



July 31, 2024

**VIA EMAIL**

Vice President Kamala Harris  
Office of the Vice President  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

Re.: Publication of the Equal Rights Amendment as the 28<sup>th</sup> Amendment of the US Constitution

Dear Vice President Harris:

I am circling back on our prior communications with your team regarding the publication of the Equal Rights Amendment (“ERA”) to provide you with an urgent update that makes immediate publication critical. As discussed below, women, girls, LGBTQIA+ people and our democracy simply cannot wait any longer, and we need your help. And with publication of the ERA, everyone wins.

During your 2020 Presidential campaign, including during your [debate with President Biden](#), you made your support and the urgent need for the ERA clear. At that time, only 37 states had ratified the ERA, and you declared [passing the ERA was a priority of your first 100 days in office](#) had you been elected.

As a former member of the Senate Judiciary Subcommittee on the Constitution, you know that, on January 27, 2020, Virginia became the 38<sup>th</sup> and final state needed to ratify the ERA. However, it has yet to be published as the 28<sup>th</sup> Amendment. Why? The Trump Administration illegally blocked its publication to clear the way for the United States Supreme Court (“SCOTUS”) to issue the *Dobbs* decision, overturning *Roe v. Wade*, and to wage the current war on women, girls, LGBTQIA+ people, and our democracy. This unprecedented interference in the constitutional amendment process, which was critical to carrying out their agenda (including Project 2025), took place at a time when there was already a solid conservative majority on SCOTUS.

[California](#), [Colorado](#), [Hawaii](#), [Illinois](#), [Michigan](#), [Minnesota](#), and, most recently, [Maryland](#) (with Governor Moore enthusiastically and ceremoniously signing the resolution) have affirmed the ERA is the 28<sup>th</sup> Amendment and have called upon President Biden to direct the US Archivist to publish the ERA. As have the [North Carolina Democratic Party](#) and [Democrats Abroad](#). [California is currently repairing its laws](#) to ensure compliance with the 28<sup>th</sup> Amendment.

**RECENT CRITICAL EVENTS**

Since our last communications with your team, there have been several significant developments – the most significant of which are the forthcoming national abortion ban and SCOTUS’s near-certain decision next term that will strip women, girls and LGBTQIA+ people of 14<sup>th</sup> Amendment “equal” protection – making ERA publication even more urgent.

**Millions Call on President Biden to Publish the ERA**

On December 5, 2023, [84 diverse organizations and medical associations \(representing millions of Americans\), sent a letter to President Biden](#). On behalf of the organizations and medical associations, I emailed the letter to each of President Biden’s most senior advisors, including his Chief of Staff and White House Counsel. The letter,



which includes the American Constitution Society, Free Speech For People, and the American Medical Women's Association as signatories, urged the President to immediately instruct the US Archivist to publish the ERA in order to guarantee equality for all, protect access to reproductive and gender-affirming healthcare, and strengthen our democracy.

Currently, there are over 100 organizations and medical associations supporting the letter as additional organizations, including Red Wine & Blue, Democrats for Change, and Democrats Abroad Veterans and Military Families Caucus have signed-on.

### **Reproductive Rights**

Unfortunately, as you know, after the devastating *Dobbs* decision, [Congress lacks the authority – which it derives from the Constitution – to simply “Restore Roe.”](#) However, the ERA, which [expressly empowers Congress](#) to enact legislation necessary for ERA enforcement, provides Congress the authority it currently lacks.

This was made clear on January 29, 2024, when the Pennsylvania Supreme Court issued its long-awaited [Allegheny Reproductive Health Center decision, ruling that abortion restrictions are sex-based discrimination under the PA Equal Rights Amendment](#) and are presumed to be invalid. Why was the decision eagerly anticipated? The Pennsylvania ERA is nearly identical to the federal ERA. As a result, **the *Allegheny* decision reinforces that the federal ERA is essential to protecting access to reproductive healthcare (including IVF and contraception) and rights for all Americans, regardless of where they live.**

Similarly, on March 19, 2024, [Nevada's newly adopted ERA was used to defeat abortion restrictions.](#)

As you are aware, the current reproductive healthcare crisis is about far more than abortion. Access to [IVF](#) and [contraception](#) are under attack as well. And restrictions on reproductive healthcare is one component of an all-out war on women and LGBTQIA+ people. They will not stop until women, girls and LGBTQIA+ people have been stripped of "equal" protection (see below).

### **LGBTQIA+ Rights**

After deferring its decision for months, SCOTUS agreed last month to hear the appeal of [the 6<sup>th</sup> Circuit's \*L.W. v. Skremetti\* decision](#), which applied the lowest standard of judicial review, rational basis, to the claims that Kentucky's and Tennessee's gender-affirming care bans constitute sex-based discrimination under the 14<sup>th</sup> Amendment. Historically, sex-based discrimination claims have been analyzed with the intermediate scrutiny standard of review.

