

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

COMMONWEALTH OF VIRGINIA, *et al.*,

Plaintiffs,

v.

DAVID S. FERRIERO, in his official capacity as  
the Archivist of the United States,

Defendant,

ALABAMA, LOUISIANA, NEBRASKA,  
SOUTH DAKOTA, and TENNESSEE,

Intervenor-  
Defendants.

No. 1:20-cv-00242 (RC)

**BRIEF OF BUSINESS AND CORPORATE ENTITIES AS *AMICI CURIAE***  
**IN SUPPORT OF PLAINTIFF STATES**

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## INTRODUCTION

From the very first words of its preamble, the United States Constitution and its Amendments set forth the values and commitments that define a nation—including separation of powers; a government accountable to the People at the ballot box; freedom of speech, religion, and the press; the right to due process and equal protection; and the right of all adult citizens to vote regardless of race or sex.<sup>1</sup> These constitutional commitments are central to our understanding of what it means to be an American. Indeed these are the values that millions have believed were worth fighting and marching and dying for. Some of these core values—such as the Constitution’s commitment to freedom itself—were absent from the text for generations and only added after decades of bitter struggle. But with amendment after amendment, Americans have come together to build a more perfect union. And for the twenty-eighth time—a century after women secured the right to vote—we have done so again by ratifying the Equal Rights Amendment (“ERA”), an amendment that guarantees equal rights for all Americans regardless of sex.

In 1972, after decades of advocacy, Congress approved and submitted the ERA to the States. The amendment was supported on a bipartisan basis, with both

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<sup>1</sup> The Equal Rights Amendment refers to “sex” equality. This brief uses both terms, “sex” and “gender,” to refer to broad equality principles that are protected by the ratification of the ERA. *See e.g., Bostock v. Clayton Cty.*, \_\_U.S.\_\_, 2020 WL 3146686, at \*4 (U.S. June 15, 2020).

chambers approving the ERA by overwhelming majorities that reflected the extraordinary support for the ERA amongst the American people—354 to 24 in the House and 84 to 8 in the Senate. Between 1972 and 1977, thirty-five of the fifty states ratified the ERA, leaving the amendment just three states short of ratification. Although the years passed, the urgent need for the ERA never did. Men and women continue to be treated differently in this country on account of sex, resulting in myriad disparities in economic, health, and other outcomes. Mindful of this continued injustice and the harm caused by failing to address gender inequality in the Constitution, each of the three Plaintiff States considered the amendment in recent years. On a bipartisan basis, Nevada became the thirty-sixth state to ratify the ERA on March 22, 2017. Ratification by Illinois and Virginia followed on May 30, 2018 and January 27, 2020 respectively. While others have argued, untethered from constitutional text or history, that the mere passage of time invalidates the ratification votes of the three Plaintiff States, *amici* submit that the continued interest in the ERA by state legislatures in Plaintiff States underscores the amendment’s continued relevance and popularity.<sup>2</sup>

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<sup>2</sup> See American Bar Association, *ABA 2020 Survey of Civic Literacy* (May 1, 2020), <https://tinyurl.com/y9u8cumh> (83% of respondents strongly supported the ERA); see also Maryclaire Dale & Jocelyn Noveck, *AP-NORC Poll: Most Americans Support Equal Rights Amendment*, Associated Press (Feb. 24, 2020), <https://tinyurl.com/uwnda4e> (73% of American adults support the ERA); Kathy Frankovic, *Virginia Could Be the 38th State to Ratify the Equal Rights Amendment, and Americans Approve*, YouGov (Nov. 18, 2019), <https://tinyurl.com/y976jxj4> (majority of Democrats, Republicans, and Independents support adding the ERA to the Constitution).

With Virginia’s ratification, the Article V requirements have been met—law, not symbolism, was made this year in Richmond. Yet, Defendant, Archivist David Ferriero—charged by statute with carrying out the ministerial function of publishing duly enacted amendments—has refused to certify the ERA’s adoption. This inaction obstructed the realization of the People’s will, and frustrated the clear purpose of Article V of the Constitution. Accordingly, on January 30, 2020, Plaintiff States filed this action to ensure that this fundamental duty be carried out.

*Amici curiae*, a diverse group of 93 businesses employing millions of women and men, are united in their longstanding support of gender equality. They submit this brief in support of the Plaintiff States’ opposition to Defendant’s May 7, 2020 motion to dismiss. Proudly joining the overwhelming majority of Americans that support the ERA, *amici* recognize that eliminating systemic barriers that impede women’s economic and social advancement will result in a more just, vibrant, and productive America. Ratification of the ERA sends a powerful message about the nation’s commitment to sex equality—a message *amici* believe would be transformational for the American economy. *Amici* strongly urge this Court to order the Archivist to perform his statutory duty to publish and certify the ERA as the Twenty-Eighth Amendment.

