To: Interested Parties
FR: U.S. Senator Kirsten Gillibrand
RE: The Urgent Case to Certify & Publish the ERA

KIRSTEN Gillibrand U.S. SENATOR FOR NEW YORK

In the wake of the *Dobbs* decision,[1] President Biden declared, "*I will do all in my power to protect a woman's right in states where they will face the consequences*"[2] and pledged to act to protect women's reproductive rights. Unfortunately, as has become glaringly evident, a Republican-led House and the Senate filibuster make legislative action all but impossible.

Fortunately, President Biden has available to him a way to restore this stolen constitutional right and codify women's freedom and equality without needing anything from a bitterly divided and broken Congress: the certification and publication of the Equal Rights Amendment (ERA).

The ERA languished for decades while awaiting ratification from the requisite number of states. But in 2020, Virginia became the 38th state to ratify the ERA, meaning that the ERA had satisfied the requirements necessary for certification under Article V of the Constitution: it had been passed by two-thirds of Congress and ratified by three-quarters of the states.[3] Therefore, there are strong constitutional grounds for President Biden to direct the archivist to publish and certify the ERA.

Opponents will raise a number of specious arguments: legislative timelines in the proposing clause, a Trump DoJ Office of Legal Counsel (OLC) memo saying the timeline for ratification expired, and flawed legal reasoning in cherry-picked court cases. The following memo challenges those arguments, lays out the strong constitutional grounds for certification, and highlights how state ERAs are already being used to strike down restrictions on reproductive rights.

The bottom line is this: President Biden has the opportunity to enshrine reproductive rights for millions of women into law by directing the archivist of the United States to certify and publish the ERA.

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[1] *Dobbs v. Women's Health Org.*, 597 U.S. 215 (2022).
[2] Remarks on the United States Supreme Court Decision To Overturn Roe v. Wade, 2022 Daily Comp. Pres. Doc. 00557, at 2 (June 24, 2022) (emphasis added).
[3] *Equal Rights Amendment*, Am. Constitution Soc'y, https://www.acslaw.org/projects/equal-rights-amendment/ (last visited Aug. 14, 2024).

Would the ERA protect reproductive freedoms?

Yes. Publishing the ERA to the U.S. Constitution would instantly provide the most effective rebuttal to post-*Dobbs* attacks on women's health in the states and serve as a bulwark against a national ban on abortion that former President Trump and congressional Republican leaders have called for.

A federal ERA would establish the premise that sex-based distinctions in access to reproductive care would be unconstitutional. Abortion bans would violate a constitutional right to sex equality since such restrictions would single out women for unfair denial of medical treatment based on sex.[4]

State-level Equal Rights Amendments have already been successful in providing the constitutional basis for reproductive equality and have been historically successful in defending against legislative infringements on women's reproductive freedom.

- **Connecticut:** In 1986, the Connecticut Superior Court held that the state's Equal Rights Amendment prohibited the limitation of Medicaid funds for therapeutic abortions.[5]

- **New Mexico:** In 1998, the New Mexico Supreme Court held that, because New Mexico "fail[ed] to provide a compelling justification for treating men and women differently with respect to their medical needs," the state's limitations on Medicaid-covered abortion care violated the state's Equal Rights Amendment.[6]

- **Pennsylvania:** The Pennsylvania Supreme Court overturned decades of state precedent and ruled that abortion providers in Pennsylvania could challenge the state ban on Medicaid funding for abortion as a form of sex discrimination under the state's Equal Rights Amendment and as a violation of the state's equal protection provisions.[7]

- **Nevada:** A state district court in Nevada ordered the removal of the state's Medicaid abortion coverage ban, finding that the ban was a direct violation of

[4] *See Resolution and Report to ABA House of Delegates on the Equal Rights Amendment,* ABA Res. 601 at 1–2 (adopted Aug. 2024).
[5] *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986).
[6] *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 857 (N.M. 1998).
[7] *Allegheny Reproductive Health Ctr. v. Pennsylvania Dep't of Human Services*, 2024 WL 318389 (Pa. 2024).

Nevada's Equal Rights Amendment that was approved by Nevada voters in 2022.[8]

- **Utah:** In July 2022, a state court temporarily blocked Utah's near-total abortion ban, finding that there were "serious" questions raised as to whether the ban violated several rights guaranteed under the Utah Constitution, including Utah's Equal Rights Amendment.[9] The Utah Supreme Court upheld the ban's suspension in August 2024.[10]

  While the Pennsylvania, Nevada, and Utah cases are still pending, these rulings fundamentally lay out the argument offered here – that a federal Equal Rights Amendment could provide a strong basis for reproductive rights for all Americans.

Opponents of women's reproductive freedom recognized this power of the ERA and did not ramp up organizing against it until after the *Roe v. Wade* decision in 1973. Prior to *Roe*, the ERA passed the House in 1971 by a vote of 354 to 24,[11] and the Senate in 1972 with only 8 senators opposing.[12]

Abortion opponents were wise to fear the ERA.

What would happen if the archivist published the ERA?

