

April 26, 2023

President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear President Biden:

Free Speech For People, Generation Ratify, Equal Rights Action, The Social Equity through Education Alliance, and Voters of Tomorrow urge you to instruct Acting Archivist Debra Steidel Wall to fulfill her ministerial duty to publish the Equal Rights Amendment with her certificate declaring that it has become part of the Constitution of the United States. It has been more than three years since Virginia became the 38th state to ratify the Equal Rights Amendment (“ERA”). In the interim, people across our country continue to be denied equal rights under the law on account of their sex, and have experienced new legal assaults on their rights, including limits on their reproductive freedom, access to appropriate medical care, and ability to express their gender. The publication and certification of the ERA by the national archivist is long overdue.

In 2020, then-Archivist David Ferriero incorrectly deferred to a wrongly reasoned advisory opinion issued by the Department of Justice Office of Legal Counsel (“OLC”) when he declined to fulfill his ministerial duty to publish the ERA. That OLC opinion, relying on an invalid and unenforceable extra-textual Congressional ratification deadline, determined that the ERA had not been properly ratified. So far, while expressing disagreement with aspects of that OLC decision, your administration has continued to follow the Trump Administration’s refusal to publish and certify the ERA.

Though a recent court decision refused to compel the archivist to act, this decision does *not* prevent the archivist from deciding independently that publication is the appropriate course of action. As explained below in Section II, the court did *not* say that the archivist lacks authority to publish the ERA; it only said that it would not *order* her to do so.

Your office should clarify to the current acting archivist that she has a responsibility to fulfill her duties by publishing and certifying the Equal Rights Amendment as a part of the Constitution.

I. Background

People in the United States currently do not have an explicit federal constitutional protection against discrimination on account of their sex. The ERA would correct this, by ensuring that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” In 1972, Congress by joint resolution proposed the ERA to the states. The preface to the joint resolution purported to place a seven-year time limit on the ratification process. Thirty-five states ratified the amendment by 1977. By a majority vote in 1978, Congress extended the time period by three years, but no additional states ratified the ERA by 1982 and the process stalled. In recent years, the movement to ratify the ERA regained momentum. Nevada and Illinois ratified the amendment in 2017 and 2018 respectively. Then, on January 15, 2020, Virginia ratified the amendment, becoming the 38th state to do so.¹ This satisfied the two-part process of amending the Constitution, as laid out in Article V of the Constitution.

Upon receipt of formal instruments of ratification from three-fourths of the states, the National Archivist is responsible for publishing the new amendment and declaring its validity. 1 U.S.C. § 106b. Indeed, in 2012, then-Archivist David Ferriero confirmed that this is the correct process in response to a request from Representative Carolyn Maloney regarding the ratification status of the ERA: “Under the authority granted by [1 U.S.C. § 106b], once [the National Archives] receives at least 38 state ratifications of a proposed Constitutional Amendment, [the National Archives] publishes the amendment along with a certification of the ratifications and it becomes part of the Constitution without further action by the Congress.”²

After Virginia became the 38th state to ratify the ERA, despite his earlier advice to Representative Maloney, Mr. Ferriero did not publish the amendment. Instead, he sought an OLC advisory opinion issued under the prior administration, which incorrectly concluded that the ERA should not be published because the final states to ratify the amendment did so outside the time limits that Congress in 1972 and 1978 attempted to place upon the ratification process. The OLC’s January 6, 2020 advisory opinion (“2020 OLC advisory opinion”) was wrong for

¹ Although several state legislatures claim that they rescinded their ratification, rescission is not authorized by Article V. Indeed, although two states purported to rescind their ratification of the Fourteenth Amendment, Congress still adopted a concurrent resolution declaring it to be part of the Constitution. See *Coleman v. Miller*, 307 U.S. 344, 448-49 (1939).

² Letter from David S. Ferriero to Carolyn Maloney (Oct. 25, 2012), <https://bit.ly/2ZkUa1m>.

two reasons.³ First, the Department of Justice should have declined to issue the opinion because it is not the gatekeeper on the legal validity of constitutional amendments. Second, the analysis is legally erroneous.⁴ Mr. Ferriero nonetheless deferred to the opinion and declined to fulfill this ministerial duty absent a court order.⁵

In January 2022, the OLC revised a portion of its 2020 advisory opinion to opine that Congress has the authority to retroactively extend the ratification deadline (“2022 OLC advisory opinion”).⁶ But despite the fact that Mr. Ferriero elected not to publish the ERA because of the prior OLC decision, the OLC continued to evade responsibility for the role it had taken in the process, asserting that “[w]hether the ERA is part of the Constitution will be resolved not by a OLC opinion but by the courts and Congress.”