## **INTEREST OF THE *AMICI CURIAE***

*Amici curiae* are a group of 93 companies whose businesses span the breadth of the U.S. economy. Although *amici* represent diverse commercial interests, they are united in their support of gender equality.

*Amici* seek the full participation of women in the economy. Operating in a wide-range of industries and markets and serving a diverse and multicultural customer base, *amici* understand that diversity in the workplace drives business performance. A workforce that includes employees with different backgrounds and life experiences is essential for any business operating in a global economy and multicultural society. Unequal access to education, inadequate health care, lack of physical safety, and economic insecurity prevent many women from fully accessing the labor market. The socioeconomic and legal challenges facing women due to gender inequality directly impact businesses in their efforts to recruit and retain women employees and access new markets, making it harder for American businesses to succeed.

Names of the *amici* are provided in Exhibit 1.

## **BACKGROUND**

*Amici* adopt and incorporate by reference the factual background set forth in Plaintiffs' Complaint [Docket No. 1].

## **ARGUMENT**

Adoption of the ERA would support all U.S. businesses in their efforts to diversify the workforce and expand their consumer reach, eliminate the barriers that

have hindered the full participation of women in the economy, and provide clear federal principles of equality. The novel coronavirus (“COVID-19”) pandemic, which has exposed and exacerbated systemic gender inequities in our society, demonstrates now, more than ever, the need for the ERA in the U.S. Constitution.

The principle of equality enshrined in the ERA is already the driving force behind long-standing corporate efforts to promote diversity, and the benefits to businesses are myriad. Diverse companies benefit from different perspectives, higher levels of employee morale, and more effective customer and community outreach. Diverse workplaces are better able to maximize talent and productivity and to spark creativity and innovation. But perhaps most importantly, diverse and inclusive workforces positively influence the society in which we live. Ultimately, diversity in the workplace not only brings about economic success in a globalized world, but also benefits workers’ professional lives and identities, promoting a more inclusive nation.

As the financial hardship of the COVID-19 pandemic falls disproportionately on women, particularly women of color, it is painfully evident to *amici* that the need for sex equality has never been greater. Despite significant advances over the past three decades, women continue to face substantial and systemic gender-based barriers, including unequal educational opportunities, inadequate access to health care, and gender-based violence. Longstanding gender inequities have left many women in a precarious economic position, making them particularly vulnerable to the disastrous economic consequences of the pandemic.

*Amici* believe that the ERA presents an opportunity for a more inclusive economic recovery from the COVID-19 crisis as well as a more equitable economy going forward. By facilitating women’s full participation in the labor force and improving women’s economic prospects, the ERA would benefit women workers, assist businesses in recruiting, developing and retaining them, and expand the universe of customers for the products and services these businesses sell. As gender diversity in the workforce increases, economic output and demand will also increase.

Importantly, the ERA would also provide the consistency and certainty of federal principles of equality that businesses need to expand and grow. Ratification of the ERA would provide a uniform federal judicial standard for protection of women’s rights, strengthen the legal advances for women that have already been achieved, and enhance the competitive edge of U.S. businesses globally. By addressing the limitations of our legal system that contribute to the socioeconomic marginalization of women, the ERA would enable businesses to emerge from the current crisis even stronger.

The ERA would also send an important message to the global community about American norms and values. Both our neighbor to the north and to the south prohibit discrimination on account of sex or gender in their constitutions.<sup>3</sup> The Charter of Fundamental Rights of the European Union, one of our largest trading partners and a jurisdiction where many *amici* operate, declares that “[e]quality between women and

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<sup>3</sup> U.S. Library of Congress, *Constitutional Provisions on Women’s Equality* (July 2011), <https://tinyurl.com/ydbf3e7y>.

men must be ensured in all areas”<sup>4</sup> and prohibits “[a]ny discrimination based on . . . sex.”<sup>5</sup> Canada, Mexico, and the European Union are not outliers—we are. An overwhelming majority of the world’s constitutions—including virtually all developed nations—contain provisions guaranteeing equal rights or prohibiting discrimination on the basis of sex or gender.<sup>6</sup> Gender equality has also been a core principle of international law for decades—so universally accepted that 187 of the United Nations’ 193 members have ratified or acceded to the Convention on the Elimination of All Forms of Discrimination against Women.<sup>7</sup> *Amici*, many of which compete internationally for customers and employees, believe that the ERA will improve American competitiveness and help accelerate the post-COVID-19 economic recovery.

**I. AS CORPORATE CITIZENS, *AMICI* ARE STRONGLY COMMITTED TO THE ERA AS A MEANS TO ADVANCE THE GOAL OF GENDER EQUALITY**

**A. *Amici* are Deeply Committed to Principles of Gender Equality, Diversity & Inclusion**

For *amici*, commitment to equality, diversity, and inclusion is a core value.

