SHATTERING GLASS

MEMORANDUM

To: Jeffrey Zients, Chief of Staff
Edward Siskel, White House Counsel
Michael Donilon, Senior Advisor to the President
Steven Richetti, Counselor to the President
From: Nicole Vorrasi Bates
Date: August 23, 2024

Introduction

I am writing as a follow-up to **the December 5, 2023 letter from 84 organizations and medical associations** to President Biden, urging him to instruct the Archivist to publish the Equal Rights Amendment as the 28th Amendment. We attempted to discuss that letter with the White House and were informed a meeting would be set up, but that never came to fruition. Tragically, the situation has become more dire for women, girls and LGBTQIA+ people since then.

In our letter, we pointed to the 6th Circuit's ***LW v. Skrmetti*** (now *US v. Skrmetti*) decision, applying rational basis, the lowest standard of judicial review, to sex-based 14th Amendment Equal Protection claims, as an urgent reason why the immediate ERA publication was necessary. Since that time, and as set forth in detail below, the United States Supreme Court ("SCOTUS") has indicated its intent to strip women, girls and LGBTQIA+ people of 14th Amendment Equal Protection. **We desperately need the Equal Rights Amendment published as the 28th Amendment by Monday August 26th to stop SCOTUS from doing so.** Monday, August 26th is significant not simply because it is Women's Equality Day; it is the day before the United States' brief is **due in *US v. Skrmetti***, and the Solicitor General needs the ERA to defeat the intended outcome.

I am providing additional details on the following:

- The American Bar Association declares the ERA is the 28th Amendment and calls for its immediate publication and implementation, joining the growing calls for the publication of the ERA;
- The imminent threat to 14th Amendment sex-based Equal Protection, including language utilized by the US Supreme Court Justices indicating their intent, as a result of *US v. Skrmetti*;
- The likelihood of success with respect to the three standards of judicial review, which highlights what is at stake;
- The five cases filed, to date, to compel publication and/or enforce the ERA; and
- The official Biden/Harris Administration position that Congress lacks authority to take action with respect to the ERA.

The American Bar Association Joins Growing Calls For Publication of the ERA

On August 6, 2024, the American Bar Association ("ABA") passed a **Resolution** acknowledging the ERA is the 28th Amendment to the Constitution and calling for its immediate publication and implementation. In the Report accompanying the Resolution, the ABA emphasized the urgent need for the ERA:

> *Currently, the Equal Protection Clause of the 14th Amendment, which was first applied to sex-based discrimination in the 1970s as a result of judicial interpretation, provides the greatest legal protection for women. The ABA believes that is in jeopardy, noting: Originalists on the Supreme Court and elsewhere argue that because the framers did not intend for the 14th Amendment to cover sex, it should not be so interpreted now. The late Supreme Court Justice Antonin Scalia famously stated: 'Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what [the 14th Amendment] meant.' To the extent that the Supreme Court's recent decisions in Dobbs and elsewhere evince a Supreme Court majority's embrace of originalism, longstanding interpretations of the 14th Amendment are in grave peril.*

The ABA joined the numerous public calls for the immediate publication of the ERA, which have increased exponentially due to the imminent threat to the rights and lives of women, girls and LGBTQIA+ people.

- There is a joint resolution 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;
    - 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.
- **Earlier today, the League of Women Voters** ("LWV"), and all 50 State Chapters and the District of Columbia sent a letter to the White House calling on President Biden to immediately instruct the Archivist to publish the ERA. This is not the first time the LWV has called on the President to publish the ERA as the 28th Amendment - **they did so on October 5, 2022**.

We Need The ERA Published To Enforce It and Stop SCOTUS From Stripping Women, Girls & LGBTQ+ People of Equal Protection

As you are aware, the only right women are guaranteed under the federal Constitution is the right to vote under the 19th Amendment. All other rights are judicially created, including 14th Amendment "Equal" Protection. *See* Reed v. Reed, 404 U.S. 71 (1971). We know all too well what the courts giveth, the courts can taketh away. And we are watching that play out in state legislatures and the courts, which are currently implementing the principles of Project 2025.

