ACLU
AMERICAