somalia, Iran, Palau, Tonga, and the United States have not. *See* U.N.T.S. 1249, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV8&chapter=4&lang=en.

The Convention is often described as an international bill of rights for women, and defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." *See* UN Women, https://www.un.org/womenwatch/daw/cedaw/. The Convention ensures women's equal access to, and equal opportunities in, political and public life, education, health and employment. It affirms women's rights to acquire, change, or retain their nationality and the nationality of their children. The

parties also agree to take appropriate measures against all forms of traffic in women and exploitation of women. Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. *See id*. The United States has not yet made this commitment to the equality of women, although the ERA confirms that equality on the basis of sex is now a fundamental governing principle.

The United States encourages other countries to add equality clauses into their constitutions and uses international aid as a strong incentive to protect women's rights. The citizens of the United States have spoken and affirmatively said that they do not want to be an international outlier. Even North Korea's Constitution provides that "Women are accorded equal social status and rights with men." Const. of Democratic People's Republic of Korea, 1972 rev. 2016, Ch. V., Art. 77 (North Korea). The U.S. Archivist should add the ERA to the Constitution so that the expressed principle of the American people will be institutionalized.

III. SEX DISCRIMINATION MAY BE SUBJECT TO "STRICT SCRUTINY" BY THE COURTS.

Ratifying the ERA will allow courts to analyze sex discrimination under the "strict scrutiny" standard alongside race, religion, and national origin. *See* Martha F. Davis, *The Equal Rights Amendment: Then & Now*, 17 Colum. J. Gender & L. 419, 422 (2008). The Fourteenth Amendment applies strict scrutiny to only race, religion, and national origin and does not address sex or gender discrimination. In fact, it was not until 1971 that the Supreme Court applied the Fourteenth Amendment to prohibit

sex discrimination for the first time, under rational basis review. *Reed v. Reed*, 404 U.S. 71 (1971). Expanding on *Reed*, the Supreme Court explained that gender is classified as a quasi-suspect class, rather than a suspect class like race, religion, and national origin, and is subject to intermediate rather than strict scrutiny. *Craig v. Boren,* 429 U.S. 190 (1976). To this day, gender or sex discrimination is subject to the lesser standard. *See United States v. Va.*, 518 U.S. 515, 531-33 (1996); *J.E.B. v. Ala.*, 511 U. S. 127, 136-37 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

Strict scrutiny requires a discriminatory law to be narrowly tailored to a compelling state interest in order to be upheld as constitutional. *See Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013). Intermediate scrutiny is less strenuous and is more likely to allow discriminatory laws to stand. To pass intermediate scrutiny, a discriminatory law must further an important government interest and must do so by means that are substantially related to that interest. *See Va.*, 518 U.S. at 533; *Hogan*, 458 U.S. at 724; *Boren*, 429 U.S. at 197-99. While intermediate scrutiny has more teeth than rational basis review, the hurdles it presents are easier to overcome in validating a discriminatory law. This lower hurdle has allowed courts to make decisions that draw heavily on stereotypical views of biological and physical gender differences. *See Michael M. v. Sup. Ct. of Sonoma City*, 450 U.S. 464 (1981); *Rostker v. Goldberg*, 453 U.S. 57 (1981).

In more recent decisions, the Supreme Court, in what many call an effort to redefine an appropriate standard for reviewing gender classification, applies heightened or "skeptical" scrutiny that requires extremely persuasive evidence to uphold a government action that differentiates on the basis of sex. *Va.*, 518 U.S. at 531. While this decision appeared to move gender discrimination closer to strict scrutiny, many courts fail to require an "exceedingly persuasive justification" when evaluating sex discrimination under an intermediate standard of review. *See, e.g., Tagami v. City of Chicago,* 875 F.3d 375, 380 (7th Cir. 2017), as amended (Dec. 11, 2017) (finding in favor of defendant on a claim of sex discrimination without any mention of the government's obligation to present an "exceedingly persuasive justification"); *Roubideaux v. N.D. Dep't of Corr. & Rehab.*, 570 F.3d 966, 974 (8th Cir. 2009) (same); *see also* David Bowsher, *Cracking the Code of United States v. Va.*, 48 Duke L.J. 305, 307-08 (1998).

