

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

SCR 92 (Leyva)  
Version: March 30, 2022  
Hearing Date: April 26, 2022  
Fiscal: Yes  
Urgency: No  
TSG

**SUBJECT**

The Equal Rights Amendment: the California Law Revision Commission: study

**DIGEST**

This concurrent resolution authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law to remedy any defects in its language or impact that discriminate on the basis of sex.

**EXECUTIVE SUMMARY**

The California Law Revision Commission (CLRC) was established in 1953. It is tasked with an ongoing study of California law for the purpose of discovering defects in that law and recommending any necessary changes to the Legislature. The Legislature may also assign the CLRC to study specific topics through the passage of a statute or concurrent resolution. The Equal Rights Amendment (ERA) to the U.S. Constitution prohibits the federal and state governments from denying or abridging equality of rights under the law based on sex. It also empowers Congress to enforce its terms through legislation. Though there is a legal dispute over whether the ERA has met the standard for incorporation into the U.S. Constitution, this resolution makes the case that it has been incorporated and that it entered into full legal force and effect on January 27, 2022. In light of that, the resolution directs the CLRC to undertake a review of all California law to ensure that the language and impact of that law is in compliance with the ERA and to make recommendations for revision where necessary.

The resolution is sponsored by the California Women's Law Center and the Feminist Majority. There is no other support or opposition on file. If the resolution passes out of this Committee, it will next be heard in the Senate Appropriations Committee.

## PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the CLRC. (Gov. Code § 8280.)
- 2) Directs the CLRC to study any topic that the Legislature, by concurrent resolution or statute, refers to it for study. (Gov. Code § 8293(a).)

This resolution:

- 1) Makes a series of legislative statements regarding:
  - a) the ratification process for the ERA;
  - b) the argument for why the ERA is now part of the U.S. Constitution;
  - c) the content of the ERA;
  - d) congressional efforts to affirm the incorporation of the ERA; and
  - e) legislative authority to assign topics of study to the CLRC.
- 2) Deems it appropriate and necessary to undertake a comprehensive study of California law to identify any defects that prohibit compliance with the ERA.
- 3) Authorizes and requests the CLRC to study, report on, and prepare recommended legislation that would revise California law (including common law, statutes of the state, and judicial decisions) to remedy any defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex upon enforcement thereof.
- 4) Directs the CLRC to request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations.
- 5) Directs the CLRC to include a list of further substantive issues that the CLRC identifies in the course of its work as topics for future examination.
- 6) Resolves that the Secretary of the Senate shall transmit copies of the resolution to the author for appropriate distribution

## COMMENTS

1. The substance of the ERA

As proposed by Congress in 1972 for ratification by the states, the text of the ERA is as follows:

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. (86 Stat. 1523.)

## 2. Controversy over ratification of the ERA

Congress may initiate a proposal to amend the U.S. Constitution by a two-thirds vote of both houses. (U.S. Const., art. V.) The proposed amendment is then transmitted to the states for ratification. When three-fourths of the states have ratified the proposed amendment, it becomes part of the Constitution. (*Ibid.*) Congress has assigned the Archivist of the United States the role of certifying the moment when the requisite number of states have ratified a proposed amendment so that it becomes part of the U.S. Constitution. (1 U.S.C. 106b.)

Congress proposed the ERA in 1972 (H.R.J Res. 208 (1972) 92d Cong., 2d Sess.), but it was not until January 27, 2020 that the requisite number of states ratified it. In the meantime, a deadline for ratification contained in the proposing clause of the ERA (but not in the Constitution or text of the ERA itself) expired and some of the states that had ratified the ERA at one time attempted to rescind their ratification. As a result, there is controversy over the status of the ERA and whether it should now be considered part of the Constitution.<sup>1</sup>

To date, the National Archivist, David Ferriero, has declined to publish or certify the ERA as the 28<sup>th</sup> Amendment to the U.S. Constitution. Based on a 2020 Office of Legal Counsel opinion,<sup>2</sup> Ferriero has taken the position that he will not certify the ERA unless ordered to do so by a final court order. (*Virginia v. Ferriero* (D.D.C. 2021) 525 F. Supp. 3d 36, 43.) Nevada, Illinois, and Virginia, as the last three states to ratify the ERA, have filed a lawsuit seeking precisely such a court order. (*Id.* at 40.) Last month, however, a federal district court for the District of Columbia dismissed that case, ruling that the National Archivist could refuse to certify the ERA based on the fact that only 35 states had ratified it by the congressionally imposed deadline. (*Ibid.*) The states have appealed to the D.C. Circuit.