Equality and reproductive freedom would be the law of the land. The ERA would be deemed the 28th Amendment and carry the weight of the law without further action needed by Congress, as was the case with the 27th Amendment.[13] Inevitably, abortion rights opponents would seek legal remedy and the case would work its way through the courts, with the burden placed on those who seek to rip away women's equality from the Constitution.

The president would be responsible for giving American women equality and protection from infringements on their privacy and bodily autonomy, and lawsuits would likely end

[8] *Silver State Hope Fund v. Nevada Dep't of Health and Human Services*, No. A-23-876702-W (Nev. Dist. Ct. Mar. 19, 2024).
[9] Order Granting Pl.'s Motion for a Prelim. Inj., *Planned Parenthood Ass'n Utah v. State*, No. 220903886 (Utah Dist. Ct. June 19, 2022).
[10] *Planned Parenthood Ass'n Utah v. State*, 2024 UT 28U, ¶¶ 228–30.
[11] 117 Cong. Rec. 35815 (1971).
[12] 118 Cong. Rec. 9598 (1972).
[13] *Congressional Pay Amendment*, 16 Op. O.L.C. 85, 99 (1992) ("[C]ongressional promulgation is neither required by Article V nor consistent with constitutional practice. As a consequence, we believe that the Archivist was not required to wait for a congressional promulgation to certify the Congressional Pay Amendment as valid.").

up reaching the Supreme Court with high-profile hearings – for all American voters to witness.

The debate this year would be a galvanizing moment for American voters where, regardless of the outcome, the president would be rewarded for his courage to have the fight and his opponents punished for their efforts against equality.

Would voters see this as an overreach?

No. The ERA by itself is exceedingly popular with voters, and post-*Dobbs*, voters have acted overwhelmingly to protect women's reproductive freedom. Since the *Dobbs* decision, 17 states have had abortion-related ballot initiatives, and reproductive freedom has prevailed in 14 of them. Kansas, Montana, and Kentucky all had anti-reproductive freedom ballot measures that were defeated by voters, while 11 states—Arizona, California, Colorado, Maryland, Michigan, Missouri, Montana, Nevada, New York, Ohio, and Vermont—approved ballot measures to strengthen reproductive freedom.

ERA proponents will argue "equality and freedom," while equal rights opponents will argue "process." The only true opposition to this plan comes from those who seek to deny women their reproductive freedom and attorneys who rely on a deeply flawed Trump-era OLC memo and an invalid 1921 Supreme Court decision.

Does the archivist have the authority to do this?

Yes. The ERA has met all the requirements as spelled out in Article V of the Constitution: passage by two-thirds of Congress and ratification by three-quarters of the states. ***In fact, the ERA is the only constitutional amendment ever proposed that has met the strict requirements, as spelled out in Article V, to be uniquely discriminated against and not certified and published.***

The president technically has no actual role at this stage of the process,[14] and under 1 U.S.C § 106b, the archivist has a ministerial duty to publish, without further action from Congress – as was the case with the 27th Amendment.[15]

If this is true, why hasn't the ERA been certified?

Donald Trump and his flawed DoJ OLC guidance. The Trump administration intentionally inserted itself in the amendment process by producing flawed legal

[14] *Hollingsworth v. Virginia*, 3 U.S. 378, 381 (1978) (holding that Congress need not present amendments to the president for signature).
[15] *Congressional Pay Amendment*, 16 Op. O.L.C. at 99 (1992).

guidance[16] that stopped the then-archivist from certifying and publishing the ERA as the 28th Amendment.

The current archivist, as was her predecessor, is deterred by this deeply flawed Trump administration OLC opinion, drafted to deny women their equality and freedom. The president is not legally bound by OLC memos and serves as the final say on matters of administration policy.[17]

Following the then-archivist's refusal to certify and publish the ERA, Virginia, Nevada, and Illinois filed a lawsuit in federal district court to compel the archivist to comply with the requirement to certify and publish the ERA. In *Virginia v. Ferriero*, the D.C. District Court dismissed the lawsuit, as it concluded the states lacked standing.[18] The states then appealed that ruling to the D.C. Circuit Court, which ultimately affirmed the lower court's decision.[19]

Lastly, just before Virginia ratified the ERA as the final necessary state, several states including Alabama, Louisiana and South Dakota filed a lawsuit in December 2019 to prevent the archivist from certifying and publishing the ERA. After the 2020 Trump OLC opinion, the plaintiff states entered into a joint stipulation and voluntary dismissal with the archivist.[20] Pursuant to this agreement, the archivist agreed not to certify the ERA following any new publication of an OLC opinion for at least 45 days.[21] It should be noted, however, that we are not seeking a new OLC memo here.

What does the precedent say?

The precedent is mixed and the question is ripe. The deeply flawed 2020 Trump OLC memo and its overreliance on the 1921 *Dillon v. Gloss* case has been treated far too deferentially and has avoided the scrutiny it deserves.