Compelling the Archivist to add the duly ratified ERA to the Constitution would codify the prohibition of gender and sex discrimination and would allow the Supreme Court to classify sex/gender as a suspect class alongside race, religion, and national origin. *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring) ("The Equal Rights Amendment, which if adopted will resolve the substance of this precise question [of strict scrutiny], has been approved by the Congress and submitted for ratification by the States."). An amendment to the U.S.

Constitution would remove any uncertainty about the fundamental protections on the basis of sex.

IV. THE ERA PROVIDES A CONSTITUTIONAL BASIS FOR FEDERAL LEGISLATION GUARANTEEING CLAIMS OF SEX DISCRIMINATION OR GENDER-BASED VIOLENCE.

A. Current law fails to allow victims of sex discrimination and gender-based violence to hold their abusers accountable.

Federal constitutional law is clear-cut —"[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *see also Marbury v. Madison*, 5 U.S. 137 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). Thus, in order for Congress to enact federal laws prohibiting sex discrimination or gender-based violence, it needs a constitutional basis, or constitutional "hook," to do so. The ERA provides just such a hook.

One need look no further than the Violence Against Women Act (VAWA) to see why the ERA is needed. VAWA was enacted in 1994 after *four years* of hearings (which included testimony from physicians, law professors, rape survivors, and domestic violence victims) and a "voluminous" record that revealed that *one in four* women will be victims of a violent crime during their lives, that as many as *half* of the homeless women in the country are "fleeing domestic violence," and that between 2,000 and 4,000 women *die each year* as a result of domestic abuse. *See*

Morrison, 529 U.S. at 629-33, 635 (Souter, J., dissenting). Those victims, Congress found, faced a 4% chance of having their abusers arrested, prosecuted, and found guilty and a less than 1% chance of collecting damages from their abusers. *Id.* at 633-34. (Almost twenty years after VAWA was enacted, the Centers for Disease Control still estimates that nearly 1 in 2 women will experience some form of sexual violence in their lifetime. Rape Prevention & Educ. Program, Ctrs. for Disease Control & Prevention, 2013, *available at* http://www.cdc.gov/violenceprevention/rpe/>. And only 9% of all rapists will be prosecuted. Rape, Abuse & Incest Nat'l Network, *available at* https://www.rainn.org/statistics/criminal-justice-system.)

Based on this "mountain of data," Congress enacted VAWA to provide a private right of action for victims of gender-based violence. 42 U.S.C. § 13981; *see also Morrison*, 529 U.S. at 661 (Breyer, J., dissenting). Specifically, VAWA authorized victims of gender-based violence (like assault, rape, or domestic violence victims) to sue their perpetrators in court if they could prove those perpetrators "commit[ted] a crime of violence motivated by gender." 42 U.S.C. § 13981. In other words, Congress passed VAWA to provide a federal remedy for gender-based violence victims because, it reasoned, "many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions," which result in "insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably

lenient punishments for those who are actually convicted of gender-motivated violation." *Morrison*, 529 U.S. at 620.

By all appearances, a model case for VAWA's civil-remedy provision would be one where a female college student was "repeatedly raped" and subjected to "vulgar remarks [made by her rapist] that cannot fail to shock and offend"—remarks so outrageous that the Supreme Court refused to repeat them in its written opinion. *Id*. at 602. But Congress used § 5 of the Fourteenth Amendment and the Commerce Clause as its Constitutional bases for VAWA, and according to the Supreme Court, those were insufficient to support VAWA and its goal of giving the repeatedly-raped college student — and other victims of gender-based violence — a civil remedy. *Id.* at 607-27 (holding that Congress's effort "to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment").

Now, as a result of the *Morrison* decision, VAWA is toothless. To be sure, it provides funding for police training, shelters for domestic violence victims, and civil legal services. *See generally* 34 U.S.C. § 12291, *et seq.* But participation in VAWA's programs is entirely voluntary, and even if a state signs on, there is no oversight or monitoring of the state's participation. Leila Abolfazli, *Criminal Law: Violation Against Women Act (VAWA)*, 7 GEO. J. GENDER & L. 863, 865-66 (2006). No federal law currently provides a civil remedy for victims of gender-based violence.

