

May 8, 2019

The Honorable Steve Cohen
Chair, House Judiciary Subcommittee on the Constitution,
Civil Rights and Civil Liberties
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Mike Johnson
Ranking Member, House Judiciary Subcommittee on the
Constitution, Civil Rights and Civil Liberties
U.S. House of Representatives
Washington, D.C. 20510



Re: Equal Rights Amendment

Dear Chairman Cohen and Ranking Member Johnson:

Washington Legislative
Office
915 15th Street, 6th
floor
Washington DC 20005
(202) 544-1681
aclu.org

Susan Herman
President

Anthony Romero
Executive Director

Ronald Newman
*National Political
Director*

On behalf of the American Civil Liberties Union (ACLU) and our more than 3 million members, activists, and supporters, we commend the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties for convening the first hearing on the Equal Rights Amendment in 36 years. We submit this statement for the record to urge the Subcommittee to extend the Equal Rights Amendment's ratification deadline so as to permit additional time to secure an explicit constitutional guarantee of equal rights for all without regard to gender.

For nearly 100 years, the American Civil Liberties Union (ACLU) has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to all people in this country. The ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

Over four decades after the Equal Rights Amendment (ERA) was approved by Congress, its promise remains unfulfilled. Despite significant gains in courts and legislatures, women and LGBTQ people still face myriad barriers to equal participation

in civic and economic life. Women working fulltime and year-round, on average, are paid only 80 cents for every dollar paid to their male counterparts.¹ The disparity for women of color is even more severe.² Pregnant and breastfeeding workers are still routinely fired, sidelined, or denied necessary job modifications. And gender-based violence and harassment remain rampant in schools, workplaces, housing, and custodial settings.

The Equal Rights Amendment would provide, for the first time, explicit constitutional recognition of the fundamental notion of gender equality—a principle that has been a cornerstone of our nation’s laws and policies for half a century. Congress and the courts have long held that existing constitutional and statutory provisions protect against gender discrimination, and, in particular, have rejected policies or practices that perpetuate gender stereotypes.³ Yet the ERA would provide women and LGBTQ individuals with a new tool to challenge the discrimination they face. It would open the door for courts to analyze discriminatory laws, policies, and practices under a more exacting level of judicial scrutiny. Further, it would authorize Congress to enact new legislation to guard against these forms of discrimination.

The Equal Rights Amendment holds particular promise for individuals facing discrimination due to their pregnancy, childbearing, or parenting status. Despite federal legislation and court decisions prohibiting pregnancy discrimination in certain contexts, it remains a lived reality for far too many working people. The number of pregnancy discrimination charges filed with the U.S. Equal Employment Opportunity Commission between 1997 and 2011 increased by 50 percent, and has remained relatively steady in recent years.⁴ ACLU clients have experienced discrimination on the basis of pregnancy, parenting, and breastfeeding in workplaces all across the country, ranging from a police department in Connecticut⁵

¹ See U.S. Census Bureau, Current Population Survey, 2018 Annual Social and Economic Supplement, Table PINC-05, https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html#par_textimage_24.

² *Id.*

³ See, e.g., Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249; Violence Against Women Act of 1994, 34 U.S.C. § 13701-14040; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.; Fair Housing Act of 1968, 42 U.S.C. § 3601-3619; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 et seq.; *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); *United States v. Virginia*, 518 U.S. 515 (1996); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

⁴ See U.S. Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges: EEOC & FEPA’s Combined: FY 1997 – FY 2011*, <https://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm>.

⁵ ACLU, *ACLU Settles Pregnancy Discrimination Charge on Behalf of Cromwell, Connecticut Police Officer* (Sept. 6, 2018), <https://www.aclu.org/news/aclu-settles-pregnancy-discrimination-charge-behalf-cromwell-connecticut-police-officer>.

to a school district in South Carolina⁶ to an airline based in Colorado.⁷ Pregnancy discrimination against students also remains rampant, including in science, technology, engineering, and math fields where women and girls are already underrepresented.⁸ The Equal Rights Amendment could recognize these forms of discrimination as grounded in paternalistic and illicit stereotypes about pregnant people’s ability to participate fully in society.

