

United States Senate

February 18, 2022

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740

Dear Mr. Ferriero:

We are concerned by the unjustifiable demands for you to ignore the law and unilaterally “ratify” the Equal Rights Amendment (ERA). As you are aware, despite a recent spike in advocacy efforts by several of our colleagues in Congress and ERA-enthusiasts, the ERA objectively lacks the Constitutionally-required support from states to warrant its certification.

Were you to heed the irresponsible urgings of these advocates, it would do profound and lasting damage to the apolitical character of the office that you have long exercised. We are confident, however, that such a hypothetical unlawful action would not bind the federal courts, nor make the long-expired ERA part of the Constitution.

In an attempt to provide further clarity to our colleagues who continue to publicly and privately pressure you to certify the ratification of the ERA, we ask that you once again clearly and publicly affirm your commitment to adhere to the decision of a federal court as well as the official position of the US Department of Justice (DOJ) that “NARA defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order.”

Your office previously sought guidance from the DOJ Office of Legal Counsel (OLC) regarding the legal status of the ERA in 2018. On January 6, 2020, OLC responded to that request and stated that “consistent with the last seven amendments adopted before 1972, Congress conditioned ratification on a deadline, requiring that the necessary number of States (thirty-eight) approve the amendment within seven years. As that deadline approached, only thirty-five States had ratified the ERA, and several had sought to rescind their initial approvals. Congress took the unprecedented step of voting, with a simple majority in each House, to extend the deadline by three years, until June 30, 1982. See 92 Stat. 3799 (1978). That new deadline came and went, however, without additional ratifications. The ERA thus failed to secure the necessary ratifications within either of Congress’s deadlines.”

That opinion was reaffirmed several weeks ago in another OLC opinion. On January 26, 2022, OLC stated that “Congress imposed a seven-year deadline when it initially proposed the ERA in 1972. Our opinion concluded that Congress had constitutional authority to impose that deadline and that, because 38 states had not ratified the proposed amendment before that deadline’s expiration, the ERA is not a part of the United States Constitution and the Archivist of the United States may not certify it as such.”

In addition to the OLC opinions, in March 2021, Judge Rudolph Contreras of the U.S. District Court for the District of Columbia dismissed the lawsuit against you that was filed by Nevada, Illinois and Virginia in an attempt to compel you to certify the ERA. In the decision, Judge Contreras stated, “[E]ven if Plaintiffs [Virginia, Nevada, and Illinois] had standing, Congress set deadlines for ratifying the ERA that expired long ago. Plaintiffs’ ratifications came too late to count....The Archivist’s

assessment of whether a proposed amendment 'has been adopted [] according to the provisions of the Constitution,' 1 U.S.C. § 106b, should therefore include confirmation that the states ratified the amendment in accordance with any properly imposed ratification deadline. Because Congress derives its power to set a ratification deadline from Article V, it would be just as absurd for the Archivist to ignore such a deadline as it would be for him to ignore a violation of one of the conditions stated expressly in Article V. Contrary to Plaintiffs' contention, the Archivist does not have to accept their ratifications as valid merely because they told him to."

Nevertheless, you have been the subject of ridiculous calls to ignore clear guidance from both the court and the Department of Justice and to unilaterally certify the ERA. We are grateful that you have repeatedly shown your respect for the rule of law on this matter. As you have previously recognized, you do not have the authority to fabricate the certification of an amendment that failed to achieve ratification before the explicit, Congressionally-imposed deadline and is no longer pending before states.

We look forward to your timely response on this critical issue.

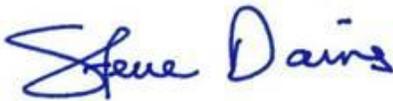
Sincerely,



James Lankford
United States Senator



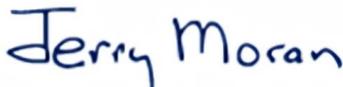
Cindy Hyde-Smith
United States Senator



Steve Daines
United States Senator



Lindsey O. Graham
United States Senator



Jerry Moran
United States Senator



Michael S. Lee
United States Senator



John Boozman
United States Senator