The Fourteenth Amendment, according to the Court, also fails to provide an adequate Constitutional hook to protect victims of gender-based violence, illustrating again why the ERA is needed. The case of *Town of Castle Rock v. Gonzales* makes this point. 545 U.S. 748 (2005). There, an abused wife's calls for help to the local police were repeatedly ignored, her restraining order against her husband (prohibiting him from "molest[ing] or disturb[ing]" his children) was not enforced by the local police, and her abusive husband ultimately kidnapped and killed their three daughters despite her calls for help. *Id.* at 751-54 (calling the facts of the case "horrible"). When she tried to sue the police for not doing their job (indeed, the officer who took her statement that her husband had kidnapped the children "made no reasonable effort to enforce the TRO or locate the three children[;] [i]nstead, he went to dinner," *id.* at 754), the Court held that she could not do so under the Fourteenth Amendment because she had no property right to have her protective order enforced. *Id.* at 768. Said another way, the Court determined that the Constitution provided *no* remedy for a state's failure to protect victims of gender-based violence. It is not hard to imagine that police may respond more consistently to calls from victims with protective orders if the law allowed the victims to hold them liable for their willful failures to do so. But no such law currently exists.

Morrison and *Gonzalez* make clear that no substantive remedy exists to

protect victims of gender-based violence, and it appears that Congress has no authority to enact one under the current Constitution. The ERA is needed to fill this gap. Once added to the Constitution, the ERA — like other Constitutional amendments before it — would give Congress the constitutional hook on which to base this much-needed legislation.

Consider the Fourteenth Amendment. Ratified in 1868, the Amendment granted citizenship to all persons born or naturalized in the United States (including former slaves) and guaranteed all citizens "equal protection of the laws." Congress used it as the constitutional basis to pass landmark civil rights legislation, including the Civil Rights Act of 1964 (that ended segregation in public places, banned employment discrimination on the basis of race, color, religion, sex, or national origin, and created the Equal Employment Opportunity Commission) and the Voting Rights Act of 1965 (that secures and protects the right to vote for racial minorities throughout the country and is considered to be "the most effective piece of federal civil rights legislation ever enacted in the country"). *See* Intro. to Federal Voting Rights Laws: The Effect of the Voting Rights Act, U.S. Dep't of Justice (June 19, 2009), *available at* https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0.

Like the Fourteenth Amendment, the ERA will provide a constitutional basis for Congress to promulgate statutes protecting women's rights and ensuring that they

are treated as equal citizens under the law.

B. The ERA is a necessary tool to eradicate workplace discrimination.

Further support for adding the ratified ERA into the Constitution exists in the lingering discrimination women face in the American workplace. Despite the multiple pieces of federal legislation purportedly targeted at eradicating workplace discrimination, the problem persists. Because the ERA may require employers to meet a higher burden to justify policies that have a discriminatory effect than currently exists under federal discrimination legislation, the ERA is primed to solve this problem that has evaded resolution thus far. *See* Lisa Baldez, *The U.S. Might Ratify the ERA. What Would Change?*, The Wash. Post, (Jan. 23, 2020), *available at* https://www.washingtonpost.com/politics/2020/01/23/us-might-ratify-era-what-would-change/ (noting research of outcomes in states that have adopted equal rights amendments shows that "having a state-level ERA significantly increases the likelihood that judges will apply a higher standard of law in sex discrimination cases" that "leads state-level courts to rule more often in favor of the person claiming sex discrimination").

i. Current laws protecting women from wage discrimination are not effective.