*Amici* foster workplace cultures that respect, value, and consider the different

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<sup>4</sup> Charter of Fundamental Rights of the European Union, title III, art. 23, 2012 O.J. (L 326) 400.

<sup>5</sup> *Id.* at art. 21-1.

<sup>6</sup> Jody Heymann et al., *Advancing Equality: How Constitutional Rights Can Make a Difference Worldwide* 58 (Univ. of Cal. Press 2020) (85% of constitutions explicitly guarantee equal rights or non-discrimination on the basis of sex and/or gender); *see also* U.S. Library of Congress, *supra* note 3.

<sup>7</sup> *See* Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980).

backgrounds and unique perspectives of *amici's* millions of employees. Consistent with this commitment, *amici* have devoted considerable resources to a variety of initiatives that support gender equality, and promote diversity and inclusion, within their own organizations. For example, some *amici* have developed vanguard policies and programs and increased training; while others have established offices and executive roles focused on diversity and inclusion. Many have launched mentoring and other initiatives designed to broaden the opportunities for women's professional advancement. *Amici* have also worked to address the effects of gender inequality in their respective communities through corporate social responsibility initiatives.

*Amici's* thorough commitment to reducing gender inequality stems, in part, from a recognition that diversity and inclusion is not only a moral imperative, it is also good for business. It is now well-established that gender diversity in the workplace improves performance.<sup>8</sup> Studies show businesses that value equality, promote diversity, and emphasize inclusion perform better financially.<sup>9</sup> According to a 2019 study of more

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<sup>8</sup> See, e.g., Catalyst, *Why Diversity and Inclusion Matter: Financial Performance* (Aug. 1, 2018), <https://tinyurl.com/y7n2kkm5> (collecting studies that demonstrate the financial benefits of workplace gender diversity).

<sup>9</sup> See Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, Harv. Bus. Rev. (Dec. 2013), <https://tinyurl.com/j8nyu8k>; Dieter Holger, *The Business Case for More Diversity*, Wall St. J. (Oct. 26, 2019), <https://tinyurl.com/y8vt8g4w>; Katherine W. Philips, *How Diversity Makes Us Smarter*, Sci. Am. (Oct. 1, 2014), <https://tinyurl.com/zo3asdr>; Julia Dawson et al., *The CS Gender 3000: The Reward for Change*, Credit Suisse Res. Inst. at 22–25 (Sept. 2016), <https://tinyurl.com/y8g24pmj>; Sundiatu Dixon-Fyle et al., *Diversity Wins: How Inclusion Matters*, McKinsey & Co. at 13–20 (May 2020), <https://tinyurl.com/ybcd2nmd>.

than 1,000 large companies in the United States and fourteen other countries, businesses with executive teams in the top quartile of gender diversity were 25 percent more likely to achieve above-average profitability compared to companies in the bottom quartile for gender diversity.<sup>10</sup> Increasingly attuned to the bottom-line benefits of diversity, companies worldwide are aggressively focused on reducing bias and other barriers that employees face at work.<sup>11</sup>

The positive correlation between diversity and financial performance makes sense, given that the success of *amici* and other businesses ultimately depend on the tenacity, resourcefulness, and creativity of their employees. Employees want to work in an environment where their contributions are valued and rewarded; and businesses want to encourage employees to draw upon and share different perspectives when solving problems or designing new products. Experience and research have repeatedly confirmed that diverse teams are more creative, better able to recognize previously unappreciated opportunities, and more likely to anticipate problems.<sup>12</sup> This means that diverse companies are likely to be more innovative and successful at rolling out new products and solutions in the marketplace.<sup>13</sup>

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<sup>10</sup> Dixon-Fyle, *supra* note 9, at 3, 14.

<sup>11</sup> See, e.g., Matt Krentz, *Survey: What Diversity and Inclusion Policies Do Employees Actually Want?*, Harv. Bus. Rev. (Feb. 5, 2019), <https://tinyurl.com/yyveswj4>.

<sup>12</sup> See Hewlett, *supra* note 9; Philips, *supra* note 9; see also Roger C. Mayer et al., *Do Pro-Diversity Policies Improve Corporate Innovation?*, 47 Fin. Mgmt. 617 (Fall 2018).

<sup>13</sup> See, e.g., Rocío Lorenzo et al., *How Diverse Leadership Teams Boost Innovation*, Boston Consulting Grp. (Jan 23, 2018), <https://tinyurl.com/y68et2mk>.