Moreover, the Equal Rights Amendment could provide an additional layer of protection against restrictions on abortion, contraception, and other forms of reproductive healthcare. For over half a century, the Supreme Court has recognized that fundamental decisions about whether or when to have a child are protected under Fourteenth Amendment principles of privacy, liberty, and equality.⁹ The Court has emphasized that the Constitution prohibits the State from insisting “upon its own vision of the woman’s role” as a mother, and recognized that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹⁰ The Equal Rights Amendment could be an additional tool against further erosion of reproductive freedom and the stereotypes restrictions on reproductive freedom reflect and engender.¹¹

The Equal Rights Amendment could also lay the groundwork to establish critical avenues of redress to individuals facing sexual harassment and gender-based violence. As the outpouring of stories in the #MeToo era has made clear, sexual harassment and assault remain pervasive throughout all corners of American life. Limitations in the existing legal landscape leave many individuals—but particularly women, LGBTQ people, people of color, immigrants, people with disabilities, and low-income people—vulnerable to sexual violence. ACLU clients

⁶ ACLU, *ACLU Wins Change of Charleston Schools’ Policy That Discriminated Against Pregnant Workers and New Mothers* (Nov. 30, 2018), <https://www.aclu.org/news/aclu-wins-change-charleston-schools-policy-discriminated-against-pregnant-workers-and-new>.

⁷ ACLU, *Frontier Airlines Flight Attendants File Discrimination Charges With EEOC* (May 16, 2017), <https://www.aclu.org/news/frontier-airlines-flight-attendants-file-discrimination-charges-eeoc>.

⁸ See Mary Ann Mason & Jaclyn Younger, *Title IX and Pregnancy Discrimination in Higher Education: The New Frontier*, 38 N.Y.U. REV. L. & SOC. CHANGE 269 (2014); Marc Goulden, Karie Frasch, & Mary Ann Mason, *Staying Competitive: Patching America’s Leaky Pipeline in the Sciences*, Berkeley Center on Health, Economic, & Family Security & The Center for American Progress (Nov. 2009), http://www.americanprogress.org/wp-content/uploads/issues/2009/11/pdf/women_and_sciences.pdf.

⁹ *Whole Women’s Health v. Hellerstedt*, 136 S.Ct. 2292 (2016); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851-52 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁰ *Casey*, 505 U.S. at 852, 856; see also *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *United States v. Virginia*, 518 U.S. 515 (1996).

¹¹ See *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 859 (N.M. 1998); *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986); but see *Bell v. Low-Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002); *Fischer v. Dep’t of Pub. Welfare*, 502 A.2d 114 (Pa. 1985).

have experienced sexual harassment and assault in low-wage workplaces,¹² housing,¹³ immigration detention,¹⁴ prisons,¹⁵ jails,¹⁶ high schools,¹⁷ colleges,¹⁸ and at the hands of domestic partners.¹⁹ After reporting their experiences of gender-based violence, these survivors have faced dangerous inaction,²⁰ punishment, eviction from their homes,²¹ and even banishment from their cities.²² The Equal Rights Amendment has potential to recognize gender-based violence as a form of gender-discrimination and remove barriers to justice for victims and survivors. It could also authorize Congress to pass new legislation that provides civil remedies for survivors of gender-based violence in a wide array of contexts.

The ACLU urges Congress to extend the 1982 ratification deadline to realize the Equal Rights Amendment's unfulfilled promise of a society in which people of all genders are treated equally. Article V of the U.S. Constitution grants Congress broad discretion over the constitutional amendment process, and does not set any

¹² Gillian Thomas, *McDonald's Is Serving Up Sexual Harassment*, ACLU (Jan. 14, 2019), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/mcdonalds-serving-sexual-harassment>.

¹³ ACLU, *Court Order Alabama Property Manager and Landlord to Pay Damages for Sexual Harassment of Tenant* (June 2, 2009), <https://www.aclu.org/news/court-orders-alabama-property-manager-and-landlord-pay-damages-sexual-harassment-tenant>.

¹⁴ ACLU, *ACLU of Arizona Files Lawsuit on Behalf of Transgender Woman Sexually Assaulted by CCA Guard*, ACLU (Dec. 5, 2011), <https://www.aclu.org/news/aclu-arizona-files-lawsuit-behalf-transgender-woman-sexually-assaulted-cca-guard>.

¹⁵ Mie Lewis, *Standing Up Against Sexual Assault by the State*, ACLU (April 12, 2012), <https://www.aclu.org/blog/smart-justice/mass-incarceration/standing-against-sexual-assault-state>.