After Mr. Ferriero refused to publish the amendment, the states of Illinois and Nevada filed a mandamus action in federal court, seeking to compel Mr. Ferriero to certify and publish the ERA. Recently, the D.C. Circuit Court of Appeals upheld the district court’s dismissal of this case on narrow grounds: it held that the plaintiffs had not satisfied the “exacting . . . requirements for invoking mandamus jurisdiction,” a remedy “only available in extraordinary situations” because their arguments could not “meet the high threshold of being clearly and indisputably correct.” *Illinois v. Ferriero*, 60 F.4th 704, 716 (D.C. Cir. 2023). In other words, as explained below, the court did *not* hold that the archivist lacked authority to publish and certify the ERA—only that the court would not *order* her to do so.

II. *Illinois v. Ferriero* Does Not Prohibit the Archivist From Fulfilling Her Duty to Publish and Certify the ERA.

The D.C. Circuit Court of Appeals’ recent decision in *Illinois v. Ferriero*, 60 F. 4th 704 (D.C. Cir. 2023) does not prevent the archivist from publishing the ERA. In *Ferriero*, the plaintiff states sought a writ of mandamus to compel the

³ Opinion of the Office of Legal Counsel of the Department of Justice, *Ratification of the Equal Rights Amendment*, Jan. 6, 2020, <https://www.justice.gov/d9/opinions/attachments/2020/01/16/2020-01-06-ratif-era.pdf>.

⁴ In prior communication with the OLC, lead signatories to this letter detailed why the 2020 OLC advisory opinion’s analysis was incorrect. Letter to Attorney General Merrick Garland (Apr. 7, 2021), <https://bit.ly/3LCmNQM>.

⁵ U.S. National Archives and Record Administration, *NARA Press Statement on the Equal Rights Amendment*, Jan. 8, 2020, <https://www.archives.gov/press/press-releases-4>.

⁶ Opinion of the Office of Legal Counsel of the Department of Justice, *Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment*, Jan. 26, 2022, <https://www.justice.gov/olc/file/1466036/download>.

archivist to publish the ERA. Although the court affirmed the district court’s denial of the writ, it did so on narrow grounds. The court did not decide whether the archivist could or should publish the ERA, but rather whether the states established that the archivist could be compelled by the court to do so by writ of mandamus.

As the court emphasized, courts disfavor mandamus writs. To obtain mandamus, a “plaintiff must demonstrate 1) a clear and indisputable right to the particular relief sought against the federal official, 2) that the federal official is violating a clear duty to act, and 3) that the plaintiff has no adequate alternate remedy.” *Id.* at 713. Plaintiffs must also “show ‘compelling equitable grounds.’” *Id.* at 714 (quoting *In re Medicare Reimbursement Litigation*, 414 F.3d 7, 10 (D.C. Cir. 2005)). The court took care to explain that the mandamus standard is an “exacting one” because mandamus—which compels a government official to act—is a “‘drastic’ remedy, only available in ‘extraordinary situations,’ and thus ‘is hardly ever granted.’” *Id.* at 714 (quoting *In re Chaney*, 406 F.3d 723, 729 (D.C. Cir. 2005)). It is “an option of last resort.” *Id.* (quoting *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 582 (D.C. Cir. 2020)). The standard can only be met if the sought-for action was “clearly and indisputably correct.” *Id.* at 715.

In finding that the plaintiffs did not meet this exacting standard, the court did *not* determine that sought-after government action—the publication of the ERA as an amendment to the Constitution—would have been wrong, or that the archivist could not take that step absent court order. To the contrary, the court specifically noted that the plaintiffs’ mandamus request failed not because their arguments were legally incorrect, but because their interpretation was “not the only permissible one.” *Id.* at 715-16; *see also id.* at 717-19 (recognizing that the plaintiffs’ interpretation “is not without force,” but finding that it did not meet the “clear and indisputable” standard to justify mandamus).