Women consumers directly make or influence nearly 80% of purchases in the United States.<sup>14</sup> As a result, *Amici's* ability to serve women consumers is of critical importance to their continued financial success. *Amici* recognize that gender diverse teams are more innovative and better able to anticipate consumer needs and patterns.<sup>15</sup>

Building and maintaining an inclusive workplace culture is now understood to be critical for businesses seeking to attract and retain top talent. While inattention to diversity and inclusion can lead to increased turnover,<sup>16</sup> draining businesses of experienced talent and saddling them with additional recruiting expenses, studies have shown that companies that prioritize diversity and inclusion are better positioned to recruit and retain employees.<sup>17</sup> The risks of inaction are real. According to one study, 86 percent of female millennials and 74 percent of male millennials believe a prospective employer's policies on diversity, equality, and inclusion are important factors when considering whether to accept a position.<sup>18</sup>

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<sup>14</sup> See Stuart Levine, *Diversity Confirmed To Boost Innovation and Financial Results*, Forbes (Jan. 15, 2020), <https://tinyurl.com/y7foz2dh>.

<sup>15</sup> Heidi Grant & David Rock, *Why Diverse Teams are Smarter*, Harv. Bus. Rev. (Nov. 4, 2016), <https://tinyurl.com/yc95n8rc>.

<sup>16</sup> See Korn Ferry, *Executive Survey Finds a Lack of Focus on Diversity and Inclusion Key Factor in Employee Turnover* (Mar. 2, 2015), <https://tinyurl.com/y7vsrawp> (84% of executives believed inattention to diversity and inclusion results in higher turnover; 56% believed that diversity and inclusion programs improved their retention rates).

<sup>17</sup> See Vivian Hunt et al., *Diversity Matters*, McKinsey & Co., at 9–13 (Feb. 2, 2015), <https://tinyurl.com/y8ykymgs>; Matt Krentz et al., *The Rewards of an Engaged Female Workforce*, Boston Consulting Grp. (Oct. 27, 2016), <https://tinyurl.com/ycbay9yk>.

<sup>18</sup> Aoife Flood, *The Female Millennial: A New Era of Talent*, PwC, 8 (2015), <https://tinyurl.com/y8bva99z>; see also Inst. for Public Relations & Weber Shandwick, *Millennials at Work: Perspectives on Diversity and Inclusion* (Dec. 6, 2016),

A company's corporate values, including its commitment to diversity, can positively influence consumer and stakeholder decisions. Research suggests Americans prefer to do business with socially conscious companies, particularly with respect to gender and racial equity.<sup>19</sup> Increasingly, institutional investors incorporate considerations of diversity and inclusion into due diligence and investment decisions.<sup>20</sup> In short, diversity and inclusion has become a business imperative.

**B. Persistent Gender-Based Inequality Demonstrates the Continued Need for the ERA**

Unfortunately, despite decades of efforts to advance women's rights, many women still face socioeconomic barriers preventing them from fully participating in the labor market. The challenges facing women—particularly women of color—have taken on increased urgency in the COVID-19 pandemic. Without full Constitutional equality, women experience widespread, systemic issues that impact the economy and make the ERA as vital as ever today.

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<https://tinyurl.com/ybgv9bsm/> (47% of millennials view diversity and inclusion of a workplace to be an important factor when searching for a new job).

<sup>19</sup> See Wayne Elsey, *Why Your Company Should Be More Socially Responsible*, Forbes (May 30, 2018), <https://tinyurl.com/ybpbj5ts> (63% of American consumers want to do business with companies that are social and environmental leaders; 78% want companies to address social issues; 87% would buy a product based on the company's social advocacy; and 76% would decline to do business with a company that held views or supported issues that conflicted with their beliefs).

<sup>20</sup> See, e.g., Nir Kaissar, *Calpers Diversity Push Blends Social-Investing Camps*, Bloomberg, June 18, 2019, <https://tinyurl.com/yx9h6rddy>; Arleen Jacobius, *CalPERS Turns Focus to Board Diversity in Proxy Voting*, Pensions&Investments, Sept. 17, 2018, <https://tinyurl.com/y7wlmq7d>.

1. *U.S. Supreme Court Decisions Demonstrate a Continued Need for the ERA*

Existing legal decisions have fallen short in effectuating women's basic rights in the enforcement of domestic violence restraining orders as well as sexual assault laws. Given that the foundation of economic productivity is physical safety and security, it is clear that a constitutional guarantee of equality of rights on the basis of sex is still critically needed. The ERA would provide a consistent federal standard that supports the fundamental rights of physical safety and security.

In *Town of Castle Rock, Colo. v. Gonzales*,<sup>21</sup> the Supreme Court held that a domestic violence victim did not have a right under the Due Process Clause to the enforcement of a restraining order. The petitioner in that case had made repeated reports to police that her estranged and abusive husband had taken their three daughters in violation of a protective order. The police failed to intervene, and the tragic events culminated in the husband murdering all three children and opening fire at the police station. When she brought a civil rights action based on the officer's refusal to enforce the restraining order, the Court held that the petitioner had no constitutional right to protection: where the state's laws permitted officer discretion in making restraining order enforcement decisions, the petitioner had no legal remedy.