In 2011, prior to the ratification of the ERA, United States Supreme Court ("SCOTUS") **Justice Scalia noted**:

> *Certainly, the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that is what it meant. Nobody ever voted for that. If the*

> *current society wants to outlaw discrimination by sex hey, we have things called legislatures and they enact things called laws.*

In so stating, Justice Scalia, a textualist/originalist like the majority of the Justices on the current SCOTUS, disregarded the precedents that, beginning in 1971, applied the Equal Protection Clause of the 14th Amendment to sex-based discrimination, albeit at the lesser "intermediate scrutiny" standard of review, and looked solely to the words in the Constitution, which do not include women. *See* Craig v. Boren, 429 U.S. 190 (1976).

We must view the cases currently pending before SCOTUS through that lens to fully grasp how dire the situation is. With that in mind, we turn to the imminent threat posed by ***L.W. v. Skrmetti***, which involves the Tennessee and Kentucky bans on gender affirming care for minors. With respect to both the Kentucky and Tennessee bans on puberty blockers, the minors and their parents argued, among other things, that the law violated the Equal Protection Clause of the 14th Amendment. In both instances, the district courts held (1) the law improperly discriminates on the basis of sex and that transgender persons constitute a quasi-suspect class, (2) the states could not satisfy the heightened intermediate scrutiny that comes with such regulations, and (3) the law was facially unconstitutional and issued a statewide injunction against its enforcement. The injunctions were stayed pending appeal, and both cases were consolidated.

On appeal, the **6th Circuit Court of Appeals** held that (1) despite the laws' explicit sex-based classifications, they do not discriminate based on sex for purposes of the Equal Protection Clause of the 14th Amendment, and (2) laws that discriminate against transgender individuals warrant only deferential rational basis review.

In doing so, the 6th Circuit noted that all not all sex-based classifications warrant a heightened standard of review; only a government classification of individuals by sex that perpetuates invidious stereotypes or unfairly allocates benefits and burdens. More specifically, the court, relying on *Dobbs* and *Geduldig*, reiterated that legislative references to biological differences do not by themselves require heightened review. ***Skrmetti*** at p.32.

The 6th Circuit further noted that transgender individuals do not constitute a suspect class, and there have been no new suspect classes in over four decades. Nonetheless, the court examined the criteria historically considered when identifying a new suspect class: whether the characteristics of the group are immutable, whether the group is politically powerless, whether the law is inexplicable by anything but animus, and whether the law draws constitutionally irrational lines. ***Skrmetti*** at p.33-37.

On November 6, 2023, the United States, an Intervenor in the case, filed a **Petition for Certorari with SCOTUS**. For whatever reason, the sole question raised on appeal was whether the Tennessee ban on gender-affirming care for minors violates the Equal Protection Clause of the Fourteenth Amendment.

After postponing consideration on seven occasions, then considering the Petition at six consecutive conferences, **on June 24, 2024, SCOTUS agreed to hear the case**.

It is important to note that **Petitioner's brief is due August 27, 2024**. If the United States' brief is consistent with the Petition for Certiorari, the United States will argue that intermediate scrutiny should apply and the law constitutes sex-based discrimination in violation of the 14th Amendment Equal Protection clause. If the ERA is published, the court would be required to apply strict scrutiny. However, once oral argument occurs (likely in December), the United States would have to seek permission from SCOTUS to amend its brief to rely on the ERA. *See* Supreme Court Rule 25.6. That should be avoided at all costs.

SCOTUS recently shined a light on what it intends to do in *Skrmetti*, when it issued a decision (through the shadow docket) in ***Labrador v. Poe***, reinstating the Idaho ban on gender-affirming care (surgeries and puberty-

blocking medication) for minors. In *Labrador*, the lower court issued a preliminary injunction prohibiting Idaho from enforcing any portion of the law (even though the plaintiffs were not seeking surgeries) as it likely unconstitutional. The Ninth Circuit agreed.

