

Sixty-sixth
Legislative Assembly
of North Dakota

HOUSE CONCURRENT RESOLUTION NO. 3037

Introduced by

Representatives Damschen, Monson, Owens, Vigesaa

Senators Clemens, Erbele, Rust

1 A concurrent resolution clarifying the 1975 ratification by the 44th Legislative Assembly of the
2 proposed 1972 Equal Rights Amendment to the Constitution of the United States was valid only
3 through March 22, 1979.

4 **WHEREAS**, the 92nd Congress of the United States of America, during its second session,
5 with the constitutionally required vote of two-thirds of both houses, on March 22, 1972, gave
6 final approval to House Joint Resolution No. 208, commonly referred to as the Equal Rights
7 Amendment, to propose the amendment to the Constitution of the United States, pursuant to
8 Article V of the Constitution of the United States; and

9 **WHEREAS**, the 1972 Equal Rights Amendment states:

10 "Section 1. Equality of rights under the law shall not be denied or abridged by the United
11 States or by any State on account of sex.

12 Section 2. The Congress shall have the power to enforce, by appropriate legislation, the
13 provisions of this article.

14 Section 3. This amendment shall take effect two years after the date of ratification."; and

15 **WHEREAS**, in offering the proposed federal constitutional amendment to America's state
16 lawmakers, the 92nd Congress chose a deadline of 7 years, or until March 22, 1979, for the
17 constitutionally mandated ratification of the amendment by three-fourths of the country's state
18 legislatures; and

19 **WHEREAS**, Congressional power to impose a deadline for ratification of a proposed federal
20 constitutional amendment was acknowledged by the United States Supreme Court in Dillon v.
21 Gloss, 256 U.S. 368 (1921); and

22 **WHEREAS**, in Senate Concurrent Resolution No. 4007, the regular session of the
23 44th Legislative Assembly in 1975, responded by ratifying the proposed 1972 Equal Rights
24 Amendment to the Constitution of the United States; and

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1 **WHEREAS**, the 44th Legislative Assembly was cognizant of the 7-year deadline the
2 92nd Congress had placed upon state legislative deliberation of the 1972 proposed constitutional
3 amendment, and North Dakota lawmakers ratified the proposed amendment in 1975 with the
4 understanding that nationwide state legislative consideration of the amendment would conclude
5 as of March 22, 1979; and

6 **WHEREAS**, taking the 92nd Congress at its word, members of the 44th Legislative Assembly
7 did not perceive any necessity to make it abundantly clear Senate Concurrent Resolution
8 No. 4007 would expire on March 22, 1979, because within the text of Senate Concurrent
9 Resolution No. 4007 an en passant reference is made to the 7-year ratification deadline; and

10 **WHEREAS**, the 95th Congress, by simple majority votes, significantly fewer than super
11 majorities in each house, adopted House Joint Resolution No. 638 on October 6, 1978, which
12 was placed before then-President Jimmy Carter who proceeded to sign it on October 20, 1978,
13 even though that action did not comply with the United States Supreme Court's ruling in
14 Hollingsworth v. State of Virginia, 3 U.S. 378 (1798), which clarified the nation's chief executive
15 has no formal role in the federal constitutional amendment process; and

16 **WHEREAS**, House Joint Resolution No. 638 of the 95th Congress purported to extend to
17 June 30, 1982, the previously agreed-upon March 22, 1979, deadline for state legislatures to
18 discuss and move favorably upon the 1972 Equal Rights Amendment, thus attempting to grant
19 to the Equal Rights Amendment a second opportunity; and

20 **WHEREAS**, that action by the 95th Congress was highly controversial, vigorously contested,
21 and viewed by some Americans at the time as tantamount to "changing the rules in the middle
22 of the game"; and

23 **WHEREAS**, even with the much-disputed revised deadline of June 30, 1982, the proposed
24 1972 Equal Rights Amendment still fell short of the required approvals by the legislatures of 38
25 of the 50 states because no additional state legislatures ratified the Equal Rights Amendment
26 between March 22, 1979, and June 30, 1982; and

27 **WHEREAS**, on December 23, 1981, a federal district court agreed that the 95th Congress'
28 attempt to extend the 1972 Equal Rights Amendment's ratification deadline was improper and
29 ruled in Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), the 1972 Equal Rights
30 Amendment had expired on the original deadline of March 22, 1979, noting "the running of the

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1 seven-year time limitation tolls and terminates any ratifications enacted by the states to that
2 point."; and