Similarly, in *United States v. Morrison*,<sup>22</sup> the Supreme Court struck down a provision of the Violence Against Women Act that provided a federal civil remedy for

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<sup>21</sup> 545 U.S. 748 (2005).

<sup>22</sup> 529 U.S. 598 (2000).

victims of sexual violence. The petitioner in that case had instituted a lawsuit based on her alleged rape by respondents. The Court reasoned that the federal civil remedy was an unconstitutional extension of Congress's powers under the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment, rendering them inadequate instruments to address gender-based sexual violence.<sup>23</sup>

In *Geduldig v. Aiello*,<sup>24</sup> the Court upheld a California disability insurance program that did not cover employment disabilities resulting from pregnancy. The Court reasoned that this policy was not a violation of the Equal Protection Clause, because “[p]articularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.”<sup>25</sup> In sum, the Court held that the Constitution does not protect women from pregnancy discrimination based on sex.

In each of these cases, the Court held that the petitioner had no legal remedy under the Constitution to address a deprivation of rights on account of sex. The outcome of each of these cases would have been different if sex equality was guaranteed by the Constitution. By providing a constitutional guarantee of equality, elevating the legal standard applied to state action on the basis of sex to strict scrutiny,

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<sup>23</sup> *See id.* at 613–27.

<sup>24</sup> 417 U.S. 484 (1974).

<sup>25</sup> *Id.* at 495.

acknowledging sex equality as a guiding principle, and creating a consistent federal standard, the ERA will expand the power of the courts to effectuate women’s rights.

2. *Women—and Particularly Women of Color—Continue to Face Substantial and Systemic Gender-Based Barriers to Full Equality*

Without an ERA as a national standard, widespread, systemic inequalities have taken root and affected women’s full participation in the economy. Difficulties that disproportionately impact women and prevent full labor market participation include gender-based violence, lack of health care, and poverty. They create barriers to the retention of skilled women employees and inhibit economic growth.

Sexual and intimate partner violence impacts a staggering number of women nationwide,<sup>26</sup> with one out of every six women having been the victim of an attempted or completed rape over a lifetime.<sup>27</sup> In 2018 alone, over 730 thousand rapes or sexual assaults were reported to the U.S. Department of Justice.<sup>28</sup> Similarly, one in three women has experienced physical violence by an intimate partner.<sup>29</sup>

Researchers have documented that sexual and intimate partner violence has long-term impacts on victims. Ninety-four percent of rape victims experience

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<sup>26</sup> Jessie Bode Brown, *The Costs of Domestic Violence in the Employment Arena: A Call for Legal Reform and Community-Based Education Initiatives*, 16 Va. J. Soc. Pol’y & L. 1, 1–2 (2008) (citation omitted).

<sup>27</sup> See Rape, Abuse & Incest National Network, *Victims of Sexual Violence: Statistics*, <https://tinyurl.com/hpwax6p>. [Hereinafter “RAINN”]

<sup>28</sup> See U.S. Department of Justice, Bureau of Justice Statistics, NCJ 253043, *Criminal Victimization, 2018* 4 (Sept. 2019), <https://tinyurl.com/yxet3gqd>.

<sup>29</sup> See National Coalition Against Domestic Violence, *Statistics*, <https://tinyurl.com/ydcp7c2x>. [Hereinafter “NCADV”]

symptoms of post-traumatic stress disorder (PTSD) in the weeks immediately following.<sup>30</sup> Approximately 70 percent of sexual assault victims suffer from long-term psychological distress, a higher rate than other violent crimes such as robbery or assault.<sup>31</sup> Sexual and intimate partner violence also impacts women's relationships with their friends, family, and co-workers. Victim advocacy organizations find that 38 percent of sexual violence victims face issues at work or school, which can include challenges with a boss or coworker.<sup>32</sup> Eighty-four percent of victims of sexual violence by an intimate partner experience socio-emotional issues.<sup>33</sup> Victims of intimate partner violence lose an estimated total of eight million days of paid work every year.<sup>34</sup> Intimate partner violence costs the economy more than \$8.3 billion per year, with between 21 and 60 percent of victims losing their jobs as a result.<sup>35</sup>

In addition, an inordinate number of women in the United States lack sufficient access to health care. Among high-income countries around the world, U.S. women have the greatest rate of chronic illness, the highest tendency to forego needed

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<sup>30</sup> See RAINN, *supra* note 28.

<sup>31</sup> U.S. Department of Justice, Bureau of Justice Statistics, NCJ 247076, *Socio-emotional Impact of Violent Crime* 3 (Sept. 2014), <https://tinyurl.com/y9hdce5q>.

<sup>32</sup> See *id.* at 17.

<sup>33</sup> See *id.* at 5.

<sup>34</sup> See NCADV, *supra* note 30.