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<sup>1</sup> See Sen. Com. on Judiciary, Analysis of SJR 12 (2021-2022 Reg. Sess.) as introduced on Mar. 3, 2022 at pp. 4-5 for a more detailed discussion of the legal issues surrounding ratification of the ERA.

<sup>2</sup> *Ratification of the Equal Rights Amendment* (2020) 44 Op. O.L.C. \_\_\_, slip op., <https://www.justice.gov/olc/file/1232501/download> (as of Apr. 13, 2022).

3. Legislative authority to assign topics to the CLRC for study

The California Law Revision Commission (CLRC) was established in 1953. (AB 35 (Shaw, Ch. 1445, Stats. 1953; Gov. Code § 8280.) The CLRC's enabling statute recognizes two types of topics the CLRC is authorized to study: (1) those that the CLRC identifies for study and lists in the Calendar of Topics that it reports to the Legislature; and (2) those that the Legislature assigns to the CLRC directly, by statute or concurrent resolution. Once the CLRC identifies a topic for study, it cannot begin to work on the topic until the Legislature, by concurrent resolution, authorizes the CLRC to conduct the study.

This concurrent resolution directs the CLRC to review all California law and assess its compliance with the ERA's prohibition on denying or abridging equality of rights under the law based on sex. Where the CLRC identifies language in California law that discriminates on the basis of sex and where the CLRC finds that the impact of enforcement of California law discriminates on the basis of sex, the CLRC is to make recommendations for revision to the law that would bring it into compliance with the ERA.

4. Arguments in support of the resolution

According to the author:

California must take the opportunity now to prepare for the Equal Rights Amendment's implementation and proactively identify any laws that might violate the amendment so that remedial action can be proactively taken.

As sponsor of the resolution, the California Women's Law Center and the Feminist Majority jointly write:

SCR 92 affirms the California legislature's commitment to equality under the law regardless of sex by empowering the Commission to undertake a reasoned and comprehensive audit of California law and shine a light upon any laws that subject Californians to discrimination on the basis of sex. This resolution seeks to ensure the principles of gender equality already enshrined in the California Constitution, and soon to be reflected in the U.S. Constitution, are not violated by the language or impact of California's laws. At a moment when these principles remain contested in national debate, this resolution clearly announces that the California legislature upholds the legal rights and equal dignity of its citizens regardless of sex.

### SUPPORT

California Women's Law Center (sponsor)  
Feminist Majority (sponsor)

### OPPOSITION

None known

### RELATED LEGISLATION

Pending Legislation: SJR 12 (Skinner, 2022) made a series of legislative findings and declarations about the history, potential benefits, and current status of the Equal Rights Amendment (ERA) to the U.S. Constitution and urged Congress to pass a resolution of its own finding that the requirements for ratification of the ERA have been met and that the ERA is now part of the U.S. Constitution.

Prior Legislation:

SCR 91 (Roth, Res. Ch. 158, Stats. 2018) granted approval to the CLRC to study and report on topics relating to hazardous waste control and hazardous substances, among other things.

ACR 148 (Chau, Res. Ch. 150, Stats. 2016) authorized the CLRC to study the California Public Records Act, among other things.

SCR 54 (Padilla, Res. Ch. 115, Stats. 2013) authorized the CLRC report on and prepare recommended legislation concerning statutes governing access by state and local government agencies to customer information from communications service providers.

AJR 18 (Skinner, Res. Chap. 111, Stats. 2013) set forth the history of prior efforts to enshrine the ERA in the U.S. Constitution, extolled the potential legal benefits of the ERA, and requested Congress to pass a resolution proposing a new attempt at ratification of the ERA.

ACR 125 (Papan, Res. Ch. 167, Stats. 2002) authorized the CLRC to study, report on, and prepare recommended legislation concerning the issue of financial privacy to address protection and control of a consumer's personal information and provide both administrative and civil penalties.

AJR 1 (Speier, Res. Chap. 114, Stats. 1993) urged the President and Congress to pass a resolution proposing to the states a new attempt at ratification of an ERA.

AB 35 (Shaw, Ch. 1445, Stats. 1953) established the CLRC.

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