**North Carolina Association of Women Attorneys (“NCAWA”)**

**Statement Calling for Immediate Publication and Certification of**

**the Equal Rights Amendment Before President Biden Leaves Office at Noon on Monday**

January 16, 2025 – With fewer than four days left until President Biden leaves office at Noon on Monday, January 20, 2025, the North Carolina Association of Women Attorneys (“NCAWA””) issues an urgent clarion call for official recognition of the fully-ratified Equal Rights Amendment (“ERA”) as the 28th Amendment to the U.S. Constitution. To that end, the NCAWA joins the growing chorus of bar associations and legal organizations[[1]](#footnote-1) – among others – urging the President in the strongest possible terms to direct the National Archivist to certify and publish the ERA *immediately* – *before it is too late.*

In a December 16, 2024 one-on-one interview in the Roosevelt Room of the West Wing of The White House, President Biden was asked: “What are you working on right now that you hope to accomplish before the end of your term? Is there one thing that you’re hoping to get done?” The very first issue that the President cited was the ERA.[[2]](#footnote-2) On behalf of the more than 170 million women and girls of this country: Mr. President – Please do it. Do it now.

**I.  The ERA Has Already Fulfilled The Two Requirements for Amending The U.S. Constitution, As Set Forth in Article V**

On August 6, 2024, the nearly 600-member House of Delegates of the American Bar Association (“ABA”) adopted Resolution 601, recognizing that, as of January 2020, the ERA is the 28th Amendment to the U.S. Constitution.[[3]](#footnote-3)

As detailed in the ABA Resolution and the accompanying Report, Article V of the Constitution sets forth *two requirements* that must be satisfied in order to amend the Constitution.[[4]](#footnote-4) First, the proposed amendment must be approved by two-thirds of both houses of Congress. The ERA satisfied this requirement in March 1972, with overwhelming bipartisan majorities in both the U.S. House of Representatives (354-24, or 94%) and in the U.S. Senate 84-8, or 91%).[[5]](#footnote-5)

The second requirement is ratification by three-quarters of the states (*i.e.*, 38 of 50 states). This second requirement was fulfilled in January 2020, when Virginia became the 38th state to ratify the ERA. Indeed, yesterday – January 15, 2025 – marked the Fifth Anniversary of Virginia’s historic, landmark vote, which pushed the ERA over the 38-state constitutional threshold.[[6]](#footnote-6) In short, as of January 2020, the ERA automatically and instantaneously became the 28th Amendment to the U.S. Constitution.[[7]](#footnote-7) As with all prior 27 amendments, under Article V, no further action by Congress, the Executive Branch, or the courts is legally necessary. The ERA is the 28th Amendment to the U.S. Constitution. It is a “done deal.”[[8]](#footnote-8)

**II. Opponents’ Objections to Recognition of the ERA as the 28th Amendment Are Specious**

ERA opponents seek to make much of the fact that, in the Resolution proposing the ERA, Congress inserted a time period – a so-called “time limit” or “deadline” – for ERA ratification by the states.[[9]](#footnote-9) According to ERA opponents, the ERA has not been ratified by the requisite 38 states, because the last three states to ratify – Nevada, Illinois, and Virginia – did so after that purported deadline had expired. This position was most recently articulated by the National Archivist, in her December 17, 2024 Statement on the Equal Rights Amendment Ratification Process.[[10]](#footnote-10)

As the ABA Report explains, however, Article V of the Constitution is entirely silent as to the timing of state ratification. Although the framers obviously could have specified a time limit for the ratification of constitutional amendments, they specifically declined to do so. Article V includes no time limit of any sort on the ratification process. As the ABA Resolution states, “any time limit for ratification of an amendment to the United States Constitution . . . is not consistent with Article V of the Constitution.”[[11]](#footnote-11)

To put it bluntly, Congress simply lacks the power to unilaterally amend the Constitution to add a third requirement to the constitutional amendment process (beyond the two requirements that the framers established in Article V). If Congress wishes to impose a time limit on the process of state ratification of constitutional amendments, it may, of course, do so. But Congress would have to satisfy the Article V process for amending the Constitution. In other words, both houses of Congress would have to approve the proposed addition of a time limit to the two existing requirements for ratification in Article V. Then, that proposal to add a time limit to Article V would have to be ratified by three-fourths (38) of the states.

**III. The Purely Ministerial Role of the National Archivist in the Constitutional Amendment Process**

Practically speaking, there is a third and final step in the constitutional amendment process – the official certification and publication of each newly-ratified amendment by the National Archivist, which is the subject of the Archivist’s recent Statement.[[12]](#footnote-12) Specifically, on December 17, 2024, the National Archivist issued a statement in which she announced that she bears “responsibility to uphold the integrity of the constitutional amendment process,” and that, “[a]t this time, the Equal Rights Amendment (ERA) cannot be certified as part of the Constitution due to established legal, judicial, and procedural decisions.”[[13]](#footnote-13)

It is essential to note that certification and publication by the National Archivist have *no impact whatsoever* on the legal status of the ERA as the 28th Amendment to the U.S. Constitution – which is, as noted above, a “done deal.” Nevertheless, certification and publication serve as legal evidence of the law and carry great weight as official performance of public affirmation, giving notice to all branches of state and federal government, as well as the general public, for purposes of compliance, enforcement, adjudication and further legislation.[[14]](#footnote-14)

Significantly, however, the Archivist’s obligation to certify and publish new constitutional amendments arises only under a federal statute, *i.e.*, 1 U.S.C. §106b – not the U.S. Constitution.[[15]](#footnote-15) Moreover, although certification and publication have important practical consequences,[[16]](#footnote-16) the Archivist’s certification and publication responsibilities pursuant to §106b are purely ministerial duties and are devoid of any legal effect as to the validity of an amendment.[[17]](#footnote-17) In other words, when – or even whether – the Archivist certifies and publishes a constitutional amendment, the Archivist’s actions have no effect on the legal status of the amendment.

