

NATIONAL ERA PUBLICATION TASK FORCE



Talking Points and Primer on the Equal Rights Amendment For The Upcoming Senate Judiciary Committee Hearing

Messaging

- The Equal Rights Amendment (“ERA”) was passed (overwhelmingly!) by Congress in 1972. It does not need to be passed;
- The ERA has been ratified by the required number of states. It does not need to be ratified;
- The ERA is duly ratified and is the 28th Amendment;
- The ERA is required to be published as the 28th Amendment;
- Opponents of equality for all and reproductive rights state that the ERA has not been passed or ratified, pointing to a deadline in the preamble to try to deny women, girls and LGBTQIA+ people equal rights. That makes it ever-so-important to state that the ERA has been ratified and is the 28th Amendment;
- The proposed resolution ([S.J.Res. 4](#)) is designed to remove any doubt, which has been cast by these opponents, to affirm the validity of the ERA, and to urge its immediate publication;
- This is not a deadline removal bill, and characterizing it as such is disingenuous and harmful as it will be misconstrued by the media, AI, and the general public.

Without the ERA in the Constitution, the rights of women, girls and LGBTQIA+ people are subject to ever-increasing attacks. Stripping women and girls of their fundamental reproductive rights. Subjecting women legislators to draconian dress codes. Proposing laws that roll back LGBTQIA+ civil rights. Permitting public charter schools to require girls to wear skirts. Clearing the way for allowing domestic abusers to possess firearms. And these are just a few recent examples.

We need the ERA now more than ever! Why?

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.

That makes the upcoming Senate Judiciary Committee Hearing and the related messaging critical. **The key components that should be reflected in statements and questions during the hearing, include the following:**

Why We Need the ERA

- Without a constitutional provision guaranteeing equality based on sex, the US is an outlier on the world stage.
 - [85% of UN countries](#) have constitutions that include gender equality.

- [All UN countries except six](#) - Iran, Somalia, Tonga, Sudan, Palau, and the United States (the only developed nation of the six) – and the Vatican have ratified the Convention of the Elimination of All Forms of Discrimination Against Women
- [U.S. has lost credibility on the world stage](#) when it alleges countries like Iran and Afghanistan are guilty of human rights violations when they treat their women and girls as less than equal citizens.
- Our democracy is fragile, and enshrining gender equality in our Constitution will help bring us back.
 - The US was first listed as a backsliding democracy in 2021, and [our democracy weakened in 2022](#) due to polarization and threats to long-established rights, made easier by the failure to publish the ERA.
 - 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 equitably 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.”
 - [Vice President Harris](#) at the 2021 Generation Equality Forum: “So I know, without doubt, gender equality strengthens democracy.”
- Women and LGBTQIA+ people are under attack, made easier by being relegated to 2nd class citizen status under the Constitution.
 - Loss of reproductive rights
 - Gender pay gap – costs American women and families [\\$1.6 trillion per year](#)
 - Increasing violence against women and LGBTQIA+ people
 - Example – [Three women are killed each day](#) by an intimate partner.
- With the Equal Rights Amendment in our Constitution, artificial intelligence (“AI”) systems [will learn, amplify and make consequential decisions based on data that reflects women, girls and LGBTQIA+ people as fully equal citizens](#). Without the ERA published, there is a danger that systemic bias of inferiority will be exponentially magnified. As a result, we need the ERA published to make certain that all Americans are equal.
- We can begin to fix all of this now with the Equal Rights Amendment.
 - The ERA would require courts to apply a strict scrutiny standard of review, thereby increasing the likelihood of success of defeating gender discrimination. Per one study ([found here at p. 47-51](#)), the likelihood of success for each standard of review is as follows:
 - Strict Scrutiny (standard with the ERA) – 73%
 - Intermediate Scrutiny (standard currently applied to gender discrimination) – 47%
 - Rational Basis (*Dobbs* standard) – 20%
 - The ERA sends a clear message that women, girls and LGBTQIA+ people have equality and will deter future attacks that have increased following the decision in *Dobbs v. Jackson Women’s Health Organization*, including those referenced above that have occurred in the first few weeks of this year.
 - The ERA is very much alive and is the 28th Amendment. We need President Biden to publish an updated Constitution. Passing S.J.Res. 4, affirming the ERA is valid and the 28th Amendment, would remove any doubt that publication is required. It is not dead as most media and opponents of equality would lead us to believe.