Moreover, despite the *Ferriero* court’s determination that mandamus was not justified, the court’s decision provides no persuasive basis for the Archivist to continue to refuse to publish and certify the ERA. Specifically, neither the cases cited by the court nor its analysis demonstrate that a ratification deadline placed only in a proposing resolution, and not the text of the amendment itself, is enforceable. *Dillon v. Gloss*, 256 U.S. 368 (1921) asked only whether Congress has the implied authority to write a ratification deadline into the text of an

amendment.⁷ The court had no occasion to address and did not discuss the very different issue presented by the ERA: whether Congress could fix such a “definite period” by resolution with no deadline included in the proposed amendment itself. *Coleman v. Miller*, 307 U.S. 433 (1939), established only that courts will not impose a ratification deadline on an amendment where Congress chose not to include one.⁸

The *Ferriero* court also suggested that the clear Congressional authority to establish the “mode of ratification (ratification by legislation or ratification by convention)” in the proposing resolution, rather than the text of the amendment, might indicate that Congress should also have the authority to impose a ratification deadline in the proposing clause or resolution. *Ferriero*, 60 F.4th at 719. But the distinction is clear: Article V explicitly provides Congress with the authority to “propose[.]” whether ratification shall be by convention or legislation, while providing Congress with no authority whatsoever to impose a ratification deadline.⁹ Consequently, as explained more fully below (*see* Part IV), the inclusion of a purported ratification deadline for the ERA outside of the terms of the amendment itself is an improper and unenforceable attempt to alter Article V’s clear provision that a proposed amendment becomes effective upon ratification by three fourths of the states.

III. The Archivist is Obligated to Fulfill Her Duties to Publish the Equal Rights Amendment.

The Archivist’s ministerial duties with regard to constitutional amendments are clear:

Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, *according to the provisions of the Constitution*, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which

⁷ In *Dillon v. Gloss*, 256 U.S. 368 (1921), the Court rejected a petition for a writ of habeas corpus by an accused bootlegger, who argued that the Eighteenth Amendment was invalid because Congress had written a seven-year deadline into the amendment and had no authority to do so. The Court concluded that Congress had an implied authority to write such a deadline. *Id.* at 373, 376.

⁸ Indeed, in 1992, the Twenty-Seventh Amendment, restricting laws for adjusting congressional pay, became part of the Constitution 202 years after it was proposed

⁹ Article V provides: Proposed amendments “shall be valid . . . as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, *as the one or the other Mode of Ratification may be proposed by Congress.*” (emphasis added).

the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

1 U.S.C. § 106b (emphasis added). The provisions of the Constitution are equally straightforward: that when two thirds of both Houses have proposed an Amendment and three fourths of the states have ratified it, the Amendment becomes valid.

As soon as Virginia, the 38th state to ratify the Equal Rights Amendment, provided official notice to Mr. Ferriero, Mr. Ferriero should have fulfilled his duties to publish the amendment. Although he failed to do so, the duty to publish remains. Ms. Steidel Wall should rectify the error and fulfill her duties as the acting Archivist to publish the Equal Rights Amendment.

IV. The Archivist Should Not Defer to the Trump Administration's Erroneous 2020 OLC Advisory Opinion.

Mr. Ferriero in 2020 should not have deferred to the 2020 OLC advisory opinion. First, the Archivist did not have authority to grant the Department of Justice final say over whether the Equal Rights Amendment, having been proposed by two thirds of both Houses and ratified by three fourths of the states, was valid. The Department of Justice is not, and should not be considered, a gatekeeper on the legal validity of an amendment. Article V expressly assigns the constitutional amendment process to Congress and the states, and the executive branch plays no role in the process of either proposing or ratifying amendments.¹⁰ By deferring to the OLC Advisory Opinion, Mr. Ferriero abdicated his duties and placed responsibility for publication squarely in the hands of the executive branch.

Second, the 2020 OLC advisory opinion was legally erroneous. It incorrectly concluded that the purported seven-year deadline contained in the proposing resolution limited the ability of the states to ratify, even though no such limitation was included in the amendment itself. Nowhere in Article V nor in any other provision does the Constitution provide Congress with authority to impose a deadline on ratification or to otherwise alter the Article V's unqualified command that an amendment proposed by Congress shall be a valid part of the Constitution "*when ratified*" by three fourths of the states.

¹⁰ For example, Congress does not present a proposed constitutional amendment to the president for signature.