As such, the Archivist’s Statement that it is the Archivist’s responsibility “to uphold the integrity of the constitutional amendment process and ensure that changes to the Constitution are carried out in accordance with the law”[[18]](#footnote-18) is inaccurate and reflects a transparent and breathtaking attempt to arrogate to her office the judiciary’s responsibility for deciding disputes concerning the validity of state ratifications. The Archivist’s Statement egregiously exaggerates her responsibilities and fails to acknowledge the very narrow and tightly-circumscribed nature of the Archivist’s role in the constitutional amendment process, implying instead that the Archivist’s role includes evaluating the validity of state ratifications. It does not.

On its own website, the National Archives has underscored the minimal, entirely ministerial nature of the Archivist’s role, explaining that the Archivist merely “examines ratification documents for facial legal sufficiency and an authenticating signature” and “does not make any substantive determinations as to the validity of State ratification actions.”[[19]](#footnote-19) The National Archivist’s misstatements, exaggerating the significance of her finite statutory duties in the constitutional amendment process, taint the entirety of the Archivist’s Statement as well as her actions – or inaction – vis-à-vis certification and publication of the ERA.[[20]](#footnote-20)

IV. The National Archivist’s Misstatements of Law

The Archivist’s Statement not only greatly overstates the National Archivist’s role in the constitutional amendment process, but, in addition, the Statement also significantly misrepresents the relevant law. As explained below, there is no merit to the Archivist’s assertion that, at this time, “the Equal Rights Amendment (ERA) cannot be certified as part of the Constitution due to established legal, judicial, and procedural decisions.”[[21]](#footnote-21)

A. The Archivist’s Misplaced Reliance on Two OLC Opinions

As authority for the sweeping proposition that the ERA cannot be certified and published at this time, the Archivist invokes two opinions issued by the U.S. Department of Justice’s Office of Legal Counsel (“OLC”).[[22]](#footnote-22) The first of the two issued on January 6, 2020 (under Attorney General William P. Barr, during the first Trump Administration), mere days before Viriginia became the 38th state to ratify the ERA.[[23]](#footnote-23) The second OLC Opinion issued on January 26, 2022 (under Attorney General Merrick Garland, in the early days of the Biden Administration), in light of the pendency of legislation to extend or remove the time limit/deadline for ratification of the ERA.[[24]](#footnote-24)

The Statement of the Archivist contends that “In 2020 and again in 2022, the Office of Legal Counsel of the U.S. Department of Justice affirmed that the ratification deadline established by Congress for the ERA is valid and enforceable. The OLC concluded that extending or removing the deadline requires new action by Congress or the courts.”[[25]](#footnote-25) The Archivist’s assertions do not withstand scrutiny.

The OLC’s 2020 Opinion addressed the legal status of the ERA and the Archivist’s role under 1 U.S.C. § 106b, and ultimately determined that “the ERA’s adoption could not be certified under under 1 U.S.C. § 106b.”[[26]](#footnote-26) The OLC predicated that determination on two OLC conclusions reached in the same 2020 Opinion, neither of which is well-founded.

The OLC’s 2020 Opinion first concluded that “Congress had the constitutional authority to impose a deadline on the ratification of the ERA and, because that deadline has expired, the ERA Resolution is no longer pending before the States.”[[27]](#footnote-27) OLC 2020 Opinion, at 2. That conclusion rested on the U.S. Supreme Court’s opinion in Dillon, which concerned ratification of the 18th Amendment.[[28]](#footnote-28) In Dillon, the Court expressly acknowledged that Article V of the Constitution sets forth no time limit for state ratification of constitutional amendments. The Dillon Court then proceeded to read into Article V an implication that constitutional amendments must be ratified, if at all, within some reasonable time after their proposal, and went on to uphold the deadline there at issue as “reasonable.”

However, Dillon’s notion that Article V includes some implied requirement that an amendment’s ratification must be reasonably “contemporaneous” with the amendment’s proposal by Congress is belied by subsequent constitutional history. Specifically, the 27th Amendment to the Constitution – the most recent amendment before the ERA – lay dormant *for more than 200 years* before its ratification in 1992.[[29]](#footnote-29) In light of this history, it is unclear what, if anything, remains of Dillon, and the OLC’s 2020 reliance on the case merits little weight.[[30]](#footnote-30)

The second conclusion in the OLC’s 2020 Opinion is, if anything, even more infirm. Specifically, the 2020 OLC Opinion concluded that “Congress may not revive a proposed amendment after the deadline has expired.”[[31]](#footnote-31) That conclusion is effectively countermanded by the OLC’s 2022 Opinion, which states, flatly and unequivocally, that “the 2020 OLC Opinion *does not preclude* the House or the Senate from taking further action regarding ratification of the ERA,” including enacting legislation to remove the time limit/deadline.[[32]](#footnote-32) The 2022 Opinion sounds a further note of caution, diplomatically observing that the issues addressed in the 2020 Opinion are “closer and more difficult than the [2020] opinion suggested.”[[33]](#footnote-33)

Lastly, contrary to the National Archivist’s assertions, the substance of the OLC’s 2022 Opinion was confined to the narrow question of whether or not the OLC’s 2020 Opinion bars either judicial consideration of questions concerning the constitutional status of the ERA or Congressional action to suspend or extend the time limit/deadline for state ratification. Thus, the OLC’s 2022 Opinion not only did not “affirm” the validity of the time limit/deadline, the 2022 Opinion did not even address the issue.[[34]](#footnote-34)

In sum, the Archivist’s Statement’s claims that the OLC’s 2020 and 2022 Opinions “affirmed that the ratification deadline established by Congress . . . is valid and enforceable” are fundamentally untrue. As outlined above, to the extent that the OLC’s 2020 Opinion so ruled, that Opinion is fatally flawed because it is predicated on Dillon, whose rationale is now demonstrably unsound (a key point that neither the National Archivist nor the 2020 OLC Opinion has addressed). And there is similarly no truth to the claim that the OLC’s 2022 Opinion ruled that the time limit/deadline “is valid and enforceable.” The 2022 OLC Opinion is entirely silent on that issue.

Likewise, there is simply no truth to the Archivist’s assertion that the OLC’s Opinions in 2020 and 2022 “concluded that extending or removing the deadline requires new action by Congress or the courts.”[[35]](#footnote-35) The OLC’s 2020 Opinion addressed only the validity of the time limit/deadline, and did not even contemplate the possibility of “extending or removing” it.[[36]](#footnote-36) And the OLC’s 2022 Opinion concluded only that nothing in the 2020 Opinion *precluded* action by Congress or the courts to extend or remove the time limit/deadline. Contrary to the National Archivist’s claims, there is nothing in the OLC’s 2022 Opinion to indicate that further action by Congress or the courts is *required* before certification and publication may proceed.[[37]](#footnote-37)

B. The Archivist’s Reliance on the Ferriero Case

To support the claim that “the Equal Rights Amendment (ERA) cannot be certified as part of the Constitution” at this time,[[38]](#footnote-38) the Statement of the Archivist also refers generally to the Ferriero litigation in the federal courts in D.C., although the case is not cited by name.[[39]](#footnote-39) The Archivist asserts that Ferriero “affirmed that the ratification deadlines established by Congress for the ERA are valid.”[[40]](#footnote-40) Again, however, the Archivist’s Statement is incorrect.

In Ferriero, a number of states sought to compel the National Archivist to certify and publish the ERA. Although ERA opponents often extract isolated sentences from the court’s opinion in an effort to bolster their arguments on the time limit/deadline, they read that language both much too broadly and out of context. The Ferriero court decided the case on very narrow procedural grounds. The gravamen of the decision is that the legal issues presented were too close to be resolved in an action seeking the “extraordinary” relief of *mandamus*, where “[t]he grounds [for granting relief] . . . are narrow and the demands are austere.” The court properly made no definitive ruling on the substantive merits of the states’ claims as to the Archivist’s statutory obligation, but – rather – found only that the states had not shown that their right to relief was so “clear and indisputable” as to warrant the “drastic” and “extraordinary” remedy of *mandamus*. In a word, the court’s decision was purely “jurisdictional.”[[41]](#footnote-41) There is thus no truth to the National Archivist’s assertion that Ferriero ruled that “the ratification deadlines established by Congress for the ERA are valid.”

C. Summary of Analysis of the National Archivist’s Legal Claims

The bottom line is that, although the Statement of the National Archivist relies on the 2020 and 2022 OLC Opinions, as well as the Ferriero case, those authorities cannot be fairly read to support her claim that the Archivist is precluded from certifying and publishing the ERA. Nothing in the OLC Opinions or Ferriero prevents the National Archivist from fulfilling her mandatory statutory obligation under 1 U.S.C. §106b to certify and publish the ERA. By failing to do so, the Archivist is in flagrant derogation of her mandatory, ministerial statutory duty.

**V. The Exigencies and The Call for Immediate Action**

The Equal Rights Amendment consists of a mere 24 words – both simple and profound: “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” It is difficult to comprehend how there could be any objection to such a fundamental statement of basic human rights.

Although the ERA has always been important, it is now *more important* – and *more urgent* – than ever before. The greatest legal protections afforded to women today rest on the Equal Protection Clause of the 14th Amendment to the Constitution. However, the focus of the 14th Amendment was not women’s rights, but the rights of formerly enslaved persons. For the past half century, judicial interpretation has extended the 14th Amendment to cover sex discrimination claims. However, “originalists” on the Supreme Court and elsewhere contend that – because the framers did not intend for the 14th Amendment to cover sex – it should not be so interpreted now. The Supreme Court’s recent decisions in Dobbs and elsewhere evince a clear and concerning trend away from longstanding interpretations of the 14th Amendment as protecting women’s rights.[[42]](#footnote-42) If 14th Amendment protections are stripped away and the ERA is not recognized as the 28th Amendment, women will be left utterly bereft of protection in the Constitution, apart from the 19th Amendment, which protects women’s right to vote.

Women’s rights are under unrelenting attack from all corners – and the horrors of today are certain to pale by comparison to what is to come, unless women are accorded the protections of the ERA.[[43]](#footnote-43)

Moreover, the ERA is plainly not a partisan issue. Poll after poll confirm that the ERA enjoys overwhelming public support, across party lines.[[44]](#footnote-44) And, significantly, the U.S. stands alone in the world, with “the only major written constitution . . . that lacks a provision declaring the equality of the sexes.” In other words, we are a global outlier.[[45]](#footnote-45) The time is now to put the 170 million women and girls of this country into the U.S. Constitution. Waiting more than a century for over half of the U.S. population to attain constitutional equality is long enough.

Over a lifetime of public service, first in the Senate and, more recently, in The White House, President Biden has earned his legendary status as a champion of equity and equality, particularly the rights of women. But certifying and publishing the Equal Rights Amendment would not merely cement the President’s women’s rights legacy, it would constitute the single greatest expansion of civil/human rights in the nation’s history. President Biden would instantly become “The Lincoln of Our Times.”

In an extraordinary stroke of poetry, Monday, January 20 will be both Inauguration Day and Martin Luther King Day. As Martin Luther King, Jr. once observed, “The time is always right to do what is right.”

President Biden has the authority, the responsibility, and the opportunity to direct that the Equal Rights Amendment be certified and published as the 28th Amendment to the U.S. Constitution. The North Carolina Association of Women Attorneys calls on the President to do so now – immediately – before it is too late.

1. *See*, *e.g.*, American Bar Association Resolution and Report/Report with Recommendations (“R&R”) #601 (Equal Rights Amendment) (adopted by acclamation Aug. 6, 2024) (Report updated Aug. 20, 2024) (“ABA Resolution and Report”) (sponsored jointly by the ABA Commission on Women in the Profession and three other ABA entities, as well as the New York City Bar Association), <https://www.americanbar.org/content/dam/aba/administrative/women/2024/res-601-adopted.pdf>; New York City Bar Association Statement Calling for the Publication and Certification of the Equal Rights Amendment Before President Biden Leaves Office on January 20, 2025 (Dec. 24, 2024), <https://www.nycbar.org/reports/publication-and-certification-of-the-equal-rights-amendment-biden/#_edn19>; Letter to President Biden from Women Lawyers on Guard Action Network (“WLGAN”) and National Association of Women Lawyers (“NAWL”) re: Certify the ERA Now! (Dec. 4, 2024), <https://mcusercontent.com/c2312611909237616b06efbcf/files/c8b48ca0-da7e-2307-a4bc-9eaaf63456f5/WLGAN_Letterhead_Letter_to_President_Biden_ERA_12_2024.pdf>; Letter to President Biden from Women’s Bar Association of D.C. (“WBA”) re: Confirm the Addition of the ERA to the Constitution as the 28th Amendment (Dec. 20, 2024), <https://wbadc.org/confirm-era-as-28th-amendment/>; NAWL Joins Second Letter to President Biden to Take Action on ERA (National Association of Women Lawyers, Dec. 16, 2024), <https://www.nawl.org/nawl-joins-second-letter-to-president-biden-to-take-action-on-era>. [↑](#footnote-ref-1)
2. *See* President Biden EXCLUSIVE Interview with MeidasTouch (MeidasTouch podcast/MeidasTouch Network, Dec. 16, 2024) (*circa* 14:22), <https://www.youtube.com/watch?v=TJfOAjUleTc>. [↑](#footnote-ref-2)
3. *See*American Bar Association Resolution and Report/Report with Recommendations (“R&R”) #601 (Equal Rights Amendment) (adopted by acclamation Aug. 6, 2024) (Report updated Aug. 20, 2024) (“ABA Resolution and Report”) (sponsored jointly by the ABA Commission on Women in the Profession and three other ABA entities, as well as the New York City Bar Association), <https://www.americanbar.org/content/dam/aba/administrative/women/2024/res-601-adopted.pdf>. With approximately 400,000 members in the U.S. and around the world, the ABA is “the largest voluntary association of lawyers in the world” and “the national voice of the legal profession.”

The ABA Resolution and Report address the two procedural issues that ERA opponents have cited to attempt to stymie recognition of the ERA as the 28th Amendment – the timing of state ratification and the legal effect of purported rescissions. As to the legal effect of states’ purported rescissions of ratification, the ABA Resolution states that “Article V does not permit a state to rescind its ratification of an amendment to the Constitution,” with the rationale spelled out in the ABA Report. *See*ABA Report at 12-13. [↑](#footnote-ref-3)
4. *See*U.S. Constitution, Article V (“The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, 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, or by conventions in three-fourths thereof”), <https://www.law.cornell.edu/constitution/articlev>. [↑](#footnote-ref-4)
5. These totals for both the U.S. House of Representatives and the U.S. Senate were thus far in excess of the two-thirds majority required by Article V of the Constitution. *See* 117 Cong. Rec. 35815 (1971) (House vote on Oct. 12, 1971); 118 Cong. Rec. 9598 (1972) (Senate vote on March 22, 1972). [↑](#footnote-ref-5)
6. *See*, *e.g.*, With Virginia’s final ratification, ERA fight advances (Associated Press, Jan. 27, 2020), <https://apnews.com/article/fd7f31ce50bc15184317d1abefb08da1>. [↑](#footnote-ref-6)
7. On its website, the National Archives acknowledged that “[a] proposed amendment becomes part of the Constitution as soon as it is ratified by three-fourths of the States.” *See* ABA Report at 13 n.43 (citing and linking to “Constitutional Amendment Process” (National Archives/Office of the Federal Register)). (Note: Since the issuance of the ABA Report, which drew attention to the quoted statement, this language apparently has been deleted from the Archives website.) [↑](#footnote-ref-7)
8. North Carolina’s own remarkable history sheds light on the importance of Article V. *See* Pauline Maier, Ratification: The People Debate the Constitution, 1787-1788 (2010). As one of the original 13 states, North Carolina was sent the Constitution for ratification. However, initially, it chose not to ratify, understanding that a ratification once made cannot be undone, and, instead, was for a time a foreign country, apart from the United States. Why? Because North Carolina wanted a Constitution that included a bill of rights, protecting human rights at the national level. And because North Carolina needed proof that the Constitution could actually be amended through the Article V process. Once the First Congress proposed the ten amendments that would become the nation’s Bill of Rights, then North Carolina chose to ratify the Constitution and rejoin the United States. As George Washington said, “The basis of our political systems is the right of the people to make and to alter their constitutions of government.” *See* President George Washington, Washington’s Farewell Address to the People of the United States (Sept. 17, 1796). <https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf>. [↑](#footnote-ref-8)
9. *See*H.J. Res. 208, 92d Cong. (1972) (in the preface to the text of the proposed amendment itself (*i.e.*, in the “proposing clause” or the “resolving clause”), specifying seven-year time period for ratification by states), [https://www.govinfo.gov/content/pkg/STATUTE-86/pdf/STATUTE-86- Pg1523.pdf](https://www.govinfo.gov/content/pkg/STATUTE-86/pdf/STATUTE-86-%20Pg1523.pdf); H.J. Res. 638, 95th Cong. (1978) (extending time for ratification by states to June 30, 1982), <https://www.congress.gov/bill/95th-congress/house-jointresolution/638>. [↑](#footnote-ref-9)
10. *See* Statement on the Equal Rights Amendment Ratification Process from Archivist of the United States Dr. Colleen Shogan and Deputy Archivist William J. Bosanko,  Dec. 17, 2024 (“Statement of the Archivist” or “Archivist’s Statement”), <https://www.archives.gov/press/press-releases/2025/nr25-004>.

News sources have reported that the Archivist’s Statement was prompted by the ongoing massive nationwide grassroots campaign calling on President Biden to ensure that the ERA is certified and published before Inauguration Day, as well as by a letter to the President and the National Archivist from three state Attorneys General, who have voiced growing alarm about the grassroots campaign’s surging momentum.

Informally led by U.S. Senator Kirsten Gillibrand and Co-Chairs of the Congressional Caucus for the ERA U.S. Representative Ayanna Pressley and (now former) Representative Cori Bush, the grassroots campaign includes petitions, op eds, letters to the editor, tweets, text messages, phone messages, postcards, letters, and rallies and protest demonstrations. *See generally*, *e.g.*, Twitter/X, National NOW (National Organization for Women (“NOW”)) (@NationalNOW) (Jan. 14, 2025) (launching massive “text message storm” targeting The White House, calling for the President to direct the National Archivist to certify/publish the ERA), <https://x.com/nationalnow/status/1879242119795126446?s=46>; Over 200,000 Petition Signatures Delivered to White House, Calling on Biden to Publish the ERA (Free Speech For People (“FSFP”), Jan. 14, 2025), <https://freespeechforpeople.org/over-200000-petition-signatures-delivered-to-white-house-calling-on-biden-to-publish-the-era/>; FULL VIDEO: Biden Publish the ERA Press Conference (Free Speech For People (“FSFP”)/YouTube, Jan. 14, 2025) (video of news conference immediately following January 14, 2025 delivery of 200,000 petitions to The White House), <https://www.youtube.com/watch?v=5IKdzYaqDcY>; Twitter/X, Ford Fischer (@FordFischer) (Jan. 10, 2025) (reporting on protests at National Archives Museum, which resulted in detention of 30 activists and arrests of seven) (“VIDEO THREAD: Activists dressed as contractors took down a banner outside the National Archives in Washington DC this morning and replaced it with their own demanding Biden publish the Equal Rights Amendment (ERA) into the Constitution before leaving office. The activists brought two additional banners which they had also planned to put up in the place of existing ones, but police arrived and confiscated them before the group could get those two up.”), <https://x.com/fordfischer/status/1877782983538540584?s=46>; We just got arrested for demanding that Biden codify sex equality (The Guardian, Dec. 11, 2024), <https://www.theguardian.com/commentisfree/2024/dec/11/biden-protest-equal-rights-amendment>; Gillibrand Presses Biden to Amend the Constitution to Enshrine Sex Equality (New York Times, Dec. 13, 2024), <https://www.nytimes.com/2024/12/13/us/politics/gillibrand-biden-equal-rights-amendment.html>; Opinion: President Biden, you vowed to add ratified ERA to our Constitution. Time’s up. (USA Today, Nov. 29, 2024) (reporting that “Women are mobilizing, and VoteEquality has moved our headquarters to Washington, D.C.”), <https://www.usatoday.com/story/opinion/2024/11/29/biden-ratified-era-constitution-equal-rights-amendment/76484339007/>; Virginia Senators Urge Biden to Enshrine ERA as 28th Amendment (Style Weekly, Dec. 2, 2024) (identifying November 22, 2024 letter to President from 46 U.S. Senators as but one “part of a nationwide effort on multiple fronts to get the ERA published before Biden leaves office”), <https://www.styleweekly.com/virginia-senators-urge-biden-to-enshrine-era-as-28th-amendment/>; Featured Commentary: Time to add ERA to Constitution (Pittsburgh Tribune-Review, Dec. 18, 2024) (reporting that “[w]omen and men all over the country are working hard to request that President Joe Biden contact the National Archives for publication of the Equal Rights *Amendment,” although “this movement has received little coverage from mainstream* media”), <https://triblive.com/opinion/cheryl-towers-and-nancy-weinstein-time-to-add-era-to-constitution/>; Letter to President Biden from 22 Senior Women Labor Leaders & Approx. 500 Additional Signatories re: Certification/Publication of ERA (Dec. 18, 2024), <https://www.aft.org/sites/default/files/media/documents/2024/Call_to_Action_on_the_ERA_from_Women_Leaders_of_Labor_Movement.pdf>; Letter to President Biden from League of Women Voters (“LWV”), Shattering Glass, & Additional 141 Other Organizations re: Certification/Publication of ERA (Dec. 16, 2024), <https://8fdaf192-a63f-4cc1-ba48-30c5727fb699.usrfiles.com/ugd/8fdaf1_7a59401d69c04ed5b9fe5be8dbc7e123.pdf>; Letter to President Biden from Women Lawyers On Guard Action Network (“WLGAN”) & National Association of Women Lawyers (“NAWL”) re: Certification/Publication of the ERA (Dec. 4, 2024), <https://www.nawl.org/nawl-joins-letter-to-president-biden-to-certify-the-era-now>; Reproductive Health Coalition Statement on the Equal Rights Amendment (Reproductive Health Coalition, Nov. 15, 2024), <https://www.amwa-doc.org/news/amwa-supports-publication-of-the-equal-rights-amendment/>; Letter to President Biden from 46 U.S. Senators re: Certification/Publication of ERA (Nov. 22, 2024), <https://8fdaf192-a63f-4cc1-ba48-30c5727fb699.usrfiles.com/ugd/8fdaf1_6808cbdc9b2f4e948d9189deb6f3db9b.pdf>; Letter to President Biden from 122 Members of U.S. House of Representatives re: Certification/Publication of ERA (Dec. 15, 2024), <https://bush.house.gov/imo/media/doc/bushpressley_era_letter_121524.pdf>; Alabama Attorney General Urges Adherence to Constitutional Procedures on Expired Equal Rights Amendment (Calhoun Journal, Dec. 19, 2024) (reporting on December 16, 2024 letter to President Biden and National Archivist, from three state attorneys general, sent in response to “reports of efforts to pressure the Biden administration to certify and publish the ERA as the 28th Amendment”), <https://calhounjournal.com/alabama-attorney-general-urges-adherence-to-constitutional-procedures-on-expired-equal-rights-amendment/>. [↑](#footnote-ref-10)
11. *See*ABA Resolution; ABA Report at 6-8. [↑](#footnote-ref-11)
12. *See generally*ABA Report at 13-14. [↑](#footnote-ref-12)
13. *See* Statement of the Archivist.

 [↑](#footnote-ref-13)
14. *See*, *e.g.*, ABA Report at 14 (and authorities cited there); 1 U.S.C. §112 (describing compilation of U.S. Statutes at Large, stating that they constitute “legal evidence of laws . . . and proposed or ratified amendments to the Constitution . . . , in all courts of the United States”), <https://uscode.house.gov/view.xhtml?req=granuleid:USC-1999-title1-section112&num=0&edition=1999>. [↑](#footnote-ref-14)
15. *See* *generally*, *e.g.*, ABA Report at 13. Significantly, the statutory language is explicitly mandatory. Specifically, as set forth in 1 U.S.C. § 106b: “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 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*.” *See*1 U.S.C. §106b (emphasis added), <https://www.law.cornell.edu/uscode/text/1/106b>. Accordingly, upon receipt of Virginia’s “official notice” of ratification in January 2020, the National Archivist was obligated by statute to certify and publish the ERA, “forthwith,” as the 28th Amendment to the Constitution. [↑](#footnote-ref-15)
16. *See*, *e.g.*, Biden Publish The ERA Digital Town Hall at 42:03 (Dec. 3, 2024) (remarks of U.S. Senator Kirsten Gillibrand summarizing practical effects of certifying and publishing the ERA, and explaining inevitability of future litigation), https://www.youtube.com/watch?v=FVx9HCNfEAg; Letter to President Biden from 46 U.S. Senators re: Certification & Publication of the ERA (Nov. 22, 2024) (stating that “Once the ERA is published, it will be presumed valid, and the burden of proof will be on the opponents of equality to prove otherwise. That is exactly as it should be and has been for the previous 27 constitutional amendments.”), https://8fdaf192-a63f-4cc1-ba48-30c5727fb699.usrfiles.com/ugd/8fdaf1\_6808cbdc9b2f4e948d9189deb6f3db9b.pdf. [↑](#footnote-ref-16)
17. *See* ABA Report at 13-14. [↑](#footnote-ref-17)
18. *See*Statement of the Archivist. [↑](#footnote-ref-18)
19. *See* ABA Report at 13 n.43 (citing and linking to “Constitutional Amendment Process” (National Archives/Office of the Federal Register)). It is telling that, following issuance of the ABA Report, which highlighted the quoted language, the National Archives de-activated the relevant link, and the quoted text apparently has been deleted from the National Archives website. [↑](#footnote-ref-19)
20. Neither the Archivist nor the Deputy Archivist is legally-trained. They are historians/librarians by profession. This lack of legal training may explain, at least in part, why the Archivist’s Statement is replete with legal errors. *See* Archivist of the United States – Colleen Shogan (official bio), <https://www.archives.gov/about/organization/senior-staff/archivist>; Deputy Archivist of the United States – William J. Bosanko (official bio), <https://www.archives.gov/about/organization/senior-staff/deputy-archivist>.

However, concerns also have been raised in some circles that the Archivist’s actions – or inaction – on the ERA may reflect personal political or ideological bias. *Cf*., *e.g.*, America’s Top Archivist Puts a Rosy Spin on U.S. History—Pruning the Thorny Parts (Wall Street Journal, Oct. 29, 2024) (reporting, *inter alia*, on alleged “whitewashing” of National Archives exhibits and other official media at the National Archivist’s behest (including the removal of a photo of former First Lady Betty Ford wearing an ERA button), leading to an exodus of seasoned National Archives staff; reporting that Archives staff state that the National Archivist “has gone out of her way to appease Republicans”; and further reporting that, in late October 2024, the National Archivist “spoke at a closed-door event at the Archives called ‘Faith in America’” – an event which “didn’t appear on the Archives’ public calendar” and which was “hosted by Stand Together, a nonprofit group founded by libertarian billionaire Charles Koch,” where the National Archivist’s husband is employed as director of internal communications), <https://www.wsj.com/politics/policy/national-archives-history-colleen-shogan-f8512bc3>; Redesign Controversy at U.S. Archives Museum Sparks Employee Concerns (Wall Street Journal/TikTok, Oct./Nov. \_\_\_\_, 2024) (WSJ investigative journalist reporting, *inter alia*, that National Archivist has raised objections to material she feared “might anger Republican lawmakers and a potential Trump administration” and has sought to “appease” them, and that “[l]ongtime employees of the National Archives have said that [the Archivist’s] efforts amounted to censorship”), [https://www.tiktok.com/@wallstreetjournal/video/7431690334943628590?\_r=1&\_t=ZT-8sRgJ4ayyZa](https://www.tiktok.com/%40wallstreetjournal/video/7431690334943628590?_r=1&_t=ZT-8sRgJ4ayyZa); *see also*, *e.g.*, An Update From SAA Council on the Wall Street Journal Article Concerning NARA (Society of American Archivists (“SAA”)/SAA Connect, Nov. 21, 2024) (noting publication of Wall Street Journal article and reporting that “additional issues have been raised outside the purview of the article that raise questions about [the National Archives] fulfilling its mission,” that “[m]any SAA members have expressed concern,” and that the Council of the SAA “shares those concerns”), <https://connect.archivists.org/discussion/an-update-from-saa-council-on-the-wall-street-journal-article-concerning-nara>. It may be no coincidence that the National Archivist released an Open Letter responding to the Wall Street Times expose on December 16, 2024 – mere hours before the December 17 issuance of the Archivist’s Statement on the ERA. *See* An Open Letter to the Society of American Archivists (Office of the National Archivist, Dec. 16, 2024), <https://aotus11.blogs.archives.gov/2024/12/17/an-open-letter-to-the-society-of-american-archivists/>.