¹⁶ Dylan Cowart, *Transgender Prisoners Face Sexual Assault and Discrimination at Pittsburgh Jail* (Nov. 13, 2017), <https://www.aclu.org/blog/lgbt-rights/criminal-justice-reform-lgbt-people/transgender-prisoners-face-sexual-assault-and>.

¹⁷ Abigail Pesta, *Kicked Out of High School for 'Public Lewdness' After Reporting Rape*, NBC News (Dec. 19, 2013), <https://www.nbcnews.com/news/us-news/kicked-out-high-school-public-lewdness-after-reporting-rape-flna2D11794148>.

¹⁸ Gabrielle, *My University Has Failed Me*, ACLU (Dec. 19, 2013), <https://www.aclu.org/blog/womens-rights/womens-rights-education/my-university-has-failed-me>.

¹⁹ Sandra Park, *A Missouri Town Will Finally Stop Banishing Residents for Reporting Domestic Violence*, ACLU (Sept. 12, 2018), <https://www.aclu.org/blog/womens-rights/violence-against-women/missouri-town-will-finally-stop-banishing-residents>; Sandra Park, *With Nuisance Laws, Has 'Serve and Protect' Turned Into 'Silence and Evict'?*, ACLU (March 25, 2016), <https://www.aclu.org/blog/womens-rights/violence-against-women/nuisance-laws-has-serve-and-protect-turned-silence-and>; Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911*, ACLU (Sept. 11, 2015), <https://www.aclu.org/blog/womens-rights/violence-against-women/i-was-domestic-violence-victim-my-town-wanted-me-evicted>.

²⁰ Lenora Lapidus, *Jessica Lenahan Lived Through a Domestic Violence Nightmare and Emerged as a Heroic Advocate for Police Reform*, ACLU (June 9, 2017), <https://www.aclu.org/blog/womens-rights/violence-against-women/jessica-lenahan-lived-through-domestic-violence-nightmare>.

²¹ Sandra Park & Linda Morris, *Dialing 911 Can Get You Evicted*, ACLU (April 18, 2019), <https://www.aclu.org/blog/womens-rights/violence-against-women/dialing-911-can-get-you-evicted>.

²² Sandra Park, *This Missouri City Banishes Domestic Violence Survivors for Calling the Police*, ACLU (April 7, 2017), <https://www.aclu.org/blog/womens-rights/violence-against-women/missouri-city-banishes-domestic-violence-survivors-calling>.

contemporaneity requirement. As the Supreme Court has held, Congress alone has the authority to establish the proper timeline for ratification and to determine the validity of prior state ratifications.²³ Nothing in the text of the ERA itself limits Congress to the original 1979 ratification deadline²⁴—indeed, Congress has already exercised its authority to extend the ratification deadline once before, in 1978, until 1982. Further, there is precedent for permitting a significant lapse in time between Congressional approval and full ratification: Congress proposed the Twenty-Seventh Amendment in 1789 but ratification was not complete until 1992, over two centuries later.

The Equal Rights Amendment is as vital today as it was in 1972, and is just one state short of gaining the necessary 38 votes necessary for full ratification. If Congress extends the Equal Rights Amendment ratification deadline and a 38th state ratifies, the Constitution will finally explicitly recognize that equality of rights shall not be denied or abridged on account of sex.

Thank you for the opportunity to offer our views. Please do not hesitate to contact Vania Leveille at 202-715-0806 or vleveille@aclu.org should you have any questions or need additional information.

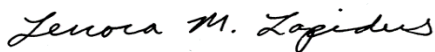
Sincerely,



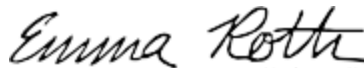
Ronald Newman
National Political Director



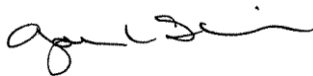
Vania Leveille
Senior Legislative Counsel



Lenora Lapidus
Director
Women's Rights Project



Emma Roth
Equal Justice Works Fellow
Women's Rights Project



Galen Sherwin
Senior Staff Attorney
Women's Rights Project

²³ See *Coleman v. Miller*, 307 U.S. 433 (1939).

²⁴ Congress placed the original ratification deadline in the Proposing Clause, not the body of the text.