The ERA is therefore distinguishable from other amendments that incorporated deadlines in the text of the amendments, including the Eighteenth, Twentieth, Twenty-First, and Twenty-Second. In contrast, the ERA contains no ratification deadline in the text of the amendment. Instead, Congress sought, quite literally, to modify Article V of the Constitution by resolution. Article V expressly provides that amendments proposed by Congress “shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States.” The ERA proposing resolution purports to alter this provision by instead providing that the amendment “shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three fourths of the several States *within seven years from the date of its submission by Congress.*” (emphasis added). Thus, unlike the Eighteenth Amendment deadline upheld in *Dillon*—which operated in a manner consist with Article V—the deadline in the ERA resolution impermissibly defies and seeks to modify Article V’s “express provision on the subject.” *See Dillon*, 256 U.S. at 373.

The extra-constitutional deadline contained in the ERA resolution also contrasts with a provision in the ERA, delaying its effective date for “two years after the date of ratification.” Unlike the purported ratification deadline, this effective date provision was contained in the Amendment itself (Section 3). As the 2020 OLC advisory opinion recognized, because Article V provides that the amendment becomes part of the Constitution “when ratified,” Congress could not have (validly) put the effective date in the resolution alone; “[i]ncluding the two-year delay in the amendment itself could be necessary to amend the effect that Article V would otherwise have on the amendment’s effective date.” 2020 OLC Op. at 22. The advisory opinion offers no explanation, however, as to why this precise reasoning does not apply to the purported ratification deadline. Just as Article V’s clear language requires that any delay of the effective date must be spelled out in the amendment itself, that language likewise requires that any ratification deadline be spelled out in the amendment itself. Accordingly, because the ERA amendment language contains no ratification deadline, the purported deadline in the resolution is invalid and unenforceable.

The 2020 OLC advisory opinion also reached the erroneous and inconsistent legal conclusion that Congress has no power to modify or eliminate the purported ratification deadline contained in the ERA resolution. The 2022 OLC advisory opinion corrected this error, but does not properly address or rescind the rest of the 2020 advisory opinion. Moreover, just because Congress *may* modify or eliminate

the deadline does not mean that it must do so in order for the ERA’s ratification to be perfected via publication by the Archivist.

V. **Publication of the ERA Should Not Be Further Delayed.**

The United States lacks explicit federal constitutional protections against discrimination on the basis of sex. The Equal Rights Amendment would close a critical gap in our Constitution. You have “loudly and clearly” voiced your support for the ERA, and have emphasized that it is time to incorporate this important right into our Constitution: “We must recognize the clear will of the American people and definitively enshrine the principle of gender equality in the Constitution. It is long past time that we put all doubt to rest.”¹¹ Yet, so far, your administration has adhered to a position developed under the Trump Administration.

Since Virginia became the 38th state to ratify the ERA, it has become clear that it is as necessary and relevant today as it was in 1972. Women, transgender people and other LGBTQ people are facing assaults on their rights in state and federal legislatures across the country.

The decision in *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. ___ (2022), which overturned *Roe v. Wade*, 410 U.S. 113 (1973), has resulted in a number of states passing laws that restrict women’s bodily autonomy, reproductive freedom, and access to necessary medical care.¹² At the same time, more than 420 anti-transgender and anti-LGBTQ bills have been introduced in the 2023 legislative cycle alone—and already 14 have passed. Examples include bills that would block or significantly reduce access gender-affirming healthcare, to school-sponsored sports, to bathrooms that correspond with their gender, and even to identification documents with correct gender information.¹³ Many of bills specifically target children.¹⁴

¹¹ Statement from President Biden on the Equal Rights Amendment, Jan. 27, 2022, <http://bit.ly/3n8jua4>.

¹² Center for Reproductive Rights, *After Roe Fell: Abortion Laws By State*, <https://reproductiverights.org/maps/abortion-laws-by-state/>; Ed Kilgrove, *In Tennessee, Even Abortion to Save a Woman’s Life May Be Illegal*, N.Y. MAGAZINE, Feb. 28, 2023, <http://bit.ly/3yPTG59>; Sarah McCammon, *5 Texas Women Denied Abortions Sue the State, Saying the Ban Puts Them in Danger*, NPR, Mar. 8, 2023, <http://bit.ly/3JsUdyR>.

¹³ 2023 Anti-Trans Bills Tracker, *Trans Legislation Tracker*, <https://translegislation.com>; American Civil Liberties Union, *The ACLU is Tracking 420 Anti-LGBTQ Bills in the United States*, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights>.

