

Congress of the United States

Washington, DC 20510

January 25, 2022

The Honorable Christopher H. Schroeder
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Assistant Attorney General Schroeder:

Generations have fought for ratification of the Equal Rights Amendment (ERA), which provides that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” This Thursday, January 27th, marks two years since Virginia voted to ratify the ERA, becoming the 38th and final state needed for ratification. According to its text, the “amendment shall take effect” two years after the date of the final state’s vote. However, a flawed opinion from the Office of Legal Counsel (OLC) seeks to stand in the way of the ERA’s recognition as the 28th Amendment.¹ We write to urge you to withdraw this OLC opinion.

The importance of the ERA cannot be overstated. Outside of the right to vote, enshrined just over a century ago by the 19th Amendment, women are entirely absent from our Constitution. It is inexcusable that in the year 2022, women and girls still cannot find a guarantee of equality under the law reflected in their Constitution. Moreover, the intermediate scrutiny that courts currently apply to laws discriminating on the basis of sex is a judge-made doctrine, subject to the whims of the courts. The Supreme Court has also repeatedly struck down protections for women, arguing that Congress lacked the authority to enact them. Ratifying the ERA would make protections for women and girls permanent, enshrining in our Constitution the guarantee to equality under law on the basis of sex, once and for all.

Thirty-eight states need to ratify the ERA for it to be included in the Constitution. In January 2020, when Virginia voted to ratify, we reached this threshold, opening the door for the Archivist of the United States to immediately perform his legal, ministerial duty under 1 U.S.C. § 106b to publish the ERA as the 28th Amendment to the Constitution. Instead, the OLC chose to attempt to delay progress, and opined that the final three votes for ratification, by Nevada, Illinois, and Virginia, were moot. The OLC concluded that the only path to ratification for the ERA was to reintroduce it and begin the entire process from scratch.

¹ Department of Justice, Office of Legal Counsel, *Opinion: Ratification of the Equal Rights Amendment* (Jan. 6, 2020), www.justice.gov/olc/opinion/ratification-equal-rights-amendment.

Any action to deny the basic recognition of sex equality demands a robust justification on policy and legal grounds. The January 2020 OLC opinion falls far short of this high standard. As preeminent constitutional and legal scholars have argued, the Trump Administration’s eleventh-hour OLC opinion “sought to advance a policy preference against the ERA” and is “lacking a thoroughly reasoned understanding of precedent and Congressional power under the Constitution.”² The opinion suffers from several defects, including that it “opines on matters that are outside the scope of the Archivist’s request, is not consistent with the views of the current President, rests on erroneous interpretations of legal precedent, and directly contradicts previous OLC opinions.”³

Last year, the House passed the bipartisan House Joint Resolution 17, voting to eliminate the initial time limit on ratifications and leave no doubt about the ERA’s current validity. Today, Congress is actively deliberating on the bipartisan Senate Joint Resolution 1, which appropriately eliminates the time limit to ratify the ERA by the state legislatures, incorporating the ratifications of Nevada, Illinois and Virginia. This is well within Congress’s authority. As the same group of scholars have argued, Congress not only has the “power to modify or remove time limits” for ratification, but also that its decision to include the time limit in the preamble rather than in the text of the Amendment itself suggests that the time limit “may be non-binding hortatory language that does not preclude further state ratifications after the expiration of that time limit.”⁴

Article V lays out the amending process. It does not say anything about deadlines. It simply states that an amendment becomes valid when ratified by three-fourths of the state legislatures. Instead of recognizing Congress’s authority, the Trump Administration OLC relied on a misreading of a century-old Supreme Court case, *Dillon v. Gloss*, 256 U.S. 368 (1921), to improperly assert a fixed time limit on ratification. In fact, the Court’s decision in *Dillon* does not indicate that a time limit on state ratifications in a resolution’s preamble is binding and does not preclude later Congresses from modifying a time limit to ensure there is no question about an amendment’s validity.⁵

After generations of fighting for the ERA, sex equality deserves a permanent home in the Constitution. A flawed opinion from the OLC must not be allowed to stand in the way of their rights. Today, more than half of all Americans remain without a permanent guarantee of equality under the law on the basis of sex—despite the fact that 94% of constitutions adopted around the world since 1970 have included a guarantee of equality on the basis of sex.⁶ It is long

² Letter from Professor Katherine Franke, Faculty Director, ERA Project, Columbia Law School, et al. to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Oct. 15, 2021), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2021-10-21.CBM%20to%20Biden%20Harris%20re%20Rescinding%20Trump%20OLC%20Opinion.pdf>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Brief of Amici Curiae Equality Now et. al, *Virginia v. Ferriero*, 466 F. Supp. 3d 253 (D.D.C. June 29, 2020), <https://2ovrcr1ntdy0qupom33icsxw-wpengine.netdna-ssl.com/wp-content/uploads/2020/07/DE-61-1-Equality-Now-Proposed-Brief.pdf>.

past time to bring the United States Constitution into the 20th (let alone the 21st) century by expressly recognizing equality on the basis of sex. We urge you to act immediately to rescind the 2020 OLC opinion, and allow the Archivist to carry out his statutory duty of recognizing the complete and final adoption of the ERA.

Thank you for your consideration of our request.

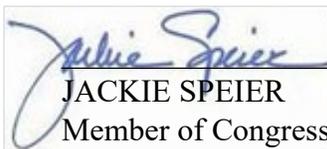
Sincerely,


RICHARD BLUMENTHAL
United States Senate


AMY KLOBUCHAR
United States Senate


CATHERINE CORTEZ MASTO
United States Senate


CAROLYN B. MALONEY
Member of Congress


JACKIE SPEIER
Member of Congress