

# ARLINGTON CIVIC FEDERATION RESOLUTION ON THE EQUAL RIGHTS AMENDMENT

## EXECUTIVE SUMMARY

### PROCEDURAL HISTORY

A draft resolution that would urge the Virginia General Assembly to ratify the federal Equal Rights Amendment (ERA), and would urge the Arlington County Board to place ratification of the ERA on its list of legislative priorities for the 2018-19 legislative session in Virginia, was introduced to the Arlington, Virginia Civic Federation and read by Julia Tanner, Delegate from Ashton Heights Civic Association, at the Arlington Civic Federation meeting on March 6, 2018. Ms. Tanner stayed after the meeting and responded to questions from attendees.

### BACKGROUND

The Equal Rights Amendment (ERA) to the United States Constitution provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."<sup>1</sup> The ERA was passed overwhelmingly by both houses of Congress in 1972 and has been ratified by thirty-six of the thirty-eight states required under the U.S. Constitution, most recently by Nevada in March, 2017.<sup>2</sup>

Virginia has a longstanding value of supporting equal rights for women and men. For 47 years, Section 11, Article 1 of the Constitution of Virginia has safeguarded all people from discrimination by the Commonwealth on the basis of religious conviction, race, color, sex, or national origin.<sup>3</sup>

Arlington County also supports equal rights. Arlington's Civic Federation and County Board Chairs have consistently noted this support,<sup>4</sup> and all of the county's current Delegates and Senators sponsored or co-sponsored bills in the Virginia General Assembly to ratify the ERA this year.<sup>5</sup>

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<sup>1</sup> <https://www.gpo.gov/fdsys/pkg/STATUTE-86/pdf/STATUTE-86-Pg1523.pdf>

<sup>2</sup> [http://www.abajournal.com/news/article/nevada\\_ratifies\\_equal\\_rights\\_amendment\\_decades\\_after\\_deadline](http://www.abajournal.com/news/article/nevada_ratifies_equal_rights_amendment_decades_after_deadline)

<sup>3</sup> <https://law.lis.virginia.gov/constitution/article1/section11/>

<sup>4</sup> <http://www.civfed.org/ban2009prog.pdf>; <https://countyboard.arlingtonva.us/board-actions/proclamations/98th-anniversary-arlington-county-civic-federation-proclamation/> ("the Arlington County Civic Federation supports equal rights for all Virginians and has been vital in making Arlington a diverse and inclusive world-class community"); <https://countyboard.arlingtonva.us/99th-anniversary-arlington-county-civic-federation/>; <https://countyboard.arlingtonva.us/100th-anniversary-arlington-county-civic-federation/>; <https://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+SJ186ER+pdf>; Arlington County Code, Chapter 31, Human Rights, <http://arlingtonva.s3.amazonaws.com/wp-content/uploads/sites/22/2014/01/County-Code-31-Human-Rights.pdf>

<sup>5</sup> <https://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HJ4>; <https://lis.virginia.gov/cgi-bin/legp604.exe?181+mbr+HJ4>; <http://lis.virginia.gov/cgi-bin/legp604.exe?181+mbr+HJ2>; <http://lis.virginia.gov/cgi-bin/legp604.exe?181+mbr+SJ4>; <http://lis.virginia.gov/cgi-bin/legp604.exe?181+mbr+HJ129>

A resolution urging the General Assembly to ratify the United States ERA would support these Arlington principles and this work by Arlington's delegation, reflecting the support for equal rights among the residents of Arlington.

The late Supreme Court Justice Scalia stated in 2010 that the Constitution does not prohibit discrimination on the basis of sex.<sup>6</sup> Because there is no federal ERA, the U.S. Supreme Court does not give its highest level of review, "strict scrutiny," to government classifications that accord different treatment to different people on the basis of sex.<sup>7</sup> If the government adopts a classification based on a characteristic that does receive strict scrutiny, such as race or religion, the classification will survive strict scrutiny only if it is narrowly tailored to meet a compelling state interest.<sup>8</sup> The ERA would provide this protection against unreasonable sex discrimination by the U.S. or state governments all the way to the highest court.<sup>9</sup>

Even though modern households generally depend upon income from both men and women,<sup>10</sup> and women tend to earn higher grades and drop out less often than men,<sup>11</sup> men earn more than women for the same work,<sup>12</sup> and discrimination still occurs in the workplace<sup>13</sup> and in healthcare,<sup>14</sup> among other contexts. Providing a higher level of scrutiny would send a message to courts that sex-based classifications must be narrowly tailored.

