



**Written Testimony of Shattering Glass to the Senate Judiciary Committee  
For the Record of the February 28, 2023 Hearing “The Equal Rights Amendment:  
How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution”**

**Introduction**

Shattering Glass, Inc. is a nonprofit organization, founded to address the systemic economic, social, and political barriers impeding equality for women and girls. Through advocacy, education, and outreach, we fight for gender equity and gender equality to ensure our daughters, granddaughters and their children can achieve their dreams, know their worth, and live in a world free of barriers, discrimination, and bias.

Our mission is to create a world where gender equality is the norm, and “Shattering Glass” refers to breakthrough innovations, not women and girls successfully fighting to break down barriers.

Since October 2021, Shattering Glass has also been a leader of the National ERA Publication Task Force, an ever-growing collection of women’s rights organizations, professional associations, labor unions and activists from across the country, urging the Executive Branch to publish the duly-ratified Equal Rights Amendment (“ERA”).

Until our Constitution reflects equality for all Americans, the rights of women, girls and LGBTQIA+ people will continue to be subject to the whims of anti-equality politicians and the judges they appoint.

**Background**

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.<sup>i</sup>

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,<sup>ii</sup> applied the Equal Protection Clause of the 14<sup>th</sup> Amendment to sex-based discrimination, albeit at the lesser “intermediate scrutiny” standard of review,<sup>iii</sup> and looked solely to the words in the Constitution, which do not include women. As a right created by the judiciary, equal protection based on sex may easily be rolled back.

Look no further than the recent *Dobbs v. Jackson Women’s Health Organization* (“*Dobbs*”) decision, which overturned *Roe v. Wade* and *Planned Parenthood of Southern Pa. v. Casey*.<sup>iv</sup> In fact, the majority of the current Justices on SCOTUS made clear in *Dobbs* that they agree with Justice Scalia when they (1) repeatedly noted that the Constitution makes no mention of abortion, (2) denied the application of the 14<sup>th</sup> Amendment’s Equal Protection Clause, and (3) applied the lowest standard of judicial review – the “rational basis” standard.

Like Justice Scalia, the SCOTUS majority in *Dobbs* noted:

When one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend.<sup>v</sup>

Fortunately, our Constitution has, in fact, been amended by the ERA to guarantee women equal protection of the laws, an argument summarily dismissed by SCOTUS in *Dobbs*.<sup>vi</sup>

### **ERA is the 28<sup>th</sup> Amendment and Must Be Published**

Originally proposed nearly 100 years ago, on March 22, 1972, the ERA was sent to the states for ratification, following overwhelming passage in the House and Senate. By 1978, 35 states had ratified the ERA. When Nevada and Illinois became the 36<sup>th</sup> and 37<sup>th</sup> states to ratify the ERA in 2017 and 2018, respectively, the U.S. Archivist, an Executive Branch employee, accepted and certified the ratifications.

In December 2019, mere weeks before the Virginia ratification, the states of Alabama, Louisiana and South Dakota sued the U.S. Archivist. They alleged the U.S. Archivist illegally (1) accepted the ratifications of Illinois and Nevada, which occurred after the expiration of the purported deadline included in the proposing clause of the ERA, and (2) refused to acknowledge certain states' rescissions of their ratifications, and asked the court to declare the ERA invalid.<sup>vii</sup>

Following the issuance of the January 6, 2020 Memorandum Opinion by the Department of Justice Office of Legal Counsel under Trump Administration,<sup>viii</sup> which declared that the purported deadline applied, the ERA could not be ratified, and the constitutional amendment process must start anew, the *Alabama v. Ferriero* lawsuit was withdrawn.

