

HOUSE CONCURRENT RESOLUTION NO. 3

Reps. Pohutsky, Edwards, Scott, Byrnes, Hill, Young, Neeley, Steckloff, Koleszar, McFall and Brabec offered the following concurrent resolution:

1 A concurrent resolution calling on the Archivist of the United
2 States to certify and publish the Equal Rights Amendment as the
3 Twenty-Eighth Amendment to the United States Constitution and
4 calling on the United States Congress to declare the Equal Rights
5 Amendment ratified.

6 Whereas, The text of the Equal Rights Amendment, as proposed
7 by Congress in 1972, reads as follows:

8 SECTION 1. Equality of rights under the law shall not be
9 denied or abridged by the United States or by any State on
10 account of sex.

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

1 SEC. 3. This amendment shall take effect two years after
2 the date of ratification.

3 ; and

4 Whereas, While similar amendments had been introduced in
5 Congress since 1923, the Equal Rights Amendment achieved the
6 necessary two-thirds vote in each chamber of Congress on March 22,
7 1972. The joint resolution passed with 354 yeas in the House of
8 Representatives and 84 yeas in the Senate. It was thereupon
9 submitted to the states, with approval by 38 needed to ratify the
10 amendment and render it part of the Constitution; and

11 Whereas, The Equal Rights Amendment has achieved the support
12 of the requisite three-quarters of the states. Only two months
13 after it was sent to the states for consideration, Michigan
14 ratified the Equal Rights Amendment on May 22, 1972. The Virginia
15 General Assembly voted for ratification in 2020, becoming the
16 thirty-eighth state to do so; and

17 Whereas, While a limited number of states have purported to
18 rescind their ratification of the Equal Rights Amendment, the text
19 of Article V and historical practice clearly indicate that they
20 cannot do so. Article V provides that amendments become part of the
21 Constitution when "ratified" by the states; it does not grant
22 states the power to rescind their ratification. Attempts to amend
23 Article V to create this power have been unsuccessful. In the past,
24 both Congress and the executive branch officer responsible for
25 certifying amendments to the Constitution have disregarded states'
26 attempts to rescind ratification. In 1868, when the executive
27 branch was uncertain about whether rescission was possible,
28 Congress adopted a concurrent resolution declaring that the
29 Fourteenth Amendment had been ratified and included two states that

1 had voted to rescind ratification in their list of ratifying
2 states; Congress did not seem to think that their rescissions were
3 legally effective. In 1870, the executive branch officer
4 responsible for certifying amendments followed this example and
5 disregarded a supposed rescission when listing ratifying states in
6 his official certification of the Fifteenth Amendment; and

7 Whereas, The Archivist of the United States is the officer who
8 currently has the statutory duty to certify and publish amendments
9 to the Constitution. This duty is conferred by 1 USC § 106b, which
10 states:

11 Whenever official notice is received at the National Archives
12 and Records Administration that any amendment proposed to the
13 Constitution of the United States has been adopted, according
14 to the provisions of the Constitution, the Archivist of the
15 United States shall forthwith cause the amendment to be
16 published, with his certificate, specifying the States by
17 which the same may have been adopted, and that the same has
18 become valid, to all intents and purposes, as a part of the
19 Constitution of the United States.

20 ; and

21 Whereas, The Archivist's statutory duty is illuminated by the
22 history of 1 USC § 106b, case law, and past practice. Early in our
23 nation's history, there was widespread confusion about whether
24 certain amendments had been adopted, because there was not a
25 standardized process for states to notify the federal government
26 that they had voted for ratification and there was not an official
27 process for publishing amendments that were properly ratified. To
28 alleviate this confusion, Congress imposed on an officer in the
29 executive branch the duty to certify and publish new amendments to

1 the Constitution. This duty has been transferred to different
2 officials over time and is now a duty of the Archivist of the
3 United States. The United States Court of Appeals for the District
4 of Columbia Circuit wrote in 1920 that the executive officer's role
5 in the amendment process is "purely ministerial" and that the
6 officer has "no authority" to examine whether it was proper for the
7 states to send their notices of ratification. This has historically
8 been the practice, where certain states claimed to have rescinded
9 their ratification of proposed constitutional amendments. The
10 executive officer did not assert authority over the process by
11 refusing outright to certify the amendments; and

12 Whereas, The 2023 decision of the D.C. Circuit Court in
13 *Illinois v. Ferriero* does not bar the Archivist from certifying the
14 Equal Rights Amendment. Although the court held that it could not
15 order the Archivist to certify the Equal Rights Amendment, this was
16 due to the nature of the legal action and the remedy sought, not
17 because the amendment could not and should not be lawfully
18 certified. On the contrary, throughout the opinion, the court
19 indicated that the states arguing for the certification of the
20 Equal Rights Amendment presented plausible interpretations of the
21 law; and

22 Whereas, While the Archivist's certification of the Equal
23 Rights Amendment is not required to make it legally effective as
24 part of the Constitution, it would send a powerful signal that the
25 amendment should be recognized as having been adopted. Under
26 Article V, the executive branch plays no role in the constitutional
27 amendment process, and Congress did not and could not alter this
28 fact by creating the statutory duty of certification and
29 publication. However, this process is important for resolving

1 confusion about the state of the law. For example, after Michigan
2 became the thirty-eighth state to ratify the Twenty-Seventh
3 Amendment to the Constitution in 1992, over two hundred years after
4 it was proposed by Congress, scholars and even the Speaker of the
5 House of Representatives doubted whether the amendment had become
6 effective. These doubts were dispelled when the Archivist certified
7 the amendment, and Congress subsequently recognized the amendment's
8 validity. The Archivist could help create a consensus about the
9 legal effectiveness of the Equal Rights Amendment by officially
10 certifying and publishing it as part of the Constitution; and

11 Whereas, The Archivist should not delay the express
12 recognition of equality by refusing to certify the Equal Rights
13 Amendment as part of the highest law of the land. While case law
14 has developed under the Equal Protection Clause of the Fourteenth
15 Amendment to limit sex-based discrimination, case law can change
16 far more easily than the text of the Constitution itself, as has
17 been demonstrated all too clearly by recent actions of the Supreme
18 Court of the United States. The principle that the government may
19 not deny or abridge equality of rights on account of sex is of such
20 paramount importance that it deserves to be enshrined in the United
21 States Constitution. Congress and the states have done their part
22 to make our imperfect founding document a little more perfect, just
23 as contemplated by Article V. The Equal Rights Amendment has been
24 ratified by three-fourths of the states. Now, the Archivist's only
25 role is to certify and publish it, as statutorily required; now,
26 therefore, be it

27 Resolved by the House of Representatives (the Senate
28 concurring), That we call upon the Archivist of the United States
29 to certify and publish the Equal Rights Amendment as the Twenty-

1 Eighth Amendment to the United States Constitution; and be it
2 further

3 Resolved, That we call upon the United States Congress to
4 declare the Equal Rights Amendment ratified; and be it further

5 Resolved, That copies of this resolution be transmitted to the
6 Archivist of the United States and the members of the Michigan
7 congressional delegation.