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The Hon. Carolyn B Maloney
Chairperson
House Committee on Oversight and Reform
2154 Rayburn House Office Building
Washington, DC 20515

Dear Chairperson Maloney and Members of the Committee:

I am submitting the attached statement pertinent to the Committee hearing scheduled for today on “Honoring ‘Equal Pay Day’: Examining the Long-Term Impacts of Gender Inequality.” It addresses the role the ERA could play in responding to gender inequality in employment, including unequal pay and the displacements resulting from the Covid-19 pandemic economy.

I hope the Committee will find it useful.

Thank you for providing the opportunity to be heard on this important issue.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Julie C. Suk". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Julie C. Suk

“Honoring ‘Equal Pay Day’:
Examining the Long-Term Economic Impacts of Gender Inequality”

Statement on the Equal Rights Amendment and Gender Inequality in Employment

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Inequality of employment opportunity between women and men was a serious concern when the 92nd Congress adopted the Equal Rights Amendment in 1972.¹ The ERA, providing “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,” sought to abolish the second-class citizenship of women. Unequal pay was one of the many ways in which that second-class citizenship was expressed in society. The ERA was designed to work in two equally important ways. First, it would invalidate laws that discriminated against women, by excluding them from certain jobs, professions, and educational opportunities. The courts would have power to strike down those laws. But the ERA also envisioned a central role for Congress and state legislatures. The constitutional amendment would catalyze legislation that would lift women out of second-class citizenship and empower them to participate fully as equals in the economy and in American democracy.² Adding the ERA to the Constitution would facilitate the legislative steps required to reduce the gender pay gap.

Although some progress was made towards equal pay without the ERA, unequal pay between women and men persists. In 2019, women made 82 cents to the man’s dollar, with

¹ See, e.g., Equal Rights Between Women and Men 1971, Hearings Before Subcommittee No. 4 of the House Judiciary Committee, 92d Cong. 525 (Statement of Rep. Shirley Chisholm); 528 (Statement of Rep. Margaret Heckler).

² See id. at 521 (Statement of Rep. Patsy Takemoto Mink).

African American women making 61 cents and Latina women making 56 cents.³ The pandemic economy has exacerbated the gender gap in employment, not only with regard to pay, but in women’s levels of participation in the paid workforce altogether.⁴ Millions of women have lost or left their jobs in the past year. Many mothers were driven out of paid work because the shutdown of schools and daycares left their kids at home. Mothers shouldered the burdens of childcare and education, resulting in job losses and reductions in working hours.

An ERA can make a difference to the constitutional status of the legislation necessary for a gender-equal economic recovery. We can learn from most countries around the world, which have equal rights for women in their constitutions.⁵ They were adopted in World War II to mirror the 1945 United Nations (UN) Charter’s provision on equal rights between women and men. The UN’s 1995 World Conference on Women in Beijing established “gender mainstreaming” as the global approach to gender equality.⁶ “Gender mainstreaming” consists of analyzing the effects of every governmental policy or program on women and men. Building on this approach, UN Women created the Global Gender Response Tracker, which analyzes global

³ See Institute for Women’s Policy Research, The Gender Wage Gap: 2019 Earnings Differences by Race and Ethnicity, <https://iwpr.org/iwpr-issues/employment-and-earnings/the-gender-wage-gap-2019-earnings-differences-by-race-and-ethnicity/>.

⁴ See Titan Alon, Matthias Doepke, Jane Olmstead-Rumsey, & Michèle Tertilt, This Time It’s Different: The Role of Women’s Employment in a Pandemic Recession, National Bureau of Economic Research (NBER), Working Paper 27660, Aug. 2020, https://www.nber.org/papers/w27660?utm_source=npr_newsletter&utm_medium=email&utm_content=20200817&utm_term=4756833&utm_campaign=money&utm_id=984457&orgid=353

⁵ See H. Rept. 116-378, Removing the Deadline for the Ratification of the Equal Rights Amendment, at 5 (quoting Justice Ruth Bader Ginsburg).

⁶ UN Women, Gender Mainstreaming: A Global Strategy for Achieving Gender Equality and Empowerment of Women and Girls 2 (2020), available at <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/gender-mainstreaming-strategy-for-achieving-gender-equality-and-empowerment-of-women-girls-en.pdf?la=en&vs=3849>

pandemic economic recovery policies to assess whether they are sufficiently responsive to women’s economic insecurity.⁷

Likewise, the ERA can engender governmental responsiveness to gender inequality. Textually, the ERA’s language prohibits the United States and all the states from “abridg[ing]” “equality of rights” “on account of sex.” It directs federal and state governments to avoid the discriminatory effect of any governmental action on women. The ERA’s Section 2 gives power to Congress to enforce equal rights, and that authorizes Congress to legislate to minimize and overcome disadvantages faced by women and girls in society. Thus construed, the ERA can be a foundational tool of law and public policy that will enable and legitimize governmental action against gender inequality, including measures to mitigate the deeper sources and complex dynamics of the gender pay gap. Effective measures would go beyond existing equal pay statutes and a broad new basis of congressional authority in the Constitution to promote gender equality would provide needed clarity.

Economists have shown that the gender pay gap is largely attributable to the effects of motherhood on women’s careers.⁸ In the United States, women’s earnings drop significantly after having a child, whereas men’s earnings don’t. Only 17 percent of American workers have access to paid parental leave;⁹ the vast majority do not. Furthermore, federal law does not require employers to accommodate the health and safety needs of pregnant workers on the job. The lack of accommodation forces women to choose between the health and safety of themselves and

⁷ See UN Women & UN Development Program Covid-19, Global Gender Response Tracker, <https://data.undp.org/gendertracker/>

⁸ See Marianne Bertrand, Claudia Goldin, & Lawrence Katz, Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors, 2 American Economic Journal: Applied Economics 228 (2010); Claudia Goldin, Sari Pekkala Kerr, Claudia Olivetti, & Erling Barth, The Expanding Gender Earnings Gap: Evidence from LEHD-2000 Census, 107 American Economic Review 110 (2017).

⁹ See Bureau of Labor Statistics, Access to Paid and Unpaid Family Leave in 2018, Feb. 27, 2019, available at <https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm>

their unborn children and the job necessary to the family's economic security. Many are forced out of their jobs because of pregnancy and family-unfriendly workplaces, which can affect their ability to re-enter the job market with a comparable salary to their male peers. Furthermore, the lack of childcare – as the pandemic has shown – significantly undermines working parents' abilities to work and earn. Even when there is no pandemic to shut down schools and childcare centers, the scarcity of affordable high-quality childcare has often prevented women from contributing their talents and skills to the paid workforce. Mothers' unpaid breaks from work to bear and raise children often have long-term consequences for their wages over a lifetime, which also impacts their retirement savings and likelihood of retiring in poverty. Not only does this diminish the quality of women's lives, and those of their families; it also deprives America's society and economy of valuable contributions that could be made by women's education, talents, and skills.

To attack these root causes of working women's vulnerability to economic insecurity over a lifetime, Congress must have the power to act boldly to guarantee paid parental leave, guarantee pregnant worker fairness, provide comprehensive access to free or affordable childcare, and prohibit employer practices that perpetuate unequal pay, such as the use of salary history and the requirement of pay secrecy among employees. Congress must also regulate other sources of women's economic insecurity, including sexual harassment and violence.

Without the ERA, Congress's constitutional power to respond effectively to the complex dynamics of the pandemic-induced female recession is unclear and may be limited. In 2000, the Supreme Court struck down the Violence Against Women Act's civil remedy provision, on the grounds that Congress could not regulate gender-motivated violence between private parties

pursuant to its Commerce Clause and Fourteenth Amendment powers.¹⁰ In 2012, the Supreme Court again read the Commerce Clause very narrowly to conclude that Congress could not require individuals to buy health insurance under the Commerce Clause.¹¹ The Court also held that Congress could not require the states to expand Medicaid under the Spending Clause. The Court upheld some provisions of Obamacare based on Congress's tax power, but the scope of Congress's commerce powers to respond to economic effects have been constrained. One federal district court recently ruled that the CARES Act's temporary moratorium on evictions exceeded Congress's power under the Commerce Clause.¹² It is unclear whether the Supreme Court's current approach to Congress's power under existing constitutional provisions would authorize the full range of legislation needed to respond to the devastating economic impact of the pandemic on women.

The Article V amendment process empowers Congress and the states to change the Constitution, particularly in the face of the Supreme Court's interpretations of the existing Constitution with which it disagrees.¹³ Congress is empowered by the Constitution to indicate a broader vision of constitutional sex equality and its power to pursue it than the one embraced by the Supreme Court, by recognizing the ERA's valid ratification in 2021.

Because the Supreme Court precedents may not clearly establish federal power to undertake affirmative legislative measures to promote gender equality, particularly to support working mothers who may be inactive in the labor market because of caregiving, the ERA could provide crucial clarity on the scope of Congress's power. From pay equity to pregnant worker

¹⁰ See *United States v. Morrison*, 529 U.S. 598 (2000).

¹¹ *NFIB v. Sebelius*, 567 U.S. 519 (2012).

¹² *Terkel v. CDC*, No. 6:20-cv-00564 (E.D. Tex. Feb. 25, 2021).

¹³ See Laurence H. Tribe, *A Constitution We Are Amending: In Defense of A Restrained Judicial Role*, 97 *Harvard Law Review* 433, 436 (1983) (noting that Congress proposes amendments to suggest a textual change in the Constitution when it is dissatisfied with the way courts have resolved the issue).

fairness, paid family leave, and childcare, national action by Congress to reverse the devastating economic effects of the pandemic on working mothers is urgently needed. The ERA will provide firm constitutional backing for these measures.