

December 5, 2023

The Honorable Joseph R. Biden, Jr.
President 1600 Pennsylvania Ave., NW
Washington, DC 20500

Dear President Biden:

As a diverse coalition of 84 organizations focused on equality for women, girls, and LGBTQIA+ people, which includes access to reproductive and gender-affirming healthcare, we are writing to urge you to instruct the United States Archivist (“Archivist”) to publish the Equal Rights Amendment (“ERA”) as the 28th Amendment to the Constitution without further delay.

As you are aware, the rights of women, girls, and LGBTQIA+ people are under attack throughout the United States. The impact of this growing trend is more acute for women of color, as their experience with sex discrimination is magnified by the intersection of discrimination on the basis of race and ethnicity.

While we applaud the efforts of your Administration to date, we need the foundation of the ERA to address these issues. The ERA is the most powerful tool available to protect these rights, guarantee equality for all, and strengthen our democracy. For the reasons stated below, we cannot afford to wait any longer.

Background

Passed by Congress in 1972 with overwhelming bipartisan support, the ERA has been ratified since January 27, 2020, when Virginia became the 38th and final state needed to meet the required ratification by three-quarters of the States.

Since that time, the Archivist has had a statutory dutyⁱ to publish the ERA as the 28th Amendment to the Constitution. That has not happened to date as the prior Administration interfered with the constitutional amendment process, asserting that, due to a purported time limit for ratifications and attempts by certain states to rescind their ratifications, the ERA has not been, and could not be, ratified, and that the constitutional amendment process must start anew.ⁱⁱ

Evident from testimony at the Senate Judiciary Committee hearing on the ERA held earlier this year,ⁱⁱⁱ the ERA is opposed, and its publication has been blocked, in large part, because it would protect reproductive and LGBTQIA+ rights, including gender-affirming care.

Hundreds of prominent Constitutional scholars,^{iv} including Harvard Professor Laurence Tribe^v and former US Senator Russ Feingold,^{vi} President of the American Constitution Society, reject the prior Administration’s analysis. They have determined the ERA has satisfied all constitutional requirements, is currently the 28th Amendment, and must be published.

More specifically, Article V of the Constitution does not impose a time limit for ratification of a proposed amendment. In fact, the 27th Amendment was ratified in 1992, nearly 203 years after it was initially proposed.

Moreover, Article V of the Constitution does not authorize rescissions of ratifications. When New Jersey and Ohio purportedly rescinded their ratifications of the 14th Amendment, both States were counted among the ratifying States. Similarly, Tennessee attempted to rescind its ratification of the 19th Amendment, but its attempt was ignored, and the Amendment was published.

Having been proposed by two-thirds of each Chamber of Congress and ratified by more than three-fourths of the several States, the ERA has met the requirements of the Constitution under Article V, is enforceable as the 28th Amendment to the Constitution, and must be published.

Why Publication is The Next Critical Step

The effect of the interference with the constitutional amendment process, blocking publication of the ERA, was to shift the burden of proof from the anti-equality opponents of the ERA to its proponents.

To date, five lawsuits,^{vii} including *Illinois v. Ferriero*, have been filed to require publication of the ERA and/or enforce its validity. In each instance, the court has refused to rule based on seemingly insurmountable procedural hurdles. The most recent decision was issued on September 8, 2023, in Rhode Island, where the court stated that Congress has determined that publication must come before enforcement.^{viii}

Until publication occurs, we are without judicial recourse, and the ERA is being held in legal limbo.

While publication of the ERA will not determine its validity, once published, it will be presumed valid, and the burden of proof will be on the opponents of equality and reproductive and LGBTQIA+ rights to prove otherwise. That is exactly as it should be and has been for the previous 27 Constitutional Amendments. Notably, the prior Administration took the unprecedented step of blocking publication of the ERA at a time when there was an already established conservative majority on the US Supreme Court.

Most importantly, when the ERA is published, we may begin to enforce it, as well as enact laws that further equality. And we need this more than ever to protect the rights of women, girls, and LGBTQIA+ people.

Given the political interference, related litigation, and the politization of equality, the current Archivist has indicated that she will not perform her ministerial duty unless directed by you, President Biden, to do so.^{ix}

Why Immediate Publication Is Necessary

Since the United States Supreme Court issued the *Dobbs v. Jackson Women's Health Organization* ("Dobbs")^x last year, attacks against the rights of women, girls, and LGBTQIA+ people have increased exponentially. *Dobbs* was always about more than reproductive rights. It was about denying women, girls and LGBTQIA+ people equal protection of the law to facilitate stripping away additional rights. There is no better example than the *US v. Rahimi* case currently before the Supreme Court, which will decide whether to permit domestic abusers subject to orders of protection to possess firearms.

Relying on the *Dobbs* decision, courts across the country have begun applying the lowest level of judicial review, rational basis, to sex-based discrimination claims, including challenges to abortion restrictions and gender-affirming care, and have rejected the claims. When courts apply strict scrutiny, which is required by the ERA, the likelihood of success for sex-based discrimination claims increases exponentially – from 20% to 73%.^{xi}

Equal rights provisions in state constitutions have been used as a basis to defeat abortion restrictions.^{xii} The Utah abortion ban triggered by the *Dobbs* decision still has not taken effect as a result of the Equal Rights provisions in the Utah Constitution. Similarly, in *Zurawski v. Texas*, the court issued a preliminary injunction, based in part on the Texas ERA, which would prohibit the abortion ban from applying when medically necessary in a physician's judgment.^{xiii}

In recent challenges to the Alabama, Kentucky and Tennessee gender-affirming care bans, the 11th and 6th Circuit Court of Appeals have applied the rational basis standard of review to the sex-based discrimination claims and upheld the bans.^{xiv} The young persons and their families have appealed the 6th Circuit's decision

upholding the Tennessee and Kentucky gender affirming care bans to the US Supreme Court, making ERA publication, and the strict scrutiny analysis that comes with it, all the more urgent.

Courts, however, will continue to apply the rational basis standard of review, making it nearly impossible to establish sex-based discrimination claims, until the ERA is published in the Constitution.

The United States is moving backwards, not forwards, with respect to gender equality, and the world is taking notice. The World Economic Forum recently released its 2023 Global Gender Gap Index, and the United States ranked 43rd out of 146 countries.^{xv} That is a remarkable 16 place drop, from its 2022 ranking of 27th.

The lack of gender equality in the United States, which is rapidly worsening, is negatively impacting our fragile democracy. The US was first listed as a backsliding democracy in 2021, and further weakened in 2022, due to polarization and threats to long-established rights.^{xvi} This backsliding has been made easier by the failure to publish the ERA. This link between the strength of our democracy and lack of gender equality has been reiterated repeatedly by Vice President Harris and Secretary Blinken.^{xvii}

In September 2023, a coalition representing the centers of nearly every former president from Herbert Hoover to Barack Obama (the “Former Presidents”) issued a collective call, for the first time ever, for the urgent need to protect our democracy. Specifically, they stated:

Americans have a strong interest in supporting democratic movements and respect for human rights around the world because free societies elsewhere contribute to our own security and prosperity here at home. But that interest is undermined when others see our own house in disarray. The world will not wait for us to address our problems, so we must both continue to strive toward a more perfect union and help those abroad looking for U.S. leadership.^{xviii}

As predicted by the centers of the Former Presidents, the Human Rights Committee of the United Nations recently responded to the Fifth Periodic Report of the US, condemning the US Government’s failure to meet its obligations under the International Covenant on Civil and Political Rights. Specifically, the Human Rights Committee called for the Equal Rights Amendment to be included in our Constitution when it stated:

*18. While welcoming the various measures taken by the State party to advance gender equality, including the establishment of the White House Gender Policy Council in 2021, the Committee regrets the lack of explicit guarantee in the Constitution against sex and gender-based discrimination (arts. 2 and 3). 19. **The [United States] should redouble its efforts to guarantee protection against sex and gender-based discrimination in its Constitution, including through initiatives such as the Equal Rights Amendment.***^{xix}

The ERA is a powerful tool available to put an end to the rollback of democracy and civil rights. To guarantee equality for all, free from the whims of anti-equality judges and politicians. To guarantee equal pay and opportunities. To restore reproductive rights. To protect from domestic violence and sexual harassment. To end gender and pregnancy discrimination, and more.

In light of the above, there has been a surge in calls for the immediate publication of the ERA, including the following:

- Two resolutions affirming that the ERA is the 28th Amendment and urging the Archivist to publish it (H.J.Res. 82 and S.J.Res 39) were introduced in Congress in July and have the support of [64 Representatives and 22 Senators];

- State Legislatures in California, Colorado, Hawaii, Illinois, Michigan, and Minnesota have affirmed the ERA is the 28th Amendment, and Hawaii, Michigan and Illinois have called for its immediate publication; and
- The North Carolina Democratic Party^{xx} and Democrats Abroad^{xxi} recently passed resolutions urging your administration to publish the ERA.

Recent polling reflects this trend and confirms constitutional gender equality is wildly popular. Per a study conducted by Lake Research Partners, 70% of voters – 89% of Democrats, 72% of Independents, 46% of Republicans – support placing the ERA in the Constitution to prohibit sex discrimination and provide equal rights for women and men and on the basis of gender.^{xxii}

During your recent meeting with the President of Chile, you stated:^{xxiii}

In my view, there comes a time, maybe every six to eight generations, where the world changes in a very short time. And I think what happens in the next two, three years are going to determine what the world looks like for the next five or six decades.

We agree, President Biden. This is the moment, and women, girls, the LGBTQIA+ community, and our democracy cannot afford to wait any longer. The time is now.

Accordingly, we urge you to direct the Archivist to publish the ERA as the 28th Amendment immediately, thereby giving all Americans the most powerful tool available to meet the moment, preserve our democracy, and win the fight for gender equality.

Sincerely,

Shattering Glass

National ERA Publication Task Force

AAUW Maryland

Accomplices of the Dayton Area SURJ

Allegany County Women's Action Coalition

American Association of University Women

American Constitution Society

American Medical Women's Association

Arkansas State Chapter of NOW

Business and Professional Women/Ohio-Akron local

Center for Common Ground

Central OH Indivisible

Charlottesville NOW (National Organization for Women)

Christian Faith Ministries of Garden City (Michigan)

Civic Health Alliance

Combat Sexual Assault

Coshocton Business and Professional Women

Democrats Abroad

Doctors for America

Dublin Progressives
Elizabeth Cady Stanton Trust
EQUAL MEANS EQUAL
Equality Illinois
Equality Now
ERA Minnesota
ERA Task Force AZ
ERA-NC Alliance
Free Speech For People
Generation Ratify
Georgia NOW
Girls Inc.
Greene County Ohio Democratic Party
Heroica Foundation
Illinois Federation of Teachers
Indiana Women's Action Movement
Indivisible
Indivisible Chicago Alliance
Indivisible Delaware Ohio
Indivisible Downtown Chicago
Indivisible Evanston
Indivisible Chicago-SouthSide
Jewish Women International
Maryland Chapter, National Organization for Women
Mid-Day Women's Alliance of Appleton, WI
Military & Veteran Women's Coalition
MomsRising
National Association of Nurse Practitioners in Women's Health (NPWH)
National Center for Lesbian Rights
National Council of Jewish Women
National Council of Negro Women
National Organization for Women (NOW)
National Organization for Women, Asheville Chapter (Asheville NOW)
National Organization for Women, North Carolina Chapter (NC NOW)
National Organization for Women, Raleigh Chapter (Raleigh NOW)
National Safe Parents Organization
National Women's Political Caucus
Nevada NOW