When Virginia became the 38<sup>th</sup> and final state needed for ratification on January 27, 2020, the U.S. Archivist was required by statute<sup>ix</sup> to certify and publish the ERA as the 28<sup>th</sup> Amendment to the U.S. Constitution. However, the ERA has yet to be published in the Constitution because the Trump Administration blocked publication, instead inserting its political views into the constitutional amendment process. Despite the fact that the sole role of the Executive Branch is the ministerial act of receiving the ratifications and publishing a revised Constitution.<sup>x</sup>

Hundreds of constitutional scholars,<sup>xi</sup> including Professor Laurence Tribe<sup>xii</sup> and the Honorable Russ Feingold,<sup>xiii</sup> agree that the ERA has met all constitutional requirements, is the 28<sup>th</sup> Amendment, and must be published. This was reinforced again at the February 28, 2023 Senate Judiciary Committee Hearing by constitutional scholar Kathleen M. Sullivan, who stated "The ERA is thus eligible to be added to the Constitution as the Twenty-Eighth Amendment without further action on the part of Congress or the States."<sup>xiv</sup>

Consequently, the states of Virginia, Illinois and Nevada brought a mandamus suit against the U.S. Archivist to compel publication of the ERA.<sup>xv</sup> The Trump Administration defended the U.S. Archivist, arguing the ERA is invalid due to the expiration of the purported deadline and attempted rescissions by five states, rendering publication inappropriate. The Biden Administration has continued this fight against the ERA, positing the same arguments as the Trump Administration.<sup>xvi</sup>

The plaintiffs in *Alabama v. Ferriero* are currently intervening defendants in *Illinois v. Ferriero*, making arguments identical to those in their earlier lawsuit.<sup>xvii</sup> However, they no longer hold the burden of proof. Instead, the Executive Branch's continued interference with the constitutional amendment process has served to shift the

burden of proof to any party seeking to compel publication or enforce the validity of the ERA. And once shifted, the burden is even greater, making it far less likely for proponents of equality to succeed.

On February 28, 2023, at the exact same time the Senate Judiciary Committee was holding its hearing “The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution” and the Senate Homeland Security and Governmental Affairs Committee was holding its second hearing on the nomination of Colleen Shogan as the U.S. Archivist, the US Court of Appeals for the DC Circuit issued its decision in *Illinois v. Ferriero*.<sup>xviii</sup>

Noting that the grounds for compelling a government employee to act “are narrow, and the demands are austere,” the court affirmed the lower court’s dismissal of the case for lack of jurisdiction.<sup>xix</sup> Specifically, the Court held that that the plaintiff states failed to meet their burden to prove that that the US Archivist’s duty to publish was “clear and indisputable” and that the US Archivist was clearly wrong, due to the existence of the arbitrary deadline in the proposing clause of the ERA.<sup>xx</sup> The Court, however, did not rule that the deadline is valid or that the ERA could not be published.

Currently, the validity of the ERA has not been acknowledged, giving the false impression that it is in legal limbo or, worse, invalid.

While President Biden has called upon Congress to pass a resolution recognizing the validity of the ERA,<sup>xxi</sup> the Biden Administration recently stated that Congress lacks the authority to do so. When asked at oral argument in *Illinois v. Ferriero* why the U.S. Archivist should not just publish the ERA and let Congress decide its validity, the Biden Administration responded:

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 backend. Congress proposes the Amendment, it goes out into the world, and the states do what they are going to do.<sup>xxii</sup>

Even if Congress passes S.J.Res. 4, it appears the Biden Administration will not publish the duly-ratified ERA, leaving it to languish in the cover of darkness. It also makes the Biden and Trump Administrations the judge and juror of the ERA, despite the fact that the Executive Branch’s sole role in the process is ministerial recordkeeping and printing a revised Constitution. Certainly not what was intended by the framers.

This statement of the Biden Administration’s position, coupled with the Court’s decision and the heightened, seemingly insurmountable burden of proof applied to proponents of equality, solely as a result of the Executive Branch’s unlawful interference with the constitutional amendment process, make publication of the ERA critical to establishing the validity of the ERA and equality for more than half of Americans.

Once published, the ERA will be presumed valid, and the burden will shift back to the opponents of equality to prove that the ERA is invalid. Exactly where it should be and would have been, in accordance with the constitutional amendment process, but for the Executive Branch’s interference.<sup>xxiii</sup>

### **Why We Need the ERA**

Unfortunately, as seen in the recent *Dobbs* decision, without ERA publication, courts are free to make decisions in an America where all citizens have not been granted equal rights. Since *Dobbs*, the rights of women, girls and

LGBTQIA+ people have been subject to ever-increasing attacks. Examples from just the first few weeks of this year include:

