

October 11, 2023

To the Members of the Maryland General Assembly:

As partners in pursuit of equal rights under the law for all Marylanders, regardless of race, color, ethnicity, national origin, age, disability, creed, religion, or sex—which includes equality on the basis of sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and decisions regarding reproductive healthcare and/or other aspects of an individual’s bodily autonomy—we respectfully urge you to introduce a resolution in the 2024 General Assembly to clearly affirm the Legislature’s view that the federal Equal Rights Amendment is the 28<sup>th</sup> Amendment to the United States Constitution.

The Equal Rights Amendment states:

***Section 1.*** *Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.*

***Section 2.*** *The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

***Section 3.*** *This amendment shall take effect two years after the date of ratification.*

The Equal Rights Amendment is needed now more than ever to ensure we are all recognized by our country’s Constitution as equal citizens:

- The United States has fallen out of the top third of countries internationally when ranked by gender equality and is ranked as the 10<sup>th</sup> most dangerous country in the world for women.<sup>1</sup>
- The ERA will make it easier for people who face discrimination on the basis of sex to seek legal recourse because it requires judges to apply the highest standard of constitutional scrutiny when deciding cases involving sex discrimination. Without the ERA, sex discrimination receives only “intermediate constitutional scrutiny” under judicial review, making it easier for the government and other entities to discriminate against individuals on the basis of sex without recourse.
- The ERA will give Congress greater power to enact laws that ensure adequate protection against sexual assault and domestic violence.
- The ERA will prevent Congress from enacting laws that curtail access to medical treatment and infringe upon civil rights, thus protecting abortion, contraception, equal

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<sup>1</sup><https://www.reuters.com/article/us-women-dangerous-poll-factbox/factbox-which-are-the-worlds-10-most-dangerous-countries-for-women-idUSKBN1JM01Z>

pay guarantees, no-fault divorce, gender affirming care, marriage equality, and a host of other rights.

- The ERA will set a clear expectation of sex equality in all aspects of life, making gender equality a fundamental and irrevocable tenet of society.
- As a constitutional amendment, the ERA could only be removed or revised with another constitutional amendment and therefore would be more enduring than legislation or court decisions. Without the ERA, state and federal legislation advancing gender equality can be repealed or replaced, court decisions are not necessarily permanent and can be retreated from or abandoned, and state-level equal rights amendments can be overridden by federal legislation or adverse court rulings.
- For decades the rights of women and LGBTQ+ people were guaranteed as a protected privacy interest under the 14th Amendment's substantive due process clause. However, the recent Supreme Court decision overruling *Roe v. Wade* illustrates that the decisions creating those 14th Amendment privacy protections against sex discrimination could be rolled back. As Justice Thomas' concurrence in *Dobbs* shows, some on the court believe that previous decisions extending the 14th Amendment's substantive due process protections specifically to sex discrimination, contraception, same-sex marriage, and same-sex intimacy should be overturned because, in their view, the framers of the 14th Amendment did not have sex equality in mind.

Article V of the US Constitution sets forth the following requirements for an amendment to be added to the Constitution: 2/3 of both houses of Congress must pass a proposed amendment and 3/4 of the states must ratify it. The first requirement was met when two-thirds of both houses of Congress passed the Equal Rights Amendment in 1972.<sup>2</sup> And in January 2020, Virginia became the 38<sup>th</sup> state to ratify the ERA, meeting the constitutionally prescribed 3/4 of states threshold and satisfying Article V's requirements.<sup>3</sup>

Although the Equal Rights Amendment should be considered as part of the constitution, the federal government doesn't currently recognize it as such. Weeks before Virginia's ratification, the Trump Administration directed the U.S. Archivist not to certify it. According to the administration, the final three ratifications were invalid because they took place after Congress' self-imposed deadline contained in the preamble to the amendment.<sup>4</sup> The Archivist is the official who collects ratifications, publishes ratifications in the Federal Register, and then certifies when enough states ratify. Publication is not listed in Article V, and thus not a requirement for an amendment. Despite a change in the White House in 2021, the Trump Administration's directive continues to stand in the way of formal federal recognition of equality on the basis of sex.