Ohio Alliance to End Sexual Violence
Ohio Democratic Women's Caucus
Ohio National Organization for Women
Ohio NOW Education and Legal Fund
Ohio NOW, Akron Chapter
Ohio Valley NOW
Patient Care Heroes
Physicians for Reproductive Health
Professional Women's Club of Chicago
Re-Sisters of Central Ohio
Resisters
Saratoga Caucus for Reproductive Rights
Sexual Violence Prevention Association (SVPA)
SIECUS: Sex Ed for Social Change
Sojourners-SojoAction
Southeast Progressives of Franklin County
Strike for America
Sugarcreek Cares
The Feminist Uprising
The Ohio Federation of Business & Professional Women
Trans Formations Project
Virginia National Organization for Women (NOW)
Women Employed
Women Injured in Combat (WINC)
Women's March Chicago
ZONTA International
Zonta USA Caucus

ⁱ 1 U.S.C. §106b.

ⁱⁱ See Memorandum Opinion for the General Counsel National Archives and Records Administration from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, (“Ratification of the Equal Rights Amendment”) available at <https://www.justice.gov/d9/opinions/attachments/2020/01/16/2020-01-06-ratif-era.pdf>.

ⁱⁱⁱ “The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution,” <https://www.judiciary.senate.gov/committee-activity/hearings/the-equal-rights-amendment-how-congress-can-recognize-ratification-and-enshrine-equality-in-our-constitution> (February 28, 2023).

^{iv} See, e.g., Brief for Constitutional Law Scholars MacKinnon, et al. as Amici Curae Supporting Plaintiff-Appellants, *Illinois v. Ferriero* (Jan. 10, 2022) (USCA Case #21-5096), available at https://8fdaf192-a63f-4cc1-ba48-30c5727fb699.usrfiles.com/ugd/8fdaf1_42879df0022644e1b7437d498223c5f7.pdf.

^v Letter from Professor Laurence Tribe to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Mar. 22, 2022), available at https://8fdaf192-a63f-4cc1-ba48-30c5727fb699.usrfiles.com/ugd/8fdaf1_35989e81c341463f9e2e3bbf6d912ffd.pdf.

^{vi} Letter from the Honorable Russ Feingold to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Mar. 21, 2022), available at https://8fdaf192-a63f-4cc1-ba48-30c5727fb699.usrfiles.com/ugd/8fdaf1_de530d244ca74128bf7035115c5b3e2c.pdf.

^{vii} See *Equal Means Equal v. Ferriero*, 3 F.4th 24 (1st Cir. 2021); *Illinois v. Ferriero*, 60 F.4th 704 (D.C. Cir. 2023); *Elizabeth Cady Stanton Trust v. Nessel*, No. 22-000066-MB, 2023 WL 3259399 (Mich.Ct.Cl. Apr. 12, 2023); *Elizabeth Cady Stanton Trust v. James*, Sup Ct, Albany County NY, June 26, 2023, Hartman, J., index No. 903819-22; *Elizabeth Cady Stanton Trust v. Nehrona*. No. 1:22-cv-00245-MSM-LDA, 2023 WL 5835874 (D.R.I. Sept. 8, 2023).

^{viii} *Elizabeth Cady Stanton Trust v. Nehrona*. No. 1:22-cv-00245-MSM-LDA, 2023 WL 5835874 (D.R.I. Sept. 8, 2023) at p. 7-8.

^{ix} “Confirmation Hearing for National Archives and Judicial Nominations” (Sept. 22, 2022), available at <https://www.c-span.org/video/?522961-1/senate-confirmation-hearing-archivist-united-states>.