Pay discrimination based on gender has been prohibited for more than half a century, with the passage of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. 29 U.S.C. § 206(d) ("No employer . . . shall discriminate . . .

between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions"); 42 U.S.C. §§ 2000e ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").[2] In 2009, the Lilly Ledbetter Fair Pay Act was passed, strengthening employees' ability to file Title VII claims by restarting the statute of limitations for each discriminatory paycheck. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

Yet despite these protections, pervasive inequities in pay between men and women continue to exist. In 2018, women made 81.6% of what men made. Nat'l Comm. on Pay Equity, *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, https://www.pay-equity.org/info-time.html. The pay gap is even wider for women of color: Black women make only 62 cents and Hispanic women

[2] These two statutes, passed within a year of each other, provide two mechanisms for an employee to challenge pay discrimination. Stephanie Bornstein, *The Statutory Public Interest in Closing the Pay Gap*, 10 Ala. C.R. & C.L. L. Rev. 1, 3 (2019). The Equal Pay Act requires equal pay for equal work unless the "*employer* can prove the disparity *was not* based on sex." *Id.* Under Title VII, an employee alleging sex discrimination in compensation, hiring, firing, and other terms and conditions of work must prove the discrimination. *Id.*

on 54 cents for every dollar paid to men. Am. Ass'n of Univ. Women, *The Simple Truth About the Gender Pay Gap: Fall 2019 Update* (Fall 2019), https://www.aauw.org/app/uploads/2020/02/Simple-Truth-Update-2019_v2002.pdf. In fact, the slow increase in women's pay between 1963 and 2010 reflects a narrowing of the wage gap by less than half a cent per year. *Id.* One study suggests "women employed full time in the United States lose a combined total of more than $900 billion every year due to the wage gap." Nat'l Partnership for Women & Families, America's Women & the Wage Gap 2 (Apr. 2018), http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf. This is especially concerning when families with children typically need the incomes of both parents to afford basic needs and almost 40% of children have a mother who is a sole breadwinner. Elizabeth Warren & Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke* 8 (2003); Heather Boushey, *Finding Time: the Economics of Work-Life Conflict* 7 (2016).

While Title VII and the Equal Pay Act have helped remedy overtly discriminatory pay policies, these statutes have not been able to redress the gender pay gap or occupational gender segregation due to narrow court interpretations, high bars of proof requirements, and deference to employer justifications. Stephanie Bornstein, *Equal Work*, 77 Md. L. Rev. 581, 602-09 (2018). Despite the protections

afforded by these statutes, employers continue to justify unequal pay by claiming a gender neutral or "legitimate nondiscriminatory reason." *Id.* And discriminatory practices in large, national corporations have proved difficult to challenge despite clear evidence of a gender pay gap.

Consider the case of *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011). In *Dukes*, women employees attempted to bring a class action lawsuit alleging that Wal-Mart violated Title VII by paying men more than women for the same work and by promoting men further and faster. While the case could have shined as a win for women working collectively to remedy unfair pay conditions, it exemplified a total failure of Title VII to rectify pay discrimination on behalf of a substantial group of women. Indeed, the women presented the Court with significant statistical evidence suggesting a disparity between men and women employees in pay and promotion. *Id.* at 2555; *see also* Dr. Mary Dunn Baker, *Class Certification Statistical Analyses Post-Dukes,* 27 ABA J. Lab. & Emp. L. 471, 473 (2012) (noting that for his report, the plaintiffs' expert in the *Dukes* case estimated nationwide annual earnings regression equations for hourly and salaried employees separately and included a nationwide analysis of hourly pay rates to show that actual female earnings (or hourly rates) fell short of the amounts predicted by his model that showed Wal-Mart exhibited an across-the-board pattern of paying women less than men). Evidence included anecdotal reports of discrimination from more than 100

women employees, *Dukes*, 131 S. Ct. at 2556, and expert testimony regarding the biased culture and corporate practices of Wal-Mart. *Id.* at 2553. But the case fell into a procedural quagmire. The Supreme Court ultimately decertified the class – an indictment of the women's ability to share common experiences, not an assessment that the unequal pay practices did not abound.

ii. The Equal Pay Act stops short.