- Missouri subjecting women legislators to draconian dress codes;<sup>xxiv</sup>
- The US Court of Appeals for the 5<sup>th</sup> Circuit issued a decision in *US v. Rahimi*, holding a federal law that prohibits a person subject to a domestic violence restraining order from possessing a firearm is unconstitutional;<sup>xxv</sup>
- SCOTUS is considering whether to allow public charter schools to require girls to wear skirts;<sup>xxvi</sup>
- Tennessee is rejecting federal funds for HIV prevention and treatment, which has a disparate impact on women and LGBTQIA+ people;<sup>xxvii</sup> and
- A Utah Judge dismissed a lawsuit filed by 94 women alleging they were sexually assaulted by their OB/GYN.<sup>xxviii</sup> The judge ruled it was healthcare.

Opponents of equality for all recognize that the ERA will put an end to this onslaught. Why else would they be fighting so hard against the ERA and its publication? To that end, they are utilizing the same fear tactics that were employed in the 1970s, which led to the delayed ratification of the ERA. Arguing that the ERA will be used to invalidate all abortion restrictions, including elective abortions up to the minute of birth. Arguing that the ERA would treat men and women exactly the same in all instances, barring any recognition of differences between the sexes. As if the ERA provides an absolute right, which it does not. No constitutional provision does.

The ERA requires courts to conduct a strict scrutiny analysis, like other constitutional rights. Therefore, if the government has a narrowly-tailored, compelling interest in a sex-based restriction, such restrictions would be upheld on a constitutional challenge. Unfortunately, until the duly-ratified ERA is published, courts are free to apply the lower “intermediate scrutiny” standard of review that typically has been applied to sex based discrimination or, worse, the rational basis standard applied in *Dobbs*. It is important to note that 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 of the ERA.<sup>xxix</sup>

Constitutional equality for women, girls and LGBTQIA+ people, who account for far more than half of our nation’s population, cannot be denied, simply because of (1) a parade of horrors that is based on neither fact nor law and/or (2) a small percentage of Americans who oppose reproductive rights in all circumstances.

This constitutional absence of equal rights impacts the economic stability of women and their families, comprehensive reproductive health services (including abortion), contraception, violence against women, pregnancy and gender discrimination, same sex marriage, interracial marriage and so much more.

It is in our nation’s best interest to fix these issues, and we can start to do so now by publishing the duly-ratified ERA.

And the ERA is good for all Americans!

It will help us address the gender pay gap, which costs American women and their families \$1.6 trillion per year.<sup>xxx</sup>

The ERA will improve our standing on the world stage. 85% of UN countries have constitutions that include gender equality,<sup>xxxi</sup> and all UN countries except six (Iran, Somalia, Tonga, Sudan, Palau, and the United States) have ratified the Convention of the Elimination of All Forms of Discrimination Against Women,<sup>xxxii</sup> making the US an outlier on the world stage. Moreover, we can start to restore our credibility, which has taken a hit as we allege countries like

Iran and Afghanistan are guilty of human rights violations for treating their women and girls as less than equal citizens, while we do the same.

We also need the ERA to help save our fragile democracy. First listed as a backsliding democracy in 2021, and further weakened in 2022, due to polarization and threats to long-established rights, made easier by the failure to publish the ERA.<sup>xxxiii</sup> As noted by Secretary Blinken on International Women’s Day 2022:

Full and equal rights for women are key to a stable and thriving society. The data is clear: countries are more secure, peaceful and prosperous when people of all genders can participate fully and equitable in every sphere of public life. . . . And countries with high levels of gender equality have stronger and more resilient democracies. That’s why fighting for the rights and dignity of women and girls everywhere is critical to so much else that we want to achieve at home and around the world.<sup>xxxiv</sup>

Vice President Harris also stated at the 2021 Generation Equality Forum: “So I know, without doubt, gender equality strengthens democracy.”<sup>xxxv</sup>

We need the ERA now more than ever! It is the most powerful tool available to put an end to the rollback of democracy and civil rights. To guarantee equality for all, free from the whims of anti-equality politicians and judges. To protect women from domestic violence. To restore reproductive rights. To guarantee equal pay. To end gender and pregnancy discrimination and more.

The ERA sends a clear message that women, girls and LGBTQIA+ people have equality and will deter future attacks that have increased following the Dobbs decision, including those referenced above.