3 **WHEREAS**, the federal district court further decreed a state's legislature may rescind a
4 prior ratification of a proposed federal constitutional amendment if the rescission occurs before
5 the proposed amendment receives the number of state legislative approvals necessary for
6 successful completion of the ratification process; and

7 **WHEREAS**, the United States Supreme Court, preferring not to rule on the actual merits of
8 Idaho v. Freeman, opted instead, on January 25, 1982, merely to stay the lower court's
9 decisions and took no further action on the matter until reconvening for its October term, at
10 which time the justices declared, on October 4, 1982, in the followup cases of National
11 Organization for Women, Inc. v. Idaho, 455 U.S. 901 (1982) and Carmen v. Idaho, 459 U.S. 809
12 (1982), the entire controversy was moot, deeming the 1972 Equal Rights Amendment's
13 procedural nonconformities, and the proposal's mixed reception in the state legislatures, to be
14 no longer cause for concern given no state's legislature ratified the proposed amendment
15 between March 22, 1979, and June 30, 1982; and

16 **WHEREAS**, nothing definitive or with any value of judicial precedent from the nation's
17 highest court emerged from what had been a years-long raging national debate; and

18 **WHEREAS**, in a further effort to contrive a suspect ratification of the 1972 Equal Rights
19 Amendment, decades beyond both the March 22, 1979, deadline and the putative revised
20 June 30, 1982, deadline, some of the proposed amendment's supporters during the 1990s
21 devised a theory, called the three-state strategy, which provided if the legislatures of three more
22 states were to tardily ratify the 1972 Equal Rights Amendment, the amendment formally would
23 become, albeit belatedly, part of the Constitution of the United States if a sympathetic Congress
24 were to disregard the many procedural irregularities and formally move to proclaim the 1972
25 Equal Rights Amendment to have officially become the 28th Amendment to the Constitution, a
26 discretionary prerogative belonging to Congress recognized by the United States Supreme
27 Court in Coleman v. Miller, 307 U.S. 433 (1939); and

28 **WHEREAS**, adherents to this strategy for reanimating the 1972 Equal Rights Amendment
29 point to the unorthodox 1992 ratification of the 27th Amendment to the Constitution and claim the
30 acceptance of the 27th Amendment as part of the nation's highest law, notwithstanding the
31 27th Amendment's age and periods of protracted dormancy, offers precedent for the 1972 Equal

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1 1 Rights Amendment to amend the Constitution of the United States by similarly unconventional
2 means; and

3 **WHEREAS**, that comparison is flawed given the 27th Amendment never had a deadline
4 imposed by Congress upon its ratification among the state legislatures while the 1972 Equal
5 Rights Amendment, by contrast, had a deadline, or perhaps two deadlines, both of which
6 passed decades ago; and

7 **WHEREAS**, clearly influenced by the questionable logic of this ill-advised theory, the
8 Legislature of the State of Nevada, on March 22, 2017, adopted Senate Joint Resolution No. 2,
9 which purported to ratify belatedly the Equal Rights Amendment, 45 years to the day the
10 92nd Congress offered it in 1972; and

11 **WHEREAS**, likewise swayed by the rationale of this misguided strategy, the Illinois General
12 Assembly, on May 30, 2018, approved Senate Joint Resolution Constitutional Amendment
13 No. 4, which tardily ratified the 1972 Equal Rights Amendment; and

14 **WHEREAS**, subscribers to this extravagant hypothesis of the 1972 Equal Rights
15 Amendment resuscitation are now down to a mere "one-state" theory; and

16 **WHEREAS**, since 2011, in the Virginia Senate, on at least six separate occasions, this
17 strategy has triggered one-house votes to approve belatedly the 1972 Equal Rights
18 Amendment, the most recent successful and favorable one-chamber vote example was on
19 January 15, 2019, when the Virginia Senate adopted Senate Joint Resolution No. 284 with
20 26 yeas and 14 nays. The Virginia House of Delegates thus far has not concurred in the action,
21 but that circumstance could change; and

22 **WHEREAS**, at some point, as in Nevada during 2017 and as in Illinois during 2018, it may
23 be that approval of the 1972 Equal Rights Amendment may gain the positive votes of both state
24 legislative chambers, within the same legislative session, in Virginia or elsewhere; and