Similarly, the Equal Pay Act fails to remedy pervasive wage discrimination because it sidesteps a firm prohibition against unequal pay. Most notably, it provides employers an affirmative defense to unequal pay claims as long as the challenged salary policy is based on any "factor other than sex." Courts have interpreted this defense broadly, allowing pay disparities to be excused based on male worker's negotiation skills, employees' prior salaries, and "prevailing market rates," even if those factors are ultimately based on sex. *Wernsing v. Dep't of Human Servs., State of Ill.*, 427 F.3d 466, 470 (7th Cir. 2005); *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003).

While salary history inquiries are not the cause of the gender pay gap, they do "perpetuat[e] the historic pay inequity between male and female workers." Torie Abbott Watkins, *The Ghost of Salary Past: Why Salary History Inquiries Perpetuate the Gender Pay Gap & Should Be Ousted As A Factor Other Than Sex*, 103 Minn. L. Rev. 1041, 1044 (2018). And their legality is the subject of much case

law under the Equal Pay Act. *Id.* at 1054. Recently, the Ninth Circuit Court of Appeals held "that employers are not allowed to rely on prior pay to justify wage disparities for employees of the opposite sex" and the Equal Pay Act's "any other factor other than sex" is limited to "legitimate job-related factors" such as experience, educational background, ability, prior job performance, effort, productivity, or regional cost of living. *Rizo v. Yovino*, 950 F.3d 1217, 1222, 1228 (9th Cir. 2020). This decision reversed earlier Ninth Circuit precedent finding that an employer's policy of calculating salary based on prior salaries was a valid "factor other than sex" and declining to consider the fact that because women make less than men on average, their prior salaries were lower; thus minimum salary of new agents was lower for women than men. *Kouba v. Allstate*, 691 F.2d 873 (9th Cir. 1982). *Rizo* remains the only case law explicitly prohibiting consideration of prior pay as an affirmative defense to a claim under the Equal Pay Act. *See* 950 F.3d at 1226-27, petition for cert. denied sub nom., *Yovino v. Rizo*, 141 S. Ct. 189 (July 2, 2020). Thus, in most courts, the text of the Equal Pay Act can be effectively wielded to prohibit women from realizing gains in pay equity. *See Wernsing*, 427 F.3d at 470 ("Wage patterns in some lines of work could be discriminatory, but this is something to be proved rather than assumed.").

With the possibility of strict scrutiny, the ERA may succeed in shifting the burden to the employer to show that sex was not a factor in determining salaries.

This, in turn, would allow for a more rigorous consideration of cultural and historical factors both within the company and in society that contribute to sexually discriminatory outcomes in salary.

iii. Current law does not provide adequate accommodations for pregnant women.

The Pregnancy Discrimination Act prohibits workplace discrimination against pregnant women and directs employers to make reasonable accommodations for pregnant women. Despite the text of the law, it has not ended pregnancy discrimination. Nora Ellmann & Jocelyn Frye, *Efforts to Combat Pregnancy Discrimination: Confronting Racial, Ethnic, & Economic Bias*, CTR. FOR AM. PROGRESS (Nov. 2, 2018) https://www.americanprogress.org/issues/women/news/2018/11/02/460353/efforts-combat-pregnancy-discrimination. Many employers fail to provide reasonable accommodations, and without a constitutional amendment upon which to base these protections, courts often interpret the Pregnancy Discrimination Act too narrowly and ignore the discriminatory effects of employer practices. Joanna L. Grossman & Deborah L. Brake, *Afterbirth: The Supreme Court's Ruling in Young v. UPS Leaves Many Questions Unanswered*, VERDICT (Apr. 20, 2015), https://verdict.justia.com/2015/04/20/afterbirth-the-supreme-courts-ruling-in-young-v-ups-leaves-many-questions-unanswered.

Although the Pregnancy Discrimination Act amended Title VII, it does not require employers to provide minor workplace accommodations needed by pregnant

employees, such as being allowed to take more frequent bathroom breaks. U.S. EEOC, *Fact Sheet: Pregnancy Discrimination*, No. EEOC-NVTA-0000-11, https://www.eeoc.gov/laws/guidance/fact-sheet-pregnancy-discrimination (Jan. 15, 1997). It is indisputable that the fundamental principle of equal rights on the basis of sex is violated when a policy harms only women.