In *Dillon v. Gloss*, the case cited by the Trump OLC memo, the Court stated that all constitutional amendments must meet a reasonable time limit for ratification.[22] *Dillon* was made moot, however, with the enactment of the 27th Amendment 203 years after its passage in Congress. *Dillon* argued that there is a "fair inference" that a constitutional amendment must be ratified within a "reasonable time" and that

[16] *See Ratification of the Equal Rights Amendment*, 44 Op. O.L.C. __ (Jan. 6, 2020).
[17] *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1466 (2010) ("OLC's opinions are also subject to 'reversal' by the President or the Attorney General.").
[18] 525 F.Supp.3d 36 (D.D.C. 2021).
[19] *Illinois v. Ferriero*, 60 F.4th 704, 719 (D.C. Cir. 2023).
[20] Joint Stipulation and Pls.' Notice of Voluntary Dismissal, *Alabama v. Ferriero*, No. 7:19-cv-2032 (N.D. Ala. Feb. 27, 2020), ECF No. 23.
[21] *Illinois v. Ferriero*, 60 F.4th at 713.
[22] 256 U.S. 368, 375 (1921).

Congress may fix a deadline for ratification as a "matter of detail."[23] According to the *Dillon* court, the amendment process must be contemporaneous, and ratification in some states may not be "separated from that in others by many years and yet be effective."[24] ***However, the successful ratification and certification of the 27th Amendment 203 years after its initial proposal to the states lays out the flawed dictum in* Dillon.** The *Dillon* decision even referenced the eventual 27th Amendment as an example of an amendment that had failed the reasonable timeliness standard.[25] It was then ratified, certified and published 71 years later.

Article V is clear in what powers are conferred to Congress and to the states in the constitutional amendment process. Congress may propose an amendment "whenever [Congress] shall deem it necessary."[26] Congress may also propose the mode of ratification – that either state legislatures or state conventions must ratify the amendment.[27] However, there is nothing remotely close to permitting Congress to submit additional conditions to the states when ratifying amendments, beyond setting the mode of ratification. Congress' role in the amendment process begins with the proposal of the amendment and the mode of ratification and ends when two-thirds of both chambers approve the amendment.

Allowing Congress to artificially set deadlines for a constitutional amendment disproportionately pushes the balance of power toward Congress and away from the states and is an overextension of the powers conferred to Congress under Article V. Such an artificial deadline would intrude on the states' power to equally participate in the ratification of constitutional amendments – a power that was explicitly conferred to them under Article V.[28]

In the alternative, even if Congress did have the right to set deadlines, <u>they would have needed to place such a deadline in the body of the amendment text itself, not in the proposing clause</u>.[29] This would be aligned not with Congress' ability to set a deadline, nor with an inherent ability to set the mode of ratification, but through its ability to propose the text of a constitutional amendment altogether. Congress has shown a preference for setting determinative deadlines when it intends to and has set deadlines for constitutional amendments in the text of the amendment itself in the 18th, 20th,

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[23] *Id.* at 375–76.
[24] *Id.* at 374.
[25] *Id.* at 376.
[26] U.S. Const. art. V.
[27] *Id.*
[28] *See* Mason Kalfus, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. Chi. L. Rev 437, 455–58 (1999).
[29] *See* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 411 (1983) ("Textual time limits on ratification . . . have a far sounder footing in tradition and legal precedent.").

21st, and 22nd Amendments. This was not the case with the Equal Rights Amendment as well as the 23rd, 24th, 25th, and 26th Amendments.

Additionally, while there are not any cases that discuss separation of powers within Article V, there is instructive precedent in Article I Presentment Clause jurisprudence that addresses similar deviations from a procedural process and concerns that arise from that deviation. The Article I precedent of more recent cases in *INS v. Chadha*[30] and *Clinton v. City of New York*[31] should apply to any review of Article V and the supercharged powers that Congress granted itself without authority in setting time limits.[32]

Proper analysis of Article V focuses on separation of powers, where both players are on a level playing field in their constitutionally defined roles: Congress proposes amendments; states ratify them. If Article V assigned the power to ratify to the president or the court instead of the states, time limits would be equally impermissible for infringing upon that power.[33]

Like in Article I, where Congress proposes laws for the president to accept or reject, in the amendment procedure of Article V, Congress proposes amendments for the states to accept or reject. In both cases, Congress must initiate or propose and another actor must accept or reject the proposal – a constitutionally delineated balance of power. As such, cases interpreting Article I's Presentment Clause should be considered when analyzing comparable issues in Article V.

A 2022 Biden DoJ OLC memo itself concluded that the issue of ERA certification was not settled, stating, "*[w]hether the ERA is part of the Constitution will be resolved not by an OLC opinion but by the courts and Congress*."[34]

Conclusion: If the president were to direct the archivist to certify and publish the ERA, the landscape for legal protections and equality would flip overnight, with the issue ultimately being litigated in the courts.

Lawyers write briefs; presidents author history.

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[30] 462 U.S. 919 (1983).
[31] 524 U.S. 417 (1998).
[32] *See* Kalfus, *supra* note 32, at 459.
[33] *See id.* at 461–62.
[34] *Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment*, 44 Op. O.L.C. ___, at *2 (Jan. 26, 2022) (emphasis added).


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ERA NOW
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