<sup>35</sup> See *id.*; see also Cynthia Hess et al., Institute for Women's Policy Research, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors' Education, Careers, and Economic Security* 45 (2018) (lifetime per female victim cost is over \$100,000).

health care because of cost, and the greatest difficulty affording their health care.<sup>36</sup> One study found that over a third of U.S. women said they skipped needed medical care due to high costs.<sup>37</sup> Women of color face even greater challenges in accessing and receiving care. As an example, American Indians and Alaska Natives have the lowest rates of mammogram screenings in the 50-74 age cohort.<sup>38</sup>

Maternal mortality rates tragically illustrate the impact of these gender and racial inequalities. As compared to other high-income countries, women in the United States “have the highest rate of maternal mortality,” with dramatic racial disparities.<sup>39</sup> In 2018, there was a rate of 18 deaths per 100,000 live births for white women, as compared with 43.3 for Black women.<sup>40</sup>

Finally, women are more likely to face economic burdens. Compared to men, women ages 25-34 are 25 percent more likely to live in extreme poverty.<sup>41</sup> In 2018, more than 15.5 million U.S. women lived in poverty, representing 20 percent of Black women, 22 percent of Native women, 18 percent of Latinx women, and 10

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<sup>36</sup> See Munira Z. Gunja et al., *What is the Status of Women’s Health and Health Care in the U.S. Compared to Ten Other Countries?*, The Commonwealth Fund (Dec. 19, 2018), <https://tinyurl.com/y44g2c8b>. [Hereinafter “CF”]

<sup>37</sup> See *id.*

<sup>38</sup> See Susan G. Komen Foundation, *Comparing Breast Cancer Screening Rates Among Different Groups* (May 18, 2020), <https://tinyurl.com/uhmpoyv>.

<sup>39</sup> See CF, *supra* note 37.

<sup>40</sup> Donna L. Hoyert et al., U.S. Centers for Disease Control and Prevention, *Maternal Mortality in the United States: Changes in Coding Publication, and Data Release, 2018* 6 (Jan. 30, 2020), <https://tinyurl.com/segjovq>.

<sup>41</sup> United Nations, *Policy Brief: The Impact of COVID-19 on Women* 7 (Apr. 9, 2020), <https://tinyurl.com/ycqpf18l>. [Hereinafter “Policy Brief”]

percent of Asian women.<sup>42</sup> Seventy percent of the people living in poverty today are women and children, with 35 percent of single mothers living in poverty.<sup>43</sup>

Single mothers who are teenagers attain below-average education levels and are more likely to live in poverty than mothers who gave birth later in life.<sup>44</sup> Children of teenage mothers are more likely to be incarcerated, have chronic medical conditions, struggle at school, be placed in foster care, and become teenage parents.<sup>45</sup>

These conditions disproportionately affecting women have multi-generational effects on women's labor force participation, and particularly impact communities of color. Black and Latinx children are more likely to live with a single mother<sup>46</sup> and, along with Indigenous children, more likely to live below the poverty line.<sup>47</sup> Persistent childhood poverty—defined as living below the poverty line for at least half of one's childhood—impacts the ability to complete high school, pursue

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<sup>42</sup> Amanda Fins, National Women's Law Center, *National Snapshot: Poverty Among Women & Families, 2019* (Oct. 2019), <https://tinyurl.com/yd9stog9>.

<sup>43</sup> The Women's Legal Defense and Education Fund – Legal Momentum, *Women and Poverty in America*, <https://tinyurl.com/yb7w6af6>.

<sup>44</sup> National Conference of State Legislatures, *Teen Childbearing is Costly to Taxpayers* (June 11, 2014), <https://tinyurl.com/yare36co>.

<sup>45</sup> *Id.*

<sup>46</sup> Pew Research Center, *About One-Third of U.S. Children Are Living with an Unmarried Parent* (Apr. 27, 2018), <https://tinyurl.com/ya66llyv>.

<sup>47</sup> Research shows 35% of American Indian children, 34% of Black children, and 28% of Latinx children are considered poor compared to 12% of white and Asian children. See Heather Koball & Yang Jiang, *Basic Facts About Low-Income Children – Children Under 18 Years, 2016* Fig. 6, National Center for Children in Poverty (Jan. 2018), <https://tinyurl.com/yaayuekb>.

secondary education, and be consistently employed as adults.<sup>48</sup> Thus, gender inequalities can carry forward into the next generation and are further exacerbated by racial inequalities faced by Black, Latinx, and Indigenous women.