[As noted by the 4th Circuit when it recently invalidated the North Carolina and West Virginia gender-affirming care coverage bans](#), "the distinction between rational basis and intermediate scrutiny is significant. We have described rational-basis review as a “deferential” standard under which 'the **plaintiff bears the burden to negate every conceivable basis which might support' the differential treatment.** . . . By contrast, an intermediate-scrutiny analysis requires the proponent of the policy to produce an “exceedingly persuasive justification” for treating individuals differently based on quasi-suspect characteristics."

SCOTUS has recently indicated its intent to apply rational basis under these circumstances (see *Labrador* below). When rational basis is applied, it will be effectively impossible to establish a 14<sup>th</sup> Amendment sex-based discrimination claim.



## **Equal Protection for Women, Girls and LGBTQIA+ People**

Although SCOTUS intentionally delayed hearing the *Skrmetti* case until after the 2024 elections, it has shined a light on what is to come. Most significantly, SCOTUS recently issued a decision (through the shadow docket) in [Labrador v. Poe](#), reinstating the Idaho gender-affirming care ban. As set forth in the concurring opinion of Justices Gorsuch, Thomas and Alito, **it is only a matter of time before SCOTUS hears the *Skrmetti* sex-based discrimination claims and applies the rational basis standard of review, thereby eviscerating "equal" protection for women, girls and LGBTQIA+ people.**

As your team is aware, for the last three years, we have been warning of the dangers of SCOTUS hearing sex-based discrimination claims, including those in the *Skrmetti* case, without the ERA in the Constitution. We need the ERA published immediately to ensure that SCOTUS is required to apply strict scrutiny (the highest level of scrutiny that comes with the ERA and is applied to discrimination based on race, religion and national origin) to sex-based discrimination claims. Unless the ERA is in the Constitution, SCOTUS is free to apply the rational basis standard of review as planned.

## **Comstock Act and National Abortion Ban**

In April, Senator Smith penned a [NYT Opinion on the Comstock Act](#), shining a light on the imminent dangers the Comstock Act presents. Senator Smith is spot-on. The Comstock Act can be used as a backdoor to a national abortion ban – even in states where reproductive rights are already protected. We have been warning of the dangers of the Comstock laws since 2021, as we have been urging President Biden to direct the US Archivist to publish the ERA. The ERA, which protects reproductive rights, would rightfully render the Comstock Act meaningless and send it back to obscurity as *Roe* did until it was overturned.

In the current political environment, the proposals pending in Congress to repeal the Comstock laws will not pass this year or even in the next few Congresses. Until then, the courts are free to use the Comstock Act to ban abortion nationwide without the need for any further Congressional action and regardless of who is in the White House. This impacts all women, including women living in states where abortion and reproductive healthcare are protected.

## **Project 2025**

There has been increased talk of [Project 2025](#) in recent weeks. However, as we all know, Project 2025 is hardly new. It is the current version of the long game conservatives have been playing for decades in their war against women, girls, LGBTQIA+ people, people of color, and our democracy.

This well-funded, long game has resulted in conservative justices embedded throughout the federal judiciary and is precisely why we will have a national abortion, and women, girls and LGBTQIA+ people will be stripped of 14th Amendment equal protection within the next year, regardless of the outcome of the 2024 elections. Why don't the election outcomes matter? Because, as noted above, the cases are already in the courts, and SCOTUS has given us a very clear indication of what it intends to do.

Although Project 2025 is currently being implemented by courts throughout the country, [SCOTUS's decision in \*Trump v. US on Presidential immunity\*](#) takes the urgency to a whole new level. 187 million women, girls and LGBTQIA+ people, particularly those of color, will be devastated by Project 2025, which contains additional attacks on our rights – the elimination of no-fault divorces, of diversity, equity and inclusion policies, of references to gender equality and so much more. We need the ERA published to stop this.



While the ERA will not prevent all the horrors of Project 2025, its publication will go a long way towards stopping the Christian Nationalist agenda in its tracks. This is proven by the response of the [Heritage Foundation](#), the architect of Project 2025, and the [National Right to Life Committee](#) to the *Allegheny Reproductive Health Center* decision discussed above – a coordinated attack on the Equal Rights Amendment, which will upend the conservative agenda.

### **White House Response To Date**

As you and your team are aware, we have been in communication with White House Counsel since January 2022, urging them to publish the Equal Rights Amendment. The White House has not offered any explanation as to why it has continued the Trump Administration's policy and has not published the ERA, even in the face of mounting calls. Moreover, the White House has refused to discuss [our December 5<sup>th</sup> letter to the President](#), even though the Gender Policy Council initially indicated it would.

It is important to note the Biden Administration [originally called on Congress to act](#) to affirm that the ERA is the 28th Amendment. However, they subsequently stated in Court that Congress has no authority to act on the ERA as its role in the constitutional amendment process ended in 1972. See [SRes. 107](#), the proposed GOP Senate resolution, [co-sponsored by Vice Presidential Candidate J.D. Vance](#), that states the ERA is invalid and quotes the Biden Administration's statements in court as support. Even more baffling, nearly a year after those statements were made in Court, [President Biden issued a another statement](#) calling on Congress to affirm the ratification of the ERA.