While the Pregnancy Discrimination Act affords working mothers significant protections, it is not without faults and loopholes. The seminal case highlighting the gaps that demonstrate the need for the ERA in the context of pregnancy discrimination is *Young v. United Parcel Service, Inc.*, 575 U.S. 206, 135 S. Ct. 1338 (2015). The Supreme Court made clear that pregnancy is not a reason to discriminate, but failed to clarify what constitutes a "reasonable accommodation" for pregnant workers in various workplace contexts, and as Justice Kennedy wrote in his dissent, added confusion to the issue by interpreting the Act in a manner that conflates evidence of disparate impact with that of disparate treatment. 135 S. Ct. at 1368 (Kennedy, J., dissenting).

In *Young*, the employer allowed light duty accommodations for several employees experiencing various types of temporary disabilities and injuries but refused to provide the same accommodation to Young during her pregnancy. *Id.* at 1346-47. The Court held that while the Pregnancy Discrimination Act does not require an employer to provide the same work accommodations to an employee with

pregnancy-related work limitations as to employees with similar, but non-pregnancy related, work limitations, courts must determine whether there are legitimate reasons for differences in an employer's policy that treats pregnant workers less favorably than non-pregnant workers with similar inabilities to work. *Id.*at 1354. Ultimately, the Supreme Court remanded, in part, because not only did Young need to prove that there was discrimination, Young also had to prove that the discrimination was intentional, a nearly impossible standard in this context. Meanwhile, other forms of discrimination – such as those based on race and religion – need only prove the existence of discrimination, not that the discrimination is intentional.

Without the ERA, pregnant women and working mothers are not afforded the same constitutional foothold as other protected classes. The ERA may provide constitutional protections as a foundation to challenge policies that exclude individuals seeking pregnancy accommodations and would ensure equitable treatment for pregnant workers. The simple fact is this: so-called "pregnancy blind" policies that seek to apply equal rules to all workers regardless of needs or situation do not mean equal treatment for pregnant workers. Pregnancy is a condition unique to women that requires unique accommodations and considerations. Women need the constitutional strength of the ERA in order to seek legal protections necessary to truly place working mothers on equal footing with their male counterparts.

iv. The ERA will provide uniform, lasting protections from sex-based discrimination across the country.

There is currently some uncertainty in the standard of review applied by courts reviewing sex discrimination claims. *See supra* § III; *Nguyen v. Immigration & Naturalization Servs.*, 533 U.S. 53, 123 (2001) (failing to articulate the "exceedingly persuasive justification" requirement as a part of intermediate scrutiny). And any inconsistency in judicial review of sex-based classifications is further exacerbated by the impact that states' equal rights amendments—or lack thereof—have on this review.

Only nineteen states have added equal rights amendments to their state constitutions.[3] *See* Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination,* 36 Rutgers L.J. 1201, 1201-02, 1288-1293 (2005). An additional five states have explicit language prohibiting certain forms of sex discrimination in their constitutions.[4] *Id.* Of these, only eight[5] apply the strict scrutiny standard of review

[3] Alaska Const. art. I, § 3; Colo. Const. art. II, § 29; Conn. Const. art. I, § 20; Del. Const. art. I, §.21; Fla. Const. art. I, § 2 Haw. Const. art. I, § 3; Ill. Const. art. I, § 18; Iowa Const. art. I, § 1; Md. Const. Decl. of Rts. art. 46; Mass. Const. pt. I, art. 1; Mont. Const. art. II, § 4; N.H. Const. pt. I, art. 2; N.M. Const. art. II, § 18; Pa. Const. art. I, § 28 ; Tex. Const. art. I, § 3a; Utah Const., art. IV, § 1; Va. Const. art. I, § 11; Wash. Const. art. XXXI, § 1; Wyo. Const. art. I, § 3.

[4] Cal. Const. art. I, §§ 8, 31(a); La. Const. art. I, § 3; Neb. Const. art. I, § 30; N.J. Const. art. I, para. 1 & art. X, para. 4; R.I. Const. art. I, § 2.