Moreover, until the ERA is published, artificial intelligence systems will learn, amplify and make consequential decisions based on data that reflects women, girls and LGBTQIA+ people as second-class citizens, and there is a danger that the systemic bias of inferiority will be exponentially magnified.<sup>xxxvi</sup>

## **Conclusion**

Publication of the ERA is critical as it will provide a presumption of validity and shift the burden of proof to the opponents of equality for all and reproductive rights. We urge you to send a message to the Biden Administration to publish the ERA immediately to end the ongoing attacks on the rights of women, girls and LGBTQIA+ people and finally enshrine equality for all, a bedrock of our nation, in the Constitution. If President Biden does not publish the ERA now, it likely will be decades before women, girls and LGBTQIA+ people have constitutional equality and reproductive rights.

Respectfully submitted,

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<sup>i</sup> Max Fisher, *Scalia Says Constitution Doesn't Protect Women From Gender Discrimination*, The Atlantic, Jan. 4, 2011, <https://www.theatlantic.com/politics/archive/2011/01/scalia-says-constitution-doesn-t-protect-women-from-gender-discrimination/342789/>.

<sup>ii</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>iii</sup> See *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>iv</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U. S. \_\_\_\_ (2022), available at [https://www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf).

<sup>v</sup> *Id.* at 40.

<sup>vi</sup> *Id.* at 10-11.

<sup>vii</sup> Complaint, *Alabama et al. v. Ferriero*, 7:19-cv-02032-LSC (N.D.AL 2019), available at <https://www.alabamaag.gov/Documents/news/ERA%20CA%20Complaint.pdf>.

<sup>viii</sup> See Memorandum Opinion for the General Counsel National Archives and Records Administration from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, ("Ratification of the Equal Rights Amendment") available at <https://www.justice.gov/d9/opinions/attachments/2020/01/16/2020-01-06-ratif-era.pdf>.

<sup>ix</sup> 1 U.S.C. §106b.

<sup>x</sup> *Id.*

<sup>xi</sup> See, e.g., Brief for Constitutional Law Scholars MacKinnon, et al. as Amici Curae Supporting Plaintiff-Appellants, *Illinois v. Ferriero* (Jan. 10, 2022) (USCA Case #21-5096), available at [https://voteequality.us/wp-content/uploads/2022/01/Amicus-Brief-Constitutional-Law-Professors\\_MacKinnon-et-al.pdf](https://voteequality.us/wp-content/uploads/2022/01/Amicus-Brief-Constitutional-Law-Professors_MacKinnon-et-al.pdf).

<sup>xii</sup> Letter from Professor Laurence Tribe to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Mar. 22, 2022), available at [https://8fdaf192-a63f-4cc1-ba48-30c5727fb699.usfiles.com/ugd/8fdaf1\\_35989e81c341463f9e2e3bbf6d912ffd.pdf](https://8fdaf192-a63f-4cc1-ba48-30c5727fb699.usfiles.com/ugd/8fdaf1_35989e81c341463f9e2e3bbf6d912ffd.pdf).

<sup>xiii</sup> Letter from the Honorable Russ Feingold to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Mar. 21, 2022), available at [https://8fdaf192-a63f-4cc1-ba48-30c5727fb699.usfiles.com/ugd/8fdaf1\\_de530d244ca74128bf7035115c5b3e2c.pdf](https://8fdaf192-a63f-4cc1-ba48-30c5727fb699.usfiles.com/ugd/8fdaf1_de530d244ca74128bf7035115c5b3e2c.pdf).

<sup>xiv</sup> Testimony of Kathleen M. Sullivan to U.S. Senate Committee on the Judiciary Hearing on Congress's Role in Ratifying the Equal Rights Amendment (Feb. 28, 2023), <https://www.judiciary.senate.gov/imo/media/doc/2023-02-28%20-%20Testimony%20-%20Sullivan.pdf>.

<sup>xv</sup> Complaint, *Virginia et al. v. Ferriero*, 1:20-cv-00242 (D.D.C. Jan. 30, 2020), available at [https://www.shatteringglass.org/\\_files/ugd/8fdaf1\\_d00b5dc1a8d64ff693364dc0fe7f3101.pdf](https://www.shatteringglass.org/_files/ugd/8fdaf1_d00b5dc1a8d64ff693364dc0fe7f3101.pdf). See also, 28 U.S.C. §1361. In 2022, upon a change of Administration, Virginia withdrew from the lawsuit, now known as *Illinois v. Ferriero*.