It is our understanding that, when recently asked by the press about ERA publication and its position on the ERA, the White House stated "[No comment.](#)"

### **INCREASED CALLS FOR ERA PUBLICATION**

In light of the above, voting alone will not stop this imminent threat to women, girls and LGBTQIA+ people. But we have the solution now - the ratified ERA - and we desperately need it published as the 28th Amendment to guarantee equality for women, girls and LGBTQIA+ people and to protect access to reproductive and gender-affirming healthcare and our democracy.

As a result, public calls for the immediate publication of the ERA have increased exponentially.

- There are two resolutions in Congress ([HJRes 82](#) and [SJRes 39](#)), led by Congresswoman Cori Bush and Senator Kirsten Gillibrand and over 150+ co-sponsors, calling for immediate publication of the ERA. Co-sponsors include:
  - All minority members of the House Judiciary Committee and nearly all majority members of the Senate Judiciary Committee;
  - Both California Senators and the majority of California Representatives, which includes leaders in the Congressional Pro-Choice, Equality and ERA Caucuses.
  - All Democratic Representatives in the key battleground states of Georgia, Michigan, Nevada, North Carolina, and Wisconsin, and all but one in Arizona have co-sponsored the joint resolution, as have Senators Ossoff, Stabenow, Cortez Masto, Rosen, and Baldwin. We anticipate more joining in the days and weeks to come.



- In its [Executive Action Agenda That Works For Women](#), the Congressional Democratic Women’s Caucus called on President Biden to “instruct the Archivist of the U.S. to certify and publish the Equal Rights Amendment to cement it into the Constitution.”
- In addition to our December 5, 2023 letter to President Biden, [hundreds of democracy, gender justice, and reproductive rights organizations and medical associations](#) have called for publication of the ERA.
- As a result of ongoing human rights violations occurring in the United States, the UN Human Rights Committee [recognized the ERA is the critical first step toward gender equality, and urged its publication](#).

### **ERA PUBLICATION IS A WIN-WIN**

You recently noted that we face a fundamental question in this election – “What kind of country do we want to live in?” Of course we choose freedom and opportunity. But women, girls, and LGBTQIA+ people do not have that today, even though it was promised in 2020, and the solution has been a mere phone call away.

In light of recent events, including SCOTUS's recent presidential immunity decision and the threat of a Trump presidency, we simply cannot wait any longer for President Biden to order the US Archivist to publish the Equal Rights Amendment. With our democracy and the rights and lives of women, girls and LGBTQIA+ people on the line, we cannot afford to roll the dice to see who wins the election.

Not only would ERA publication help us protect the rights of women, girls and LGBTQIA+ people, insulate us from many of the horrors of Project 2025, restore those rights already lost, and preserve our democracy, it will galvanize voters to support you and other Democratic candidates up and down the ballot. A recent poll by Lake Research Partners found [70% of Americans support putting the ERA in the Constitution](#), and, per the poll, support for ERA publication grows as a priority when abortion and the ERA are factored together.

A [KKF Poll of women voters from Early Summer 2024](#) found that 61% of Democratic or Democratic leaning Independent women believe the Democratic Party has not done enough to ensure access to reproductive healthcare. Moreover, women across the country are asking “what rights are they going to take next?” The answer is all of them – unless, of course, the President publishes the ERA.

Publishing the ERA now also gives voters an added incentive to back a 2024 Presidential candidate who supports the ERA and its immediate publication. Why? Because conservatives, including the [Heritage Foundation](#) and the [National Right to Life Committee](#), undoubtedly will challenge immediately the validity of the ERA, and it will be up to the Biden Administration’s Department of Justice, subsequently controlled by the next President, to defend the challenges. [Other Presidential candidates – Kennedy, Stein, West and Williamson](#) – have already stated that they will publish the ERA on Day One, if elected. We know former President Trump will not and, in fact, will [withdraw the DOJ opposition to the anticipated challenges to the ERA](#), as he did in 2020.

As the presumptive Democratic nominee for President, it is imperative that you are an equal citizen. As you well know, the baseless, harmful attacks on you (childless, DEI Candidate, etc.) are indicative of the challenges women face every day. Having to work so much harder and better for a fraction of the pay and lower probability for advancement. And it is worse for women of color. The ERA will make you, who the President



endorsed, an equal citizen and give you the foundation needed to propel you to victory and to more effectively and successfully perform your job.

There simply is no possible reason why President Biden should not publish the ERA at this point. Everyone wins, including the President.

As a strong supporter of women's and LGBTQIA+ rights and our democracy, and, prior to your Vice Presidency, a vocal supporter of the ERA, we are counting on you to urge President Biden to publish the ERA. While President Biden cannot turn back the hands of time, by publishing the ERA, he would be fighting to save democracy and to protect the rights and lives of more than 187 million Americans. By doing so at this pivotal moment, he would solidify his legacy, give you the tools needed to be successful, and strengthen the Democratic Party for generations to come.

I, together with leaders of Shattering Glass's partner organizations, would love to discuss further with you and/or members of your team. In the interim, please let us know if you have any questions. Thank you.

Sincerely,

A handwritten signature in blue ink that reads "Nicole Vorrasi Bates".

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