On appeal to SCOTUS, Idaho did not challenge the application of the preliminary injunction to the plaintiffs but merely sought to enforce the ban in all other instances. SCOTUS agreed, despite the implied admission that the law was unconstitutional with respect to the plaintiffs.

The concurring opinion of Justices Gorsuch, Thomas and Alito, which referenced the *Skrmetti* case and the existing split in the circuits on the issue, provides "The district court purported to bar the State from bringing into effect portions of a statute that no party has shown, and no court has held, likely offensive to federal law." ***Labrador*** (Gorsuch, J. concurring) at p.5-6. This statement supports the 6th Circuit's analysis and application of the rational basis standard of review to the sex-based discrimination claims in *Skrmetti*. In their dissenting opinion, Justices Brown and Sotomayor challenged the majority's conclusion given Idaho did "not even seek relief from the District Court's determination that the law is likely unconstitutional as to at least some of the individuals it will impact." ***Labrador*** (Brown, J. dissenting) at p. 5.

While it is clear SCOTUS intends to apply rational basis to the sex-based 14th Amendment Equal Protection claims in *Skrmetti*, it is less clear whether SCOTUS will use *Skrmetti* to apply rationale basis to all sex-based 14th Amendment Equal Protection claims or it will wait for another case to completely strip women, girls, and LGBTQIA+ people of the judicially-created "Equal" Protection we currently think we have.

In light of (1) the *Dobbs* decision, including its emphasis on the political power of women regularly quoted by President Biden, (2) numerous courts examining the mutability of sex in the wake of the *Bostock* decision, (3) the principles of Project 2025 currently being implemented in state legislatures and courts throughout the country, and (4) the originalist/textualist viewpoints of the majority of SCOTUS (as articulated by Justice Scalia above), there is a very real and significant risk that SCOTUS eliminates sex as a protected class and 14th Amendment sex-based discrimination in its *Skrmetti* decision, which we anticipate in June 2025.

As you are aware from our discussions with White House Counsel in 2022, a similar risk was taken in connection with *Dobbs*, and instead of limiting its decision to the challenges to Mississippi's 15-week abortion ban as many expected, SCOTUS went even further and overturned *Roe*.

We need the Equal Rights Amendment (and the strict scrutiny that comes with it) now to avoid making this tragic mistake again as it will, in all likelihood, result in women, girls and LGBTQIA+ people losing Equal Protection.

Levels of Judicial Review and Likelihood of Success

As set forth in **our December 5, 2023 letter to President Biden**, following the Dobbs decision, courts across the country have begun applying the lowest level of judicial review, rational basis, to sex-based discrimination claims, including challenges to abortion restrictions and gender-affirming care, and have rejected the claims.

This is even lower than the intermediate scrutiny historically applied to 14th Amendment sex-based Equal Protection claims, which, in turn is lower than strict scrutiny, which applies to claims based on race, religion and national origin.

When courts apply strict scrutiny, **a study concluded** the likelihood of success increases exponentially – a plaintiff's likelihood of success increases from 20% under the rational basis standard, to 47% under intermediate scrutiny, and up to 73% with the strict scrutiny that comes along with the ERA.

The 4th Circuit noted, 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."

The reality is that when rational basis is applied, it effectively will be impossible to establish 14th Amendment sex-based discrimination claims. This is precisely why we need President Biden to direct the Archivist to publish the ERA today.

Pro-ERA Advocates Cannot Overcome Procedural Hurdles to Compel Publication or Enforce the ERA

As set forth in **our December 5, 2023 letter to President Biden**, to date, five lawsuits, including Illinois v. Ferriero, have been filed to require publication of the ERA and/or enforce its validity. See *Equal Means Equal v. Ferriero*, 3 F.4th 24 (1st Cir. 2021); *Illinois v. Ferriero*, 60 F.4th 704 (D.C. Cir. 2023); *Elizabeth Cady Stanton Trust v. Nessel*, No. 22-000066-MB, 2023 WL 3259399 (Mich.Ct.Cl. Apr. 12, 2023); *Elizabeth Cady Stanton Trust v. James, Sup Ct*, Albany County NY, June 26, 2023, Hartman, J., index No. 903819-22; *Elizabeth Cady Stanton Trust v. Nehrona*, No. 1:22-cv-00245-MSM-LDA, 2023 WL 5835874 (D.R.I. Sept. 8, 2023).

In each instance, the court has refused to rule based on seemingly insurmountable procedural hurdles. The most recent decision was issued on September 8, 2023, in Rhode Island, where the court stated **that Congress has determined that publication must come before enforcement.** *Elizabeth Cady Stanton Trust v. Nehrona*, No. 1:22-cv-00245-MSM-LDA, 2023 WL 5835874 (D.R.I. Sept. 8, 2023) at p.7-8.

This is precisely why President Trump blocked ERA publication at a time when there was already a conservative majority on SCOTUS. **We need the ERA published by August 26th so the Solicitor General can argue that the Equal Rights Amendment applies, thereby stopping SCOTUS from rendering its intended decision.**

Official Biden/Harris Position – Congress Has No Authority to Act

On January 27, 2022, the day the Equal Rights Amendment took effect in accordance with its terms, **President Biden stated**:

> *We must recognize the clear will of the American people and definitively enshrine the principle of gender equality in the Constitution. It is long past time that we put all doubt to rest. I am calling on Congress to act immediately to pass a resolution recognizing ratification of the ERA.*

However, on September 28, 2022, the Biden/Harris Administration said in court, at oral argument in *Illinois v. Ferriero*, that Congress has no such authority. This was in direct response to a question from Judge Wilkens of the US DC Circuit Court of Appeals.

Specifically, Judge Wilkens asked Sarah Harrington, the attorney representing the Biden/Harris Administration "why shouldn't the Archivist just certify and publish and let Congress decide whether the timeline should be enforced?"

In response, the Biden/Harris Administration stated:

> *Although Congress has with the 14th and 15th Amendments issued some proclamations about when Amendments were ratified, the Constitution doesn't contemplate any role for Congress at the back end. Congress proposes the Amendment, it goes out into the world, and the states do what they are going to do.*

You may listen to this exchange **HERE** (the exchange begins at 1:41:30).

You may also read the quote, which is contained in the final WHEREAS clause of **S.Res. 107**, a resolution introduced last year by Senator Hyde-Smith and co-sponsored Senators **Vance,** Lankford, Cruz, Cotton, Mullin, Cassidy, Ricketts, Rubio, Boozman, Kennedy, Lee, Risch, Marshall, Braun, Graham, Barrasso, Moran, Hawley, Budd, and Wicker. SJRes 107 claims the ERA is invalid due to the time limit contained in the in the preamble and five states' attempted rescissions of ratifications. The September 28, 2022 quote from the Biden/Harris Administration was used to bolster the argument against the ERA.

If Congress has no authority to act on the back end, and we cannot avail ourselves of the Courts due to procedural hurdles, by blocking the publication of the ERA, the Trump Administration and, to date, the Biden/Harris Administration have effectively killed the ERA – at a time when we desperately need to enforce it.

Conclusion

In light of the above, we cannot afford to wait any longer for President Biden to direct the Archivist to publish the ERA. If the ERA is not published as the 28th Amendment before August 27, 2024, the date Petitioner's brief is due in *US v. Skrmetti*, we risk being unable to rely on the ERA to stop SCOTUS from stripping women, girls and LGBTQIA+ people of Equal Protection.

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

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 Vice President Harris the tools needed to be successful, and strengthen the Democratic Party for generations to come.