25 **WHEREAS**, in a brazen display of audacity, this theory further stipulates the Equal Rights
26 Amendment ratification rescissions of the Nebraska Legislature in 1973 (Legislative Resolution
27 No. 9), of the Tennessee General Assembly in 1974 (Senate Joint Resolution No. 29), of the
28 Idaho Legislature in 1977 (House Concurrent Resolution No. 10), and of the Kentucky General
29 Assembly in 1978 (House [Joint] Resolution No. 20), all are invalid, and the original zealous
30 Equal Rights Amendment ratifications by lawmakers in those four states, hurriedly effectuated
31 between March and June of 1972, remain every bit as viable today as devotees of this

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1 presumptuous strategy assert the never-rescinded ratifications of 31 other state legislatures,
2 including the 1975 ratification by the North Dakota Legislative Assembly, allegedly remain; and

3 **WHEREAS**, acceptance of a belated ratification of the 1972 Equal Rights Amendment,
4 when the originating 92nd Congress clearly saw fit to specify a deadline upon its consideration,
5 and ratifying state legislators acted in the good faith belief that, once established, the deadline
6 would hold firm, makes a sad mockery of the entire concept of time limitations and would result
7 in the side effect of no proposed federal constitutional amendment ever being perceived as
8 having failed among the states; and

9 **WHEREAS**, in 2019, in the United States, women and men have achieved equal legal
10 rights through alternate means in the absence of the 1972 Equal Rights Amendment; and

11 **WHEREAS**, in today's world, it is not entirely certain how federal judges would construe the
12 word "sex" as contained in the proposed 1972 Equal Rights Amendment; and the massive
13 transfer of power away from the states and over to the federal government by the 1972 Equal
14 Rights Amendment's second section would doubtless divest North Dakota and other states of
15 the ability to legislate in conformity with each state's own unique needs; and

16 **WHEREAS**, under the legal doctrine of *qui tacet consentire videtur, ubi loqui debuit ac
potuit*, it is important North Dakota lawmakers not be idle and mum relative to efforts underway
18 in other states to resurrect the long-expired 1972 Equal Rights Amendment, as that doctrine
19 stipulates that silence equals consent; and

20 **WHEREAS**, whatever positive features or laudable attributes the 1972 Equal Rights
21 Amendment might possess aside, the North Dakota Legislative Assembly wants no part of this
22 Equal Rights Amendment revivification experiment that potentially could launch irreversible
23 consequences of high constitutional magnitude;

24 **NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF
NORTH DAKOTA, THE SENATE CONCURRING THEREIN:**

26 That the 66th Legislative Assembly deems it appropriate and necessary to make abundantly
27 clear, as our neighboring South Dakota lawmakers did in early March 1979 with their adoption
28 of Senate Joint Resolution No. 2, that the vitality of Senate Concurrent Resolution No. 4077 of
29 the 44th Legislative Assembly by which North Dakota lawmakers ratified the 1972 Equal Rights
30 Amendment, officially lapsed at 11:59 p.m. on March 22, 1979; and

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1 **BE IT FURTHER RESOLVED**, that, after March 22, 1979, the Legislative Assembly, while in
2 agreement women and men should enjoy equal rights in the eyes of the law, should not be
3 counted by Congress, the Archivist of the United States, lawmakers in any other state, any court
4 of law, or any other person, as still having on record a live ratification of the proposed Equal
5 Rights Amendment to the Constitution of the United States as was offered by House Joint
6 Resolution No. 208 of the 92nd Congress on March 22, 1972; and

7 **BE IT FURTHER RESOLVED**, that the 66th Legislative Assembly respectfully requests the
8 full and complete verbatim text of this resolution be duly published in the United States Senate's
9 portion of the Congressional Record, as an official memorial to the United States Senate, and
10 that this resolution be referred to the committee of the United States Senate with appropriate
11 jurisdiction over its subject matter; and

12 **BE IT FURTHER RESOLVED**, that the 66th Legislative Assembly respectfully requests the
13 substance of this resolution be duly entered in the United States House of Representatives'
14 portion of the Congressional Record, as an official memorial to the United States House of
15 Representatives, and that this resolution be referred to the committee of the United States
16 House of Representatives with appropriate jurisdiction over its subject matter; and

17 **BE IT FURTHER RESOLVED**, that the Secretary of State forward copies of this resolution
18 to the Vice President of the United States, the secretary and parliamentarian of the United
19 States Senate; the Speaker, clerk, and parliamentarian of the United States House of
20 Representatives; each member of the North Dakota Congressional Delegation; and the
21 Archivist of the United States at the National Archives and Records Administration in
22 Washington, D.C.