VALIDITY OF THE ERA

- The ERA passed Congress with an overwhelming majority in 1972 and was sent to states for ratification. 35 states quickly ratified, but it stalled following the Roe decision and the strong opposition to abortion because the ERA protects reproductive rights.
 - [State ERAs have been used successfully by NARAL, Planned Parenthood and others to defeat abortion restrictions](#) in New Mexico, Connecticut, and most recently, Utah where the abortion ban triggered by Dobbs decision has not taken effect.
 - This is clearly evident from the strong opposition to the ERA put forth by anti-choice activists. For example, in anticipation of the hearing on the ERA, [the National Right to Life Committee urged Senators to oppose S.J.Res. 4](#).
- ERA included a deadline in the preamble that 100s of Constitutional scholars, including [Harvard Professor Laurence Tribe](#) and [former US Senator Russ Feingold](#), President of the American Constitution Society, have determined is invalid. According to these scholars, the ERA is the 28th Amendment and must be published.
- After the 27th Amendment, related to Congressional pay raises, was [ratified in 1992, nearly 203 years after it was proposed](#), women's rights activists kick-started efforts to secure the final three ratifications needed for the ERA.
 - Nevada (2017) and Illinois (2018) ratified, followed by Virginia, which became 38th state to ratify on January 27, 2020. On that date, the ERA became the 28th Amendment and [was required to be published in the Constitution](#).
- [President Trump illegally blocked ERA](#) publication, in large part [because it would give women a constitutional right to bodily integrity and personal autonomy](#), claiming the deadline expired and that the constitutional amendment process would have to start all over. The three recent ratifying states [sued](#).
- [Senators Blumenthal, Klobuchar and Cortez Masto](#), along with Congresswomen Maloney and Speier have urged the Biden Administration to publish the ERA, as required by law. In contrast, [Senators Portman, Romney and Johnson](#) have urged the Archivist to never publish the ERA. [Seven additional GOP Senators \(Lankford, Hyde Smith, Graham, Daines, Boozman, Moran and Lee\)](#) followed-up with a letter against ERA publication.
- To date, President Biden has not published the ERA and, in fact, continues to fight against the ERA in court, [making the same arguments that the Trump Administration made](#).
- In addition to Illinois and Nevada (Virginia dropped out of the suit when Governor Youngkin came into office), the following (and others) have joined the lawsuit urging publication of the ERA as all constitutional requirements have been met:
 - [constitutional scholars](#);
 - [86 major corporations](#);
 - [50+ women's rights organizations](#), and
 - [most significantly, 22+ states, led by New York and including Connecticut, Delaware, Hawaii, Minnesota, New Jersey, Rhode Island and Vermont, who have argued that all constitutional requirements have been satisfied and the ERA must be published as the 28th Amendment](#).

- Additional State Legislatures Call For Publication of the Equal Rights Amendment – including California and Georgia
 - California recently passed two resolutions - one stating that [all requirements have been met and ERA is 28th Amendment](#) and the other taking action [to review and repair California law](#) to ensure compliance with the ERA.
 - Similar resolutions have been proposed in [Illinois](#), Minnesota and [Georgia](#) and more states are expected to do so soon.
- [State Attorneys General in New York](#), Rhode Island and Michigan have moved to dismiss lawsuits brought by the Elizabeth Cady Stanton Trust to declare the ERA valid as the 28th Amendment. Why? The Attorneys General agree that the ERA is the 28th Amendment, so there is no controversy.

Response to Arguments Made By Opponents of Equality

- In general, the opposition to equality for women, girls and LGBTQIA+ people is nothing more than a parade of horrors and fearmongering. These arguments are all based on the erroneous assumption that the Equal Rights Amendment guarantees rights that are absolute and not subject to any interference.
 - Nonetheless, opponents should all agree (at least publicly) to the bedrock principle that equality is a basic fundamental right of all Americans.
- **Argument: Women already have equality; ERA is Unnecessary.**
 - The only right of women that is guaranteed under the Constitution is the right to vote.
 - The Equal Protection Clause of the 14th Amendment, adopted in 1868, [was not applied to women until 1971](#).
 - At that time, the court did not address whether sex discrimination claims were entitled to strict scrutiny, which applied to all other discrimination against a “suspect class.”
 - Four years later, the court created and [applied the intermediate scrutiny standard](#), a lower standard of review that makes it far more difficult to prove discrimination (see study results referenced above in “[Why We Need The ERA](#)”).
 - Despite the above rulings, some judges, [including the late Justice Scalia and Justice Thomas, believe that there is nothing in the Constitution that prohibits discrimination based on sex](#).
 - Based on that philosophy, fundamental rights will continue to be rolled back.
 - We need the ERA to insulate women, girls, LGBTQIA+ people from the whims of anti-equality politicians and the judges they appoint.
 - See additional points above under “[Why We Need The ERA](#).”
- **Argument: The ERA could be used to invalidate all abortion restrictions, including late-term abortions. See [here](#) for anti-equality position paper on ERA.**
 - As noted above in “[Validity of the ERA](#),” the ERA has been used to defeat abortion restrictions. However, that does not mean elective late-term abortions/abortions at 40 weeks will be permitted.
 - ERA will require a strict scrutiny analysis, but if the government has a narrowly-tailored, compelling interest in the abortion restrictions, such restrictions would be upheld.
 - The application of the ERA to reproductive rights would result in an ongoing discussion that we must have as a nation.
 - However, 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 a small percentage of Americans oppose reproductive rights in all circumstances.

- **Argument: The ERA results in equality for all LGBTQIA+ people, including transgender women. As a result, the rights, privacy and safety of women and girls will be erased.**
 - The focus of this argument is generally on bathrooms, sports and prisons. For example, see [here for the position of the Eagle Forum](#), founded by the original anti-ERA activist Phyllis Schlafly, on transgender girls participating in sports.
 - Again, the ERA will require a strict scrutiny analysis, but if the government has a narrowly-tailored, compelling interest in the restriction, such restrictions would be upheld.
 - Here again, the application of the ERA would result in an ongoing discussion that we must have as a nation.
 - However, constitutional equality for women, girls and LGBTQIA+ people, who account for far more than half of our nation's population, cannot be denied because of the parade of horrors put forth by opponents of equality for all.

Conclusion

- Publication of the ERA may not be the last word on the validity of the ERA as the opposition is intense. Nonetheless, publication 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](#).
- If President Biden does not publish the ERA now, it likely will be decades before women, girls and LGBTQ+ people have constitutional equality and reproductive rights.