3. *The COVID-19 Pandemic Has Worsened these Disparities*

These issues—gender-based violence, inadequate health care, and higher female rates of poverty—have been worsened by the COVID-19 pandemic. First, women are more likely to be victims of intimate partner violence during the pandemic,<sup>49</sup> with “surges” reported around the world.<sup>50</sup> Restrictions on movement and shelter-in-place orders have confined more women with their abusers. Home isolation “giv[es] . . . more power to the abuser,” who is able to isolate the victim from friends, family, and coworkers, monitor the victim, engage in abuse, and cut off intervention.<sup>51</sup> While domestic violence service agencies have piloted creative methods for helping victims—such as converting hotlines to text messaging, which can be used discreetly—many victims are being told that police resources are scarce.<sup>52</sup>

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<sup>48</sup> Caroline Ratcliffe, *Child Poverty and Adult Success* 1, Urban Institute (Sept. 2015), <https://tinyurl.com/y9ooz8v5>.

<sup>49</sup> See Harvard Kennedy School Women and Public Policy Program, *Utilizing Evidence-Based Research to Incorporate a Gendered Lens for the COVID-19 Pandemic*, <https://tinyurl.com/y7ohfed6>.

<sup>50</sup> See *Policy Brief*, *supra* note 42, at 17.

<sup>51</sup> Amanda Taub, *A New Covid-19 Crisis: Domestic Violence Rises Worldwide*, N. Y. Times (Apr. 14, 2020), <https://tinyurl.com/vqjlr8q>.

<sup>52</sup> *Id.*

Second, more women than men are essential workers, which poses increased risks to their health. Globally, 70 percent of frontline health workers are women.<sup>53</sup> According to an analysis of U.S. Census data conducted by the New York Times, one in three jobs held by women has been deemed essential, with women of color most likely to be doing essential work.<sup>54</sup> Essential employment results in greater health risks: of the over 9,000 COVID-19 cases reported among health care professionals over a two-month period, 73 percent were women.<sup>55</sup>

Finally, even though more women than men are essential workers, the economic recession resulting from the COVID-19 pandemic has also disproportionately impacted women, who, at the outset, were on more uncertain economic footing.<sup>56</sup> According to data from the Bureau of Labor Statistics, women make up 47 percent of the United States workforce<sup>57</sup> but, as reported by the National Women's Law Center, accounted for 55 percent of lost jobs in April 2020.<sup>58</sup> Women

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<sup>53</sup> *Policy Brief*, *supra* note 42, at 10.

<sup>54</sup> Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N. Y. Times (Apr. 18, 2020), <https://tinyurl.com/y9rpvjsz>.

<sup>55</sup> CDC COVID-19 Response Team, Centers for Disease Control and Prevention, *Characteristics of Health Care Personnel with COVID-19—United States, February 12 - April 9, 2020* (Apr. 14, 2020), <https://tinyurl.com/y8gz4cgm>.

<sup>56</sup> See *Policy Brief*, *supra* note 42, at 4.

<sup>57</sup> U.S. Bureau of Labor Statistics, *Report No. 1084, Women in the Labor Force: A Databook* (Dec. 2019), <https://tinyurl.com/ybbvclaw>. [Hereinafter “*Women in the Labor Force*”]

<sup>58</sup> See Claire Ewing-Nelson, *After a Full Month of Business Closures, Women Were Hit Hardest by April's Job Losses 1*, National Women's Law Center (May 2020), <https://tinyurl.com/y757dzzs>.

of color have been especially impacted. The unemployment rate for Black women increased to 16.4 percent, and for Latinas it rose to 20.2 percent.<sup>59</sup> In contrast, the unemployment rate for white men, while still high, is 12.4 percent.<sup>60</sup>

This disparity may be explained by the types of jobs that women and men tend to hold. More women than men serve as frontline workers in the health care sector, and women are also more likely to be employed in the hospitality sector—retail and restaurants—which has been largely shut down during the pandemic.<sup>61</sup> By contrast, men are more likely to be employed by financial institutions, technology companies, and other professional services firms.<sup>62</sup> As a result, while women are largely unemployed, or else doing essential work throughout the pandemic, a larger percentage of men remain employed, potentially in sectors that permit them to work remotely. Adding to their financial difficulties, many women with families are experiencing increased childcare burdens, at a time when social distancing, stay-at-home orders, and school closings have cut off the safety net that many rely on.<sup>63</sup>

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<sup>59</sup> *See id.* at 2.

<sup>60</sup> *See id.*

<sup>61</sup> *See Policy Brief, supra* note 42, at 4.

<sup>62</sup> *Women in the Labor Force, supra* note 57 at Table 13.

<sup>63</sup> Caroline Kitchener, *'I had to choose being a mother': With no child care or summer camps, women are being edged out of the workforce*, *The Lily* (May 22, 2020), <https://tinyurl.com/y9kb265b>.

## II. THE ERA WOULD ENABLE WOMEN'S FULL PARTICIPATION IN THE LABOR FORCE AND PROVIDE CONSISTENCY IN THE ENFORCEMENT OF LAWS AFFECTING WOMEN

Amici support the ERA because it would provide the consistency and certainty of federal principles of equality and better protect women's constitutional rights—critical components of economic development and growth.