[5] California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Hampshire, and Texas.

to gender-based classifications. Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?,* 70 Temple L. Rev. 907, 915 (Fall 1997) (noting that two states apply an even more rigorous—"absolutist"—standard of review; three follow the federal standard; and other states have yet to determine the appropriate standard of review). Twenty-four states fail to provide state constitutional protection from sex-based discrimination. Thus, the ERA is crucial to ensuring that courts nationwide apply the same scrutiny standard to claims of sex discrimination—otherwise, the right to gender equality under the law may change based on where one lives.

Another example of inconsistency in the judicial application of legal protections from sex discrimination is in the context of the wage gap. As discussed above, prior salary is one of the factors that perpetuates the gender pay gap. And, as things stand currently, whether one's salary history may be used to justify pay disparity depends on where one lives. The Ninth Circuit does not allow prior salary to be used as an affirmative defense to a claim of pay discrimination. *Rizo*, 950 F.3d at 1226-27. The Sixth, Tenth, and Eleventh Circuits do not allow the use of previous salary alone to defend against a claim of pay disparity, but it may be considered as one of multiple factors. *See Perkins v. Rock-Tenn Servs., Inc*., 700 F. App'x 452, 457 (6th Cir. 2017); *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995). An Equal Pay Act claimant in the

Seventh and Eighth circuits will have to overcome the view of these courts that salary history is a valid "factor other than sex" exception to the Equal Pay Act; indeed, these Circuits do not even require an employer to demonstrate an "acceptable business reason" for a wage gap between men and women. *See Wernsing*, 427 F.3d at 470 ("The disagreement between this circuit (plus the eighth) and those that require an 'acceptable business reason' is established, and we are not even slightly tempted to change sides."); *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003) ("To conduct a reasonableness inquiry into the actions of the employer . . . would, we believe, unnecessarily narrow the meaning of the phrase 'factor other than sex.'").

Nor does state legislation help to resolve these discrepancies. Some states have taken action to limit employer inquiries into past wages in order to alleviate the effects of past wage discrimination. [6] In Illinois,[7] North Carolina,[8] and Pennsylvania,[9] executive orders prevent state entities from inquiring into salary

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[6] Cal. Lab. Code § 432.3(b) (2019); Conn. Gen. Stat. § 31-40z(b)(5) (2019); Del. Code Ann. tit. 19, § 709B (2017); Haw. Rev. Stat. § 378-2.3 (2019); Mass. Gen. Laws ch. 149 § 105A; N.J. Stat. Ann. § 34:6B-20 (2020); N.Y. Lab. Law § 194-a (2020); Me. Rev. Stat. tit. 5, § 4577 (2019); Or. Rev. Stat. Ann. § 659A.357 (2017); Vt. Stat. Ann. tit. 21, § 495m (2018).

[7] Ill. Exec. Order No. 2019-02 (Jan. 15, 2019), *available at* https://www2.illinois.gov/IISNews/19609-Executive_Order_2019-02.pdf.

[8] N.C. Exec. Order No. 93 (Apr. 2, 2019), *available at* https://files.nc.gov/governor/documents/files/EO93-_Prohibiting_the_Use_of_Salary_History_in_the_State_Hiring_Process.pdf.

[9] Exec. Order No. 2018-18-03 (Pa. June 6, 2018), *available at* https://www.governor.pa.gov/executive-order-2018-18-03-equal-pay-for-employees-of-the-commonwealth.

history. But these state laws are not comprehensive and do not necessarily prohibit the pervasive effects of historical wage discrimination that the Ninth Circuit cautioned against. *See Rizo*, 950 F.3d at 1229. The ERA, however, would allow a more rigorous standard of review to apply to claims of wage discrimination based on sex, and, if needed, provide the constitutional basis to pass stronger protections for pay equality. *See supra* § III.

V. CONCLUSION

For these reasons, the Court should reverse the district court's dismissal of the Plaintiff States' complaint. As the Plaintiff States contend, the ERA is valid and should be part of the Constitution within the meaning of Article V.

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I HEREBY CERTIFY that on this 18th day of January, 2022, the foregoing Corrected Brief of Amici Curiae was electronically filed and served on all counsel of record via the Court's CM/ECF e-filing system.

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