Media commentators have gone so far as to accuse the National Archivist of “auditioning” for the incoming Trump Administration. *See*, *e.g.*, 'Auditioning for Trump'? U.S. archivist refuses to publish Equal Rights Amendment to Constitution (The Reid Out/MSNC/YouTube , Jan. 7, 2025), <https://www.youtube.com/watch?v=Jf8bUdQEvKI>. Incoming President Trump has now stated that the National Archivist will be replaced. *See* Trump Says He’ll Replace the National Archives Leader (New York Times, Jan. 6, 2025), <https://www.nytimes.com/2025/01/06/us/politics/trump-national-archives.html>. [↑](#footnote-ref-20)
21. *See* Statement of the Archivist. [↑](#footnote-ref-21)
22. As a threshold matter, while OLC opinions are generally regarded as authoritative, they have no binding force outside the Executive Branch and are essentially advisory. Thus, for example, OLC opinions do not bind courts. *See generally*, *e.g.*, Justice Department opinions take on the force of law — but are not, in fact, the law (Washington Post, May 31, 2019), <https://www.washingtonpost.com/world/national-security/justice-department-opinions-take-on-the-force-of-law--but-are-not-in-fact-the-law/2019/05/30/f4efe222-8280-11e9-933d-7501070ee669_story.html>; Fact Sheet: Office of Legal Counsel Transparency (Project on Government Oversight, Nov. 3, 2021), <https://www.pogo.org/fact-sheets/fact-sheet-office-of-legal-counsel-transparency>. [↑](#footnote-ref-22)
23. *See* Ratification of the Equal Rights Amendment, 44 Op. O.L.C. \_\_\_\_ (Jan. 6, 2020) (“2020 OLC Opinion”), <https://www.justice.gov/olc/file/1235176/dl?inline>. Apparently the driving force behind the 2020 OLC Opinion was the Trump Administration’s dawning realization that Virginia was just a few short weeks away from becoming the 38th state to ratify the ERA. *See*, *e.g.*, Gillibrand Presses Biden to Amend the Constitution to Enshrine Sex Equality (New York Times, Dec. 13, 2024),  <https://www.nytimes.com/2024/12/13/us/politics/gillibrand-biden-equal-rights-amendment.html>. [↑](#footnote-ref-23)
24. *See* Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment*,* 46 Op. O.L.C. \_\_\_\_ (Jan. 26, 2022) (“2022 OLC Opinion”), <https://www.justice.gov/d9/2022-11/2022-01-26-era.pdf>. [↑](#footnote-ref-24)
25. *See* Statement of the Archivist. [↑](#footnote-ref-25)
26. *See* 2020 OLC Opinion, Slip Op. at 37. [↑](#footnote-ref-26)
27. *See* OLC 2020 Opinion, Slip Op. at 2. [↑](#footnote-ref-27)
28. *See* 2020 OLC Opinion, Slip Op.at 2, *citing* Dillon v. Gloss, 256 U.S. 368 (1921), <https://supreme.justia.com/cases/federal/us/256/368/>; *see also* ABA Report at 9 n.27. [↑](#footnote-ref-28)
29. *See* ABA Report at 11-12 (and authorities cited there). [↑](#footnote-ref-29)
30. Significantly, the OLC’s 2022 Opinion merely recites the 2020 OLC Opinion on this point, and stops well short of endorsing it. *See* 2022 OLC Opinion, Slip Op.at 1 (summarizing, without discussion/analysis, conclusions of Part II of 2020 Opinion, re: Congress’s ability to impose a time limit/deadline for state ratification of the ERA, and substantively addressing only Part III of 2020 Opinion, concerning Congress’s ability to extend or remove the time limit/deadline). [↑](#footnote-ref-30)
31. *See* OLC 2020 Opinion, Slip Op. at 3. [↑](#footnote-ref-31)
32. *See* 2022 OLC Opinion, Slip Op.at 2 (emphasis added) & *passim*. Even more to the point, it bears noting that, here, ERA advocates are urging action by *the President* to direct the National Archivist to certify and publish the ERA. The second issue addressed in the OLC’s 2020 opinion – *i.e.*, the authority of *Congress* to remove the time limit/deadline for ratification of the ERA – therefore has no relevance here.  [↑](#footnote-ref-32)
33. *See* 2022 OLC Opinion. [↑](#footnote-ref-33)
34. *See* 2022 OLC Opinion, Slip Op.at Precis (summarizing the Opinion’s conclusion), 1 (stating that “nothing in the [2020 Opinion] stands as an obstacle to Congress’s ability to act”), 2 (stating that “the 2020 OLC Opinion does not preclude the House or the Senate from taking further action regarding ratification of the ERA”), 3 (concluding that “the 2010 OLC Opinion is not an obstacle either to Congress’s ability to act with respect to ratification of the ERA or to judicial consideration of the pertinent questions”). [↑](#footnote-ref-34)
35. *See* Statement of the Archivist. [↑](#footnote-ref-35)
36. *See* 2020 OLC Opinion. [↑](#footnote-ref-36)
37. *See* 2022 OLC Opinion. [↑](#footnote-ref-37)
38. *See* Statement of the Archivist. [↑](#footnote-ref-38)
39. *See* Illinois v. Ferriero, 60 F.4th 704 (D.C. Cir. 2023), <https://law.justia.com/cases/federal/appellate-courts/cadc/21-5096/21-5096-2023-02-28.html>. [↑](#footnote-ref-39)
40. *See* Statement of the Archivist. [↑](#footnote-ref-40)
41. *See generally* Ferriero, 60 F.4th 704; *see also* ABA Report at 13 n.41.  [↑](#footnote-ref-41)
42. *See generally*ABA Report at 1-2 (and authorities cited there); *see also*, *e.g.*, Statement, “Constitution Week,” by U.S. Senator Ben Cardin (MD), Congressional Record, Vol. 170 at S6420-S6421 (Sept. 25, 2024) (Senate) (underscoring that “[t]he current Supreme Court’s approach to the Constitution highlights the need for the ERA, given the apparent belief by some Justices that the Equal Protection Clause should be frozen in time in 1868, casting in doubt those precedents currently holding that the Equal Protection Clause applies to sex discrimination”) (“Cardin Statement on Senate Floor”), https://www.congress.gov/congressional-record/volume-170/issue-150/senate- [↑](#footnote-ref-42)
43. Recognition of the ERA will afford women constitutionally-secured protections in reproductive autonomy and in many other areas including closing the gender pay gap, workforce and equal employment rights, discrimination in health care and education, pregnancy discrimination, sexual harassment, and sexual and other violence against women.