## TIMING

The preamble to the ERA set forth a ratification deadline, later extended to 1982.<sup>15</sup> If that deadline is valid,<sup>16</sup> attorneys and legislators have concluded Congress has the power to

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<sup>6</sup> <https://www.theatlantic.com/politics/archive/2011/01/scalia-says-constitution-doesn-t-protect-women-from-gender-discrimination/342789/>

<sup>7</sup> <https://www.leg.state.nv.us/Session/79th2017/Minutes/Assembly/LOE/Final/428.pdf>, pp. 16-17; see also, e.g., *Fronteiro v. Richardson*, <https://supreme.justia.com/cases/federal/us/411/677/case.html>

<sup>8</sup> <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1271&context=wmjowl>, pp. 135-36.

<sup>9</sup> <http://www.equalrightsamendment.org/why.htm>

<sup>10</sup> Women make up almost of half (47%) of the U.S. labor force today, and are breadwinners in 40% of households with children. <http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/>

<sup>11</sup> <http://fortune.com/2013/03/27/boys-vs-girls-whats-behind-the-college-grad-gender-gap/>

<sup>12</sup> Female earnings in the U.S. in 2016 were 80% of male earnings for the same jobs. U.S. Census Bureau, *Income and Poverty in the United States: 2016*, at 10, <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf> (September 2017).

<sup>13</sup> U.S. EEOC, *Women In the American Workforce, EEOC's Efforts To Address Sex-Based Discrimination in Employment*, [https://www.eeoc.gov/eeoc/statistics/reports/american\\_experiences/women.cfm](https://www.eeoc.gov/eeoc/statistics/reports/american_experiences/women.cfm); U.S. Census Bureau, *Income and Poverty in the U.S.: 2016*, p. 10, <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf> (September 2017).

<sup>14</sup> Harvard Health Pub., *Gender Matters: Heart disease risk in women*, <https://www.health.harvard.edu/heart-health/gender-matters-heart-disease-risk-in-women>; J. of the Amer. Heart Assoc., *Implicit Gender Bias & the Use of Cardiovascular Tests Among Cardiologists*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5779009/> (2017); J. of Women's Health, *Disparities in Physicians' Interpretations of Heart Disease Symptoms by Patient Gender: Results of a Video Vignette Factorial Experiment* (2009).

<sup>15</sup> "ERA Deadline Extended," *Congressional Quarterly Almanac*, 95th Congress, 2nd Session, 1978, vol. XXIV (34) (Washington, DC: Congressional Quarterly Inc., 1979), pp. 773-775.

retroactively remove or extend it.<sup>17</sup> An informal advisory opinion from the Virginia Attorney General's office stated that Congress has the power to retroactively extend or remove the deadline.<sup>18</sup> Nonpartisan counsel to the Nevada legislative committee also stated that Congress can remove or extend the deadline.<sup>19</sup> Legislation pending before Congress would remove the deadline.<sup>20</sup>

## CONCLUSION

In conclusion, a Resolution regarding ratification of the ERA will send the message that Arlington supports federal recognition of the value that Virginia, Arlington, and the Civic Federation place on equal rights for men and women.

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<sup>16</sup> The Constitution does not expressly authorize Congress to set deadlines for ratification. See U.S. Const. Art. V. The ratification deadline for the ERA resides in the preamble, not in the active language of the amendment itself. In other cases, the Court has stated that language in preambles is not operative language. See *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009), [https://scholar.google.com/scholar\\_case?case=8910590074858139443&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=8910590074858139443&hl=en&as_sdt=6&as_vis=1&oi=scholar) (quoting *D.C. v. Heller*, 554 U.S. 570 at 578 n.3 (2008)).

<sup>17</sup> Other amendments have been ratified years after introduction. The Twenty-Seventh Amendment, for example, was ratified more than two centuries after it was proposed. <https://fas.org/sgp/crs/misc/R42979.pdf>, at p. 17.

<sup>18</sup> [https://www.washingtonpost.com/local/virginia-politics/virginias-hopes-of-era-ratification-go-down-in-flames-this-year/2018/02/09/7acfbf80-0dab-11e8-8890-372e2047c935\\_story.html?utm\\_term=.f7e24a7dbced](https://www.washingtonpost.com/local/virginia-politics/virginias-hopes-of-era-ratification-go-down-in-flames-this-year/2018/02/09/7acfbf80-0dab-11e8-8890-372e2047c935_story.html?utm_term=.f7e24a7dbced).

<sup>19</sup> <https://www.leg.state.nv.us/Session/79th2017/Minutes/Assembly/LOE/Final/428.pdf>, pp. 16-17, 37; accord <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1271&context=wmjowl>.

<sup>20</sup> <https://govtrackinsider.com/nevada-just-became-the-first-state-since-1978-to-ratify-the-equal-rights-amendment-270e1b10c60e>