### A. Sex Equality Would Benefit Women Workers and Improve Economic Output

By ensuring sex equality under the Constitution, the ERA would help dismantle systemic gender-based barriers, enabling women to more fully participate in the workforce and benefitting the economy as a whole.

#### 1. *The ERA Would Facilitate Women's Full Participation in the Workforce*

As discussed above, gender inequalities diminish women's ability to participate in the workforce. As such, it comes as little surprise that nearly a quarter of working women are employed on a part-time basis, compared to 12 percent of men, or that women have lower overall participation rates in the U.S. labor force.<sup>64</sup>

Eliminating some of the systemic barriers that discourage women from entering certain fields, for instance, would significantly expand human capital. Department of Education data show women earn a higher percentage of overall bachelor's degrees compared with men (58 percent versus 42 percent), but are underrepresented in high-paying and highly productive sectors of the economy, such as

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<sup>64</sup> *Women in the Labor Force*, *supra* note 57 at Table 21.

technology (only 19 percent of software developers are women), manufacturing (29 percent), and other STEM fields.<sup>65</sup> By ensuring that women receive equality under the law, the ERA would promote greater female contribution to these fast-growing fields.

## 2. *Sex Equality Would Increase Economic Output*

Headwinds facing women caused by unequal representation in key industry sectors, gender-based violence, inadequate health care, and poverty undermine professional realization, which has detrimental effects on the economy. But this negative cycle could be reversed—and economic growth expanded—through efforts to promote women’s full participation in the labor market. Businesses that effectively recruit and retain women employees are better able to adapt to a rapidly changing global market, leverage additional sources of revenue, and tap into greater human potential.

For example, fast-growing sectors like the digital economy stand to benefit greatly from women’s increased participation in the labor force. Over the past 15 years, this sector has grown at a rate two and a half times faster than the global economy such that it now accounts for 15.5 percent of global GDP.<sup>66</sup> Given that the digital sector workforce remains nearly three-quarters male, women’s increased participation in this labor market will unlock the sector’s significant capacity for economic growth.<sup>67</sup>

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<sup>65</sup> *Id.*; U.S. Department of Education, *Fast Facts: Science, Technology, Engineering, and Mathematics (STEM) Education, by Gender*, <https://tinyurl.com/y9segrbn>.

<sup>66</sup> Huawei & Oxford Economics, *Digital Spillover: Measuring the True Impact of the Digital Economy* at 2, 8 (2017), <https://tinyurl.com/y9v76t3b>.

<sup>67</sup> *Women in the Labor Force*, *supra* note 57.

**B. Businesses and their Employees Would Benefit from the Consistency and Certainty of Federal Principles of Equality**

Without Constitutional equality, however, existing laws will continue to fall short in effectuating women's rights, leaving many women on the margins of the economy and with fewer professional options. The ERA would bring consistency in the enforcement of laws that impact women by providing a clear judicial standard based on federal principles of sex equality. By creating an overarching federal legal principle of sex equality, the ERA would fill the void left by inadequately and unevenly enforced state laws. The ERA would also strengthen previously achieved advances by establishing sex equality as an enduring right and a federal constitutional principle. The ERA thus has the potential to significantly improve the physical well-being and financial security of women, enabling *amici* and all U.S. businesses to benefit from women's greater participation in all aspects of the economy.

\* \* \*

At its conception, this nation embraced the dream of equality. The bitter struggle to realize equality of all persons continues to this day. Due to these efforts, the ideal of sex equality is now closer than ever to reality. With Virginia's ratification of the ERA, the supreme law of the land can now reflect, for the first time, a commitment to the equality of all persons regardless of sex.

## CONCLUSION

For these reasons, the Archivist of the United States should be required to recognize the complete and final adoption of the ERA as the Twenty-Eighth Amendment to the Constitution. *Amici* urge the Court to consider this information when assessing whether to deny Defendant's motion to dismiss.

Dated: June 29, 2020

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**CERTIFICATE OF SERVICE**

Pursuant to LCvR 5.3, I hereby certify that, on June 29, 2020, I caused to be electronically filed a copy of the foregoing Brief of *Amici Curiae* Business and Corporate Entities using the Court's CM/ECF system, and service was effected electronically pursuant to LCvR 5.4(d) to all counsel of record.

Dated: June 29, 2020

By: /s/ Jeannie S. Rhee

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 29(a)(4) and 32(a)(5) and the type-style requirements of Fed. R. App. P. 29(a)(4) and 32(a)(6) because it has been prepared in a proportionally spaced serif typeface in 14-point font.

Dated: June 29, 2020

By: /s/ Jeannie S. Rhee

# Exhibit 1

**LIST OF AMICI**

The businesses\* that join this brief are:

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2. 98point6 Inc.
3. Advance Local Media LLC
4. Advance Magazine Publishers Inc. AKA Condé Nast
5. Advance Publications, Inc.
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71. salesforce.com, inc.
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