Certification and publication of the ERA is virtually certain to be challenged in the courts. But litigation of constitutional amendments is nothing new. Historically, amendments have often been the subject of controversy. *See*, *e.g.*, Opinion: President Biden, you vowed to add ratified ERA to our Constitution. Time’s up. (USA Today, Nov. 29, 2024) (stating that legal historians teach that “almost every constitutional amendment had a messy path”), <https://www.usatoday.com/story/opinion/2024/11/29/biden-ratified-era-constitution-equal-rights-amendment/76484339007/>.

For examples of amendments that were certified and published notwithstanding major controversy and even litigation, *see* New York City Bar Association Statement at n.18.

Continuing litigation over the ERA is, of course, a certainty, as ERA advocates candidly acknowledge. *See*, *e.g.*, Gillibrand Presses Biden to Amend the Constitution to Enshrine Sex Equality (New York Times, Dec. 13, 2024) (reporting that Biden directing the Archivist to certify/publish the ERA “would almost certainly invite a legal challenge that would land in the Supreme Court. But Ms. Gillibrand wants Mr. Biden to use his presidential power while he is still has it to force the issue”), <https://www.nytimes.com/2024/12/13/us/politics/gillibrand-biden-equal-rights-amendment.html>; Kirsten Gillibrand Leads Last, Desperate Push for Biden to Ratify ERA (Jezebel, Dec. 17, 2024) (reporting that action by President Biden to direct Archivist to certify/publish the ERA “would inevitably invite extensive legal challenges), <https://www.jezebel.com/kirsten-gillibrand-leads-last-desperate-push-for-biden-to-ratify-era>; Over 120 House Democrats call on Biden to have Equal Rights Amendment ratified (Washington Post, Dec. 15, 2024) (reporting that, if President directs Archivist to certify/publish the ERA, “the publication of the ERA would probably spark legal challenges over the validity of the amendment”), <https://www.washingtonpost.com/politics/2024/12/15/equal-rights-amendment-biden/>.

As to the inevitable future litigation, ERA advocates say “Bring it on!”, indicating that they will relish the opportunity to watch opponents grapple with the optics of opposing equal rights for the women of this country. [↑](#footnote-ref-43)
44. *See*, *e.g.*, ABA Report at 11 & n.31 (citing AP-NORC, The Equal Rights Amendment and Discrimination against Women, Jan. 2020 (reporting that roughly three in four Americans support the ERA), https://apnorc.org/projects/the-equal-rightsamendment-and-discrimination-against-women/)); Data for Progress (reporting results of May 2022 poll, indicating that 85% of voters support the ERA, including 93% of Democrats, 79% of Independents, and 79% of Republicans), https://www.filesforprogress.org/datasets/2022/6/dfp\_era\_toplines.pdf; Public Support for Equal Rights Amendment is Sky-High (Ms. Magazine, May 14, 2020) (reporting that “[r]esults from the American Bar Association’s (ABA) 2020 Survey of Civic Literacy show that a wide majority of respondents – 83 percent – believe the Equal Rights Amendment (ERA) should be ratified and incorporated into the U.S. Constitution. Only 8 percent opposed.” and that “Support was virtually equal between men (82 percent) and women (83 percent). Support was highest among younger individuals; 90 percent of 18- to 24-year olds were in favor of the ERA, while 80 percent of those between 50 and 64 years old were supportive and 83 percent of those older than 64 favored it.”), https://msmagazine.com/2020/05/14/public-support-for-equal-rights-amendment-is-sky-high/. [↑](#footnote-ref-44)
45. *See*, *e.g.*, Cardin Statement on Senate Floor (emphasizing that “[e]ighty-five percent of countries have an explicit prohibition against governmental discrimination on the basis of sex” and that “[t]he United States is the only industrialized democracy that does not include an explicit provision in its Constitution”); The US has fallen behind on equality of the sexes (CNN, Jan. 14, 2020) (reporting that “the US is one of just 28 nations that has failed to provide an explicit guarantee of equal rights or non-discrimination on the basis of sex or gender. Globally, the US now lags 165 other nations with stronger constitutional protections for women. Every constitution adopted since 2000 from Afghanistan’s to Zimbabwe’s – has included a gender equality guarantee.”), https://www.cnn.com/2020/01/14/opinions/equal-rights-amendment-heymann-raub-sprague.

Remarkably, the United Nations itself recently named-and-shamed the United States quite publicly, criticizing the country’s failure to include in its Constitution “an explicit guarantee . . . against sex- and gender-based discrimination,” and expressly calling for the inclusion of the ERA in the U.S. Constitution. *See*ABA Report at 14 n.46 (citing CCPR/C/USA/CO/5: Concluding observations on the fifth periodic report of the United States of America, at paras.18-19 (U.N. Human Rights Committee, Dec. 7, 2023), https://www.ohchr.org/en/documents/concluding-observations/ccprcusaco5-concluding-observations-fifthperiodic-report-united); *see also*Letter to the United States from U.N. Special Rapporteur on Violence Against Women and Girls, Its Causes and Consequences (United Nations, Dec. 13, 2024) (criticizing U.S. for “lack of publication and incorporation of the Equal Rights Amendment . . . into the United States Constitution as the 28th Amendment, which would significantly advance sex and gender equality for women in the United States of America.”), <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=29558>. [↑](#footnote-ref-45)