^x *Dobbs v. Jackson Women’s Health Organization*, 597 U. S. ____ (2022),

^{xi} Lee Epstein, Andrew D. Martin, Lisa Baldez, & Tasina Nitzschke Nihiser, *Constitutional Sex Discrimination*, 1 TN J. L. & Pol. 11, 47-51 (Fall 2004), available at <https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1002&context=tjlp>. It is important to note that a plaintiff’s likelihood of success increases from 20% under the rational basis standard, to 47% under intermediate scrutiny, and up to 73% with the strict scrutiny that comes along with the ERA.

^{xii} See *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Doe v. Maher*, 40 Conn. Supp. 394 (1986); *Planned Parenthood of the Great NW v. State*, 375 P.3d 1122 (AK 2016); *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (AK 2001); *Simat Corp. v. Arizona Health Care Cost Containment Sys.*, 56 P.3d 28 (AZ 2002).

^{xiii} *Zurawski v. Texas*, D Ct Travis County, TX, Aug. 4, 2023, Mangrum, J., No. D-1-GN-23-000968. The decision was appealed, and the preliminary injunction has not taken effect.

^{xiv} *Eknes-Tucker v. Alabama*, No. 22-11707 (11th Cir. 2023), available at *L.M. v. Skremetti*, Sept. 28, 2023, available at <https://wp.api.aclu.org/wp-content/uploads/2023/09/CA6-Opinion.pdf>.

^{xv} World Economic Forum, 2023 Global Gender Gap Report, available at <https://www.weforum.org/reports/global-gender-gap-report-2023/in-full/benchmarking-gender-gaps-2023#global-results>.

^{xvi} Global State of Democracy Report 2022: Forging Social Contracts in a Time of Discontent, available at <https://idea.int/democracytracker/gso-d-report-2022#chapter2.4>.

^{xvii} As one example, Secretary Blinken noted on International Women’s Day 2022 “Full and equal rights for women are key to a stable and thriving society. The data is clear: countries are more secure, peaceful and prosperous when people of all genders can participate fully and equitable in every sphere of public life. . . . And countries with high levels of gender equality have stronger and more resilient democracies. That’s why fighting for the rights and dignity of women and girls everywhere is critical to so much else that we want to achieve at home and around the world.” See <https://www.facebook.com/watch/?v=1007471753310218>.

Another example is from the 2021 Generation Equality Forum, when Vice President Harris stated “So I know, without doubt, gender equality strengthens democracy.” See <https://www.reuters.com/world/gender-equality-makes-democracy-stronger-says-kamala-harris-2021-06-30/>.

^{xviii} George W. Bush Presidential Center, Joint Statement: Strengthening our democracy PRESIDENTIAL CENTERS AFFIRM THAT “DEMOCRACY HOLDS US TOGETHER,” (September 7, 2023), <https://www.bushcenter.org/publications/reaffirming-americans-commitment-to-a-more-perfect-union>.

^{xix} United Nations Human Rights Committee, “Concluding observations on the fifth periodic report of the United States of America,” Nov. 3, 2023, available at https://www.eracoalition.org/uploads/2023/11/CCPR_C_USA_CO_5_56540_E.pdf.

^{xx} The resolution, which is available at <https://www.ncdp.org/wp-content/uploads/2023/06/DRAFT-FINAL-REPORT-NCDP-RESOLUTIONS-AND-PLATFORM-COMMITTEE-2023.pdf>, was passed in June 2023. See Section 2.30.

^{xxi} The Resolution, which is available at https://www.shatteringglass.org/files/ugd/8fdaf1_31178895b2624675807167dd356db09f.pdf, is

^{xxii} “The Power of Abortion Rights and the Equal Rights Amendment in Driving the 2024 Elections,” Sept. 2023, available at https://msmagazine.com/wp-content/uploads/2023/09/presentation.Ms-and-FMF-Press-Briefing.f_rev.2023.09.22.pdf.

^{xxiii} Audio available at https://www.realclearpolitics.com/video/2023/11/02/biden_what_happens_in_the_next_2-3_years_will_determine_what_the_world_will_look_like_for_the_next_6_decades.html.