<sup>xvi</sup> Brief of Appellee-Biden Administration, *Illinois v. Ferriero* (March 4, 2022) (USCA Case #21-5096), available at [https://www.shatteringglass.org/\\_files/ugd/8fdaf1\\_afdbf60cf1514320a491354d056b1320.pdf](https://www.shatteringglass.org/_files/ugd/8fdaf1_afdbf60cf1514320a491354d056b1320.pdf).

<sup>xvii</sup> Brief For Intervenors-Appellees, *Illinois v. Ferriero* (March 4, 2022) (USCA Case #21-5096), available at <https://voteequality.us/wp-content/uploads/2022/04/Appellate-Court-Intervenor-Brief-March-2022.pdf>.

<sup>xviii</sup> *Illinois v. Ferriero*, (USCA Case #21-5096) (DC Cir. Feb. 28, 2023), available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/1D7BCC9C5AF51F968525896400549E2C/\\$file/21-5096-1987839.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/1D7BCC9C5AF51F968525896400549E2C/$file/21-5096-1987839.pdf).

<sup>xix</sup> *Id.* at 6-7.

<sup>xx</sup> *Id.* at 26.

<sup>xxi</sup> Statement from President Biden on the Equal Rights Amendment (January 27, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/27/statement-from-president-biden-on-the-equal-rights-amendment/>.

<sup>xxii</sup> Audio From Sept. 28, 2022 Oral Argument in *Illinois v. Ferriero*, <https://www.youtube.com/watch?v=RsnAMkOJLOQ>. Relevant exchange starts at 1:41:30.

<sup>xxiii</sup> 1 U.S.C. §112.

<sup>xxiv</sup> See <https://www.npr.org/2023/01/13/1149057491/missouri-house-dress-code-women-cardigan>.

<sup>xxv</sup> *U.S. v. Rahimi*, 4:21-CR-83-1 (ND TX Feb. 2, 2023), <https://www.documentcloud.org/documents/23596606-5th-circuit-ruling-on-domestic-violence-restraining-order-gun-restriction>.

<sup>xxvi</sup> See <https://www.reuters.com/legal/supreme-court-seeks-us-government-view-charter-schools-skirt-requirement-2023-01-09/>.

<sup>xxvii</sup> See

<https://www.nbcnews.com/news/amp/rcna66689?fbclid=IwAR37NSPX1SNTeRRYUwDQPbRSRLxU3GrrsIckRIhSw1aJHRWkKjGKP13hw>.

<sup>xxviii</sup> See <https://www.propublica.org/article/94-utah-women-sue-obgyn-for-sexual-assault-judge-tosses-case>.

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<sup>xxix</sup> Lee Epstein, Andrew D. Martin, Lisa Baldez, & Tasina Nitzschke Nihiser, *Constitutional Sex Discrimination*, 1 TN J. L. & Pol. 11, 47-51 (Fall 2004), available at <https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1002&context=tjlp>.

<sup>xxx</sup> See online <https://www.nationalpartnership.org/our-work/economic-justice/wage-gap/#:~:text=On%20average%2C%20women%20employed%20in,and%20invest%20for%20the%20future>.

<sup>xxxi</sup> "U.S. protections for constitutional rights falling behind global peers," Jan. 8, 2020, <https://www.newswise.com/politics/u-s-protections-for-constitutional-rights-falling-behind-global-peers>.

<sup>xxxii</sup> UN Treaty Body Database, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en).

<sup>xxxiii</sup> Global State of Democracy Report 2022: Forging Social Contracts in a Time of Discontent, <https://idea.int/democracytracker/g sod-report-2022#chapter2.4>.

<sup>xxxiv</sup> See <https://www.facebook.com/watch/?v=1007471753310218>.

<sup>xxxv</sup> See <https://www.reuters.com/world/gender-equality-makes-democracy-stronger-says-kamala-harris-2021-06-30/>.

<sup>xxxvi</sup> See <http://aibluedot.com/>.