



**STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL**

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ATTORNEY GENERAL

501 WASHINGTON AVE
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December 16, 2024

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

Dr. Colleen J. Shogan
The National Archives and Records Administration
700 Pennsylvania Avenue NW
Washington, DC 20408

Dear President Biden and Archivist Shogan:

We have read recent reports of a campaign to pressure President Biden to order the Archivist to certify that the long-expired Equal Rights Amendment is part of the Constitution and to publish the ERA as the 28th Amendment.¹ We write to remind you of two things. First, multiple courts and every judge to consider the issue have rejected the preposterous notion that the ERA did not expire decades ago. Second, the Archivist entered a legally binding agreement with our States in exchange for termination of litigation over whether the Archivist has authority to certify the ERA. That agreement precludes her (barring a court order) from certifying the ERA until at least 45 days elapse following an announcement from the United States Department of Justice that the ERA should be certified. Even if that announcement from the Department of Justice were made today, the earliest the Archivist could certify the ERA would be January 30, 2025. We thus urge you to reject reckless calls to violate the duties you undertook in litigation and when you swore an oath to defend the Constitution.

The Constitution is the fundamental law by which We the People decide how we will be governed. As such, the Constitution's amendment process is designed to ensure broad support of the people. In 1972, Congress proposed the ERA to the Constitution and, critically, imposed a seven-year deadline

¹ Annie Karni, Gillibrand Presses Biden to Amend the Constitution to Enshrine Sex Equality, N.Y. Times, Dec. 13, 2024, <https://www.nytimes.com/2024/12/13/us/politics/gillibrand-biden-equal-rights-amendment.html>.

for the necessary 38 States to approve the amendment. After a period of intense national debate, the ERA fell eight States short. Only thirty-five States ratified, and five of those States—Idaho, Kentucky, Nebraska, Tennessee and South Dakota—reconsidered and rescinded their ratifications before the deadline. Thus, the ERA expired in 1979. As Justice Ruth Bader Ginsburg—a noted proponent of the ERA—put it, that proposed amendment is no more, and the ERA cannot be law unless it is “put back in the political hopper and we start over again collecting the necessary states to ratify it.”²

Yet forty years later, activists hatched the idea that both those rescissions and the seven-year deadline can simply be ignored. In 2020, Virginia purported to become the “38th” State to ratify the long-defunct amendment. Our States—Alabama, Louisiana, and South Dakota—sued the Archivist to ensure that this provision, rejected by the People, was not sneaked into our fundamental law. The ploy, if successful, would not only undermine our constitutional structure, but would potentially lead to troubling policy outcomes. Based on how state-law versions of the ERA have been interpreted, a federal ERA could mandate allowing boys to compete in sports against girls and threaten state-funded women’s shelters for excluding men, state prisons for housing women apart from men, or even state colleges for considering sex when assigning roommates.

In 2020, the Department of Justice issued a thorough opinion explaining why the ERA expired more than 40 years ago.³ The opinion recounted how Congress has often included deadlines for ratification of constitutional amendments to ensure that any change to our foundational document reflects the will of the people across the country “at relatively the same period.” When Congress sent the ERA to the States in 1972 with a seven-year ratification deadline, Congress and the States understood the deadline to be binding. The deadline thus was binding, and the ERA expired in 1979 when the deadline passed without ratification from three-fourths of the States.

In response to that opinion, the Archivist declared that “NARA defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order.”⁴ Our States then agreed to dismiss our lawsuit once the Archivist agreed to the following terms:

² Marcia Coyle, Partisan Divisions Are 'Not Serving Our Country Well,' Justice Ginsburg Says, Law.com, Sept. 12, 2019, <https://www.law.com/nationallawjournal/2019/09/12/partisan-divisions-are-not-serving-our-country-well-justice-ginsburg-says/?sreturn=20241215152316>.

³ Ratification of the Equal Rights Amendment, Op. Off. Legal Counsel (Jan. 6, 2020), <https://www.justice.gov/olc/file/1232501/dl>.

⁴ NARA Press Statement on the Equal Rights Amendment, Jan. 8, 2020, <https://www.archives.gov/press/press-releases/2020/nr20-27>.

Following OLC's guidance, the Archivist has stated that he will not certify the adoption of the Equal Rights Amendment under 1 U.S.C. § 106b. *See* NARA Press Release on Equal Rights Amendment, Jan. 8, 2020, <https://www.archives.gov/press/press-releases-4>. The Archivist has further stated that he "defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order." *Id.*

In the event that the Department of Justice ever concludes that the 1972 ERA Resolution is still pending and that the Archivist therefore has authority to certify the ERA's adoption under 1 U.S.C. § 106b, the Archivist will make no certification concerning ratification of the ERA until at least 45 days following the announcement of the Department of Justice's conclusion, absent a court order compelling him to do so sooner.⁵

Undeterred, the three States who "ratified" the ERA decades after it expired sued the Archivist in the U.S. District Court for the District of Columbia seeking an order compelling the Archivist to certify and publish the amendment as part of the Constitution. It didn't go well for them. The court refused their invitation to "pull the rug out from under Congress's long-accepted practice of declaring ratification conditions in a proposing resolution's preamble based on a technicality."⁶ The court had little trouble concluding that the deadline "for ratifying the ERA ... expired long ago."⁷

Two of the late-ratifying States then appealed to the D.C. Circuit.⁸ The appellate court recognized the flawed and radical nature of their theory, which would call into question the validity of "every amendment in our nation's history."⁹ Those States lost their appeal 3-0.

The recent demands that President Biden order the Archivist to certify and publish the ERA are no less radical than the demands rejected by courts. The proposed bait-and-switch would undermine our constitutional order, and executing it within the next 45 days would break a binding agreement you made to end litigation with our States. Nothing stops supporters of the ERA from making their case to the People today and trying to add it to the Constitution through a new amendment process, but the ERA of the 1970s was soundly rejected. You should ignore calls that pretend otherwise.

⁵ *See* Joint Stipulation and Plaintiffs' Notice of Voluntary Dismissal, *Alabama v. Ferriero*, No. 7:19-cv-2032, (N.D. Ala. Feb. 27, 2020), Doc. 23.

⁶ *Virginia v. Ferriero*, No. 1:20-cv-242 (D.D.C. Mar. 5, 2021), Doc. 117 at 35.

⁷ *Id.* at 1-2.

⁸ *Illinois v. Ferriero*, No. 21-5096 (D.C. Cir. Feb. 28, 2023).

⁹ *Id.* at 25.

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For the sake of the rule of law, we urge you to stand firm in the face of this pressure campaign.

Sincerely,



Steve Marshall
Alabama Attorney General



Liz Murrill
Louisiana Attorney General



Marty Jackley
South Dakota Attorney General