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<sup>2</sup> <https://catalog.archives.gov/id/7455549>

<sup>3</sup> <https://www.nytimes.com/2020/01/15/us/era-virginia-vote.html>

<sup>4</sup> <https://www.justice.gov/d9/opinions/attachments/2020/01/16/2020-01-06-ratif-era.pdf>

By the plain text of Article V's requirements, the US Constitution changed in January 2020 when Virginia ratified the ERA. Per Section 3 of the ERA, it took legal effect as the 28th Amendment to the Constitution in January 2022. By Article V's terms, Congress "*shall propose Amendments to this Constitution*" and, as soon as  $\frac{3}{4}$  of state legislatures ratify an amendment, it "*shall be valid to all Intents and Purposes, as Part of this Constitution.*" Article V makes both Congress and the States necessary and co-equal parties in the process to adopt a constitutional amendment. Even though Congress and the States have each completed their portion of the Amendment process for the ERA, the federal government has not acted accordingly, and so it is incumbent on the State Legislatures—as co-equal players in this process—to urge the federal government to follow its constitutional mandate and recognize the ERA as the 28<sup>th</sup> Amendment to the Constitution.

Attorneys General for the final three states to ratify the ERA (Nevada, Illinois, and Virginia) filed a lawsuit to require the Archivist of the United States to "carry out his statutory duty of recognizing the complete and final adoption" of the ERA as the 28th Amendment to the Constitution. Maryland's Attorney General issued an amicus brief in support of the lawsuit.<sup>5</sup> The D.C. Circuit Court ultimately left the issue in the hands of Congress to remove the time limit contained in its preamble and affirm the ERA as the 28th Amendment.

In a statement released after the D.C. Circuit Court's ruling, Illinois Attorney General Kwame Raoul and Nevada Attorney General Aaron Ford emphasized that the D.C. Circuit didn't validate the ratification deadline or deny the power of Congress to affirm the ERA, stating, "[t]he court's opinion makes it all the more important for the federal government and Congress to act—today—to ensure that the Amendment is acknowledged as the 28th Amendment to the Constitution."<sup>6</sup>

In the current Congress, identical resolutions have been introduced to remove the deadline imposed in the amendment's preamble and affirm the ERA as the 28th Amendment to the Constitution.<sup>7</sup> President Biden said in a statement that he will sign the bill once it passes both houses of Congress and then direct the Archivist to publish the ERA in the National Register as part of the U.S. Constitution.<sup>8</sup> Polls indicate 85% of voters approve of the ERA being part of the Constitution.<sup>9</sup> Despite the polls, at a recent hearing, opponent senators argued that the people of the United States do not need or want the Equal Rights Amendment in the Constitution. It is

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<sup>5</sup>[https://www.cadc.uscourts.gov/internet/opinions.nsf/1D7BCC9C5AF51F968525896400549E2C/\\$file/21-5096-1987839.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/1D7BCC9C5AF51F968525896400549E2C/$file/21-5096-1987839.pdf)

<sup>6</sup><https://news.bloomberglaw.com/daily-labor-report/equal-rights-amendment-backers-100-year-fight-turns-to-congress>

<sup>7</sup> [SJ Res 4](#) is the Senate resolution; [HJ Res 25](#) is the House resolution

<sup>8</sup><https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/27/statement-from-president-biden-on-the-equal-rights-amendment/>

<sup>9</sup><https://www.dataforprogress.org/blog/2022/6/2/fifty-years-later-voters-support-passing-the-equal-rights-amendment>

clear that the Maryland General Assembly must act to ensure the will of Marylanders is recognized and acknowledged by the federal government.

Resolutions such as the ERA-affirming resolution we are urging you to introduce in the 2024 General Assembly (a) raise awareness that the ERA has met the ratification threshold to be included in the US Constitution, but is unrecognized by the federal government, and (b) make a clear statement that the States, especially the 38 states that have already ratified the ERA, affirm its validity and expect the Congress and Biden Administration to do so. To date California, Colorado, Hawaii, Illinois, and Minnesota have passed resolutions to affirm the ERA, and Georgia, Indiana, Massachusetts, New Jersey, New York, Ohio, and Tennessee have introduced ERA-affirming resolutions.<sup>10</sup> Additionally, advocates in some of those states are also suing their Attorneys General with the goal of securing state court rulings that affirm the ERA's legal effect and forcing state law to come into compliance with the Amendment.<sup>11</sup>

**Strong deeds, gentle words.** Marylanders have long been leaders in the fight for sex equality, with the Free State being one of the first to ratify the Equal Rights Amendment in 1972. However, we are falling behind our sibling state legislatures in this final stretch.