¹⁴ *Id.*; see also Anne Branigin & N. Kirkpatrick, *Anti-Trans Laws are on the Rise. Here’s a Look at Where—And What Kind*, WASH. POST, Oct. 14, 2022, <http://bit.ly/3Z301og>.

Even without a slew of discriminatory state action, women, transgender people, and other LGBTQ people face discrimination in a variety of areas,¹⁵ including housing,¹⁶ education,¹⁷ employment,¹⁸ and access to social services.¹⁹ This discrimination is consistently worse for women of color.²⁰ The COVID-19 pandemic exacerbated existing workplace inequities, causing a significant drop in women’s labor participation that, again, most seriously harmed women of color.²¹

In the absence of the ERA, statutes alone are not sufficient to protect people from sex-based discrimination. In comparison, states that have ratified equal rights amendments in their state constitutions have powerful protections against laws, policies, and practices that discriminate on the basis of sex.²² Such protections should now be available to all people via the Equal Rights Amendment.

VI. Conclusion

The archivist should not abdicate her duties to the OLC. No court order prohibits her from publishing the amendment. The President of the United States should inform the archivist that it is her obligation as archivist to fulfill her ministerial duties and publish the ERA, an amendment that has been passed by two

¹⁵ Center for American Progress, *Discrimination and Experiences Among LGBTQ People in the US: 2020 Survey Results*, <http://bit.ly/3Z19flc>; Harv. T.H. Chan School of Public Health, *Poll Finds a Majority of LGBTQ Americans Report Violence, Threats, or Sexual Harassment Related to Sexual Orientation or Gender Identity; One-Third Report Bathroom Harassment*, Nov. 17, 2017, <http://bit.ly/3LzFqF1>.

¹⁶ See, e.g., Noah Kazis, *Fair Housing for a Non-Sexist City*, 134 HARV. L. REV. 1683, 1686-87 (2021) (explaining that “substantial gender disparities remain in the housing market,” with women—and in particular women of color—being more likely to face eviction and subsequent structural disadvantages).

¹⁷ Mary Ellen Flannery, *New Title IX Regulations Needed to Protect Survivors of Sexual Assault*, NEA TODAY, Apr. 14, 2021, <http://bit.ly/3lobVeX>; Kelsey M. McGregor, *‘Raped a Second Time’: The Mental Health Impact of Campus Sexual Assault Investigation and Adjudication*, 18 QUINNIPIAC HEALTH L.J. 401 (2016); Anna North, *Trump Administration Releases New Campus Sexual Assault Rules in the Midst of the Pandemic*, VOX.COM, May 6, 2020, <http://bit.ly/3Tu5SBQ>; Stephanie Mabel Kong et al, *Reducing Gender Bias in STEM*, 1 MIT SCI. POL’Y REV. 55 (Aug. 20, 2020), <https://bit.ly/3lwwSEr>.

¹⁸ See, e.g., Center for American Progress, *Discrimination and Experiences Among LGBTQ People in the US: 2020 Survey Results*, <http://bit.ly/3Z19flc>; Joan C. Williams, *The 5 Biases Pushing Women Out of STEM*, HARV. BUS. REV., Mar. 24, 2015, <http://bit.ly/3JVSEdW>.

¹⁹ Human Rights Campaign, *State Scorecards*, <https://www.hrc.org/resources/state-scorecards>.

²⁰ For example, women still experience a pay gap, and the gap is widest for Black, Latina, and Indigenous women. Janelle Jones, *5 Facts About the State of the Gender Pay Gap*, U.S. Dep’t of Labor Blog, Mar. 19, 2021, <http://bit.ly/3LCES16>; see also Maria Temming, *STEM’s Racial, Ethnic, and Gender Gaps are Still Strikingly Large*, SCIENCE NEWS, Apr. 14, 2021, <http://bit.ly/3LCLk8o>.

²¹ Jones, *supra* note 20; U.S. Department of Labor, *Bearing the Cost: How Overrepresentation in Undervalued Jobs Disadvantaged Women During the Pandemic*, Mar. 15, 2022, <https://bit.ly/3TwBff5>.

²² See, e.g., *Doe v. Maher*, 40 Conn. Supp. 394 (1986) (relying in part on Connecticut’s Equal Right Amendment to block restrictions on medicare payments for therapeutic abortions); *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788 (1998) (same, in New Mexico).

thirds of both houses and ratified by three-fourths of the states, thereby qualifying for publication and inclusion in the Constitution.

Sincerely,

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