**Why is the federal Equal Rights Amendment an issue for state legislatures?** Article V of the US Constitution gives states a clear role in amending the Constitution: ratification of proposed amendments. In 2020, the required  $\frac{3}{4}$  of states ratified the ERA, completing the Article V process and making it the 28<sup>th</sup> Amendment. When the federal government declines to affirm the validity of an amendment that has been duly ratified, as it is doing with the ERA, this calls into question federal recognition of state government and disregards the will of the people. Marylanders must not delay in making a clear statement that we expect the Constitutional powers of our legislature in the amendment process to be respected.

On a more practical level, absent the ERA in the Constitution, federal laws could be enacted that eliminate the rights Marylanders are guaranteed by our state-level Equal Rights Amendment, legislative action, or court rulings. Rights currently enjoyed by Marylanders that could be jeopardized include the right to equal pay, contraception, abortion care, gender-affirming care, and same-sex marriage and intimacy, among others. And even our own state Supreme Court may deliver rulings that weaken or eliminate sex-based protections that would be guaranteed by the Equal Rights Amendment, as we've just seen in this year's *John Doe v. Catholic Relief Services* ruling.

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<sup>10</sup><https://eracoalition.blog/2023/03/22/state-legislators-on-the-front-lines-in-fight-for-equal-rights-amendment-and-equal-protections-on-the-basis-of-sex/>

<sup>11</sup>Elizabeth Cady Stanton Trust v. Nessel , Mich. Ct. Cl., 22-000066-MB, (2022) , Elizabeth Cady Stanton Trust v. Neronha , R.I. Super. Ct., PC-2022-02942, (2022), and Elizabeth Cady Stanton Trust v. James , N.Y. Sup. Ct., 903819-22, (2022)

[https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XF3A1GFO000000?bna\\_news\\_filter=daily-labor-report#jcite](https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XF3A1GFO000000?bna_news_filter=daily-labor-report#jcite)

**What influence could state legislatures have on the final affirmation, certification, publication, and judicial backing of a US constitutional amendment?** According to Columbia Law Professor David Pozen, a renowned constitutional law scholar, clear statements by state legislatures could have a strong impact. He asserts the process for constitutional amendments is not clear cut, and virtually every amendment has faced legal challenges as to its adherence to Article V of the Constitution. Professor Pozen contends, "at the end of the day, whether an amendment has crossed the line and deserves to be considered part of the Constitution is a function of whether enough government officials, lawyers and ordinary citizens treat it as such."<sup>12</sup> And, as Justice Sotomayor wrote in her dissent in *303 Creative v. Elenis*, "The meaning of our Constitution is found not in any law volume, but in the spirit of the people who live under it." It is time for the Maryland General Assembly to declare that the people in our state understand the Constitution to guarantee that *"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."*

As a coalition, our organizations represent a diverse range of Marylanders, all of whom stand to benefit from the protection from discrimination guaranteed by the Equal Rights Amendment, including those who continue to be discriminated against based on their sex and the intersections of their sex with their race, color, ethnicity, national origin, age, disability, creed, and religion.

We ask you to join us in our efforts to see the Equal Rights Amendment affirmed as the 28<sup>th</sup> Amendment to the US Constitution by introducing a resolution during the 2024 session of the Maryland General Assembly that:

- Affirms that the Equal Rights Amendment has met all procedural requirements for an amendment set by Article V of the US Constitution;
- Clearly asserts the Legislature's position as a ratifying State body that the ERA is the 28<sup>th</sup> amendment of the US Constitution;
- Urges the US Congress to pass a joint resolution affirming the Equal Rights Amendment as our 28<sup>th</sup> Amendment to the US Constitution;
- Urges President Biden to publish, without delay, the Equal Rights Amendment as our 28<sup>th</sup> Amendment to the US Constitution; and
- Calls on other states to pass the same or similar resolutions

We look forward to working with you on this and future legislation to guarantee equal rights for all Marylanders, especially those who face discrimination on the basis of sex—which includes discrimination because of sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and decisions regarding reproductive healthcare and/or other aspects of

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<sup>12</sup><https://abcnews.go.com/Politics/democrats-unveil-new-effort-enforce-equal-rights-amendment/story?id=101220031>

an individual's bodily autonomy—and any other protected class. We hope the Maryland General Assembly recognizes its important role in this process and understands that its actions bear significant consequences at this crucial moment for our Nation and state.

With sincere appreciation,

**Allegany County Women's Action Coalition** - Sarah Parsons

**American Association of University Women (AAUW) Maryland** - Tracy Lantz, President



**AAUW Anne Arundel County** - Roxann King

**AAUW of Bethesda and Chevy Chase** - Margaret Tevis



**AAUW Garrett Branch** - Judy A. Carbone, President

**AAUW Harford County Branch** - Sheila Allen, PhD

**AAUW Howard County Branch** - Beth Hayden

**AAUW Kensington-Rockville Branch** - Dian Belanger and Maritsa George, co-Presidents



**AAUW Easton Branch** - Susan Regier

**Anne Arundel County Maryland NOW** - Sandy Bell



**Baltimore Safe Haven**

**Baltimore Safe Haven** - Iya Dammons



**Business & Professional Women - Maryland (BPW MD)** - Alicia Hannon, President



**The Concerned Black Women of Calvert County** - Sinetra Bowdry, President



**MARYLAND'S LGBTQ ADVOCATES**

**FreeState Justice** - Camila Reynolds-Dominguez, Policy Advocate & Legal Impact Coordinator



**Garrett County NAACP branch #7139** - Devin Barroga, President



**GLSEN Maryland** - Brendon Bailey, Chair



Maryland Coalition Against Sexual Assault

**Maryland Coalition Against Sexual Assault** - Lisae C Jordan, Esquire



[www.marylandwomen.org](http://www.marylandwomen.org)

**Maryland Commission for Women** - Tawanda A. Bailey, Chair



**Maryland Legislative Agenda for Women (MLAW)** - Michaele Cohen



**Maryland LGBTQ+ Chamber of Commerce** - Terri Hett





**Maryland NOW** - Barbara Hays



**Maryland Women's Heritage Center** - Kathi Santora, President

**Montgomery County Business & Professional Women (MC BPW)** - Alicia Hannon, President



**Montgomery County Maryland NOW** - Jeannette Feldner



MONTGOMERY  
COUNTY, MARYLAND

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WOMEN'S  
DEMOCRATIC CLUB

**Montgomery County Women's Democratic Club** - Tazeen Ahmad

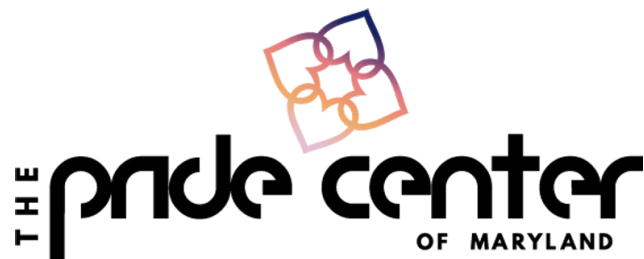


**Mountain Maryland Alliance for Reproductive Freedom** - Cresta Miller-Kowalski, President



**The National Coalition of 100 Black Women Prince George's County** - Thedosia Munford

**National Congress of Black Women-Prince George's County Maryland, Inc.** - Dr. Evelyn Y. Jenkins, Ph.D., President



**Pride Center of Maryland** - Tramour Wilson



**Reproductive Justice Maryland** - Jakeya Johnson

**TALBOT DEMOCRATIC WOMEN'S CLUB** - Dr. Lynne Fahey McGrath



**The Women's Law Center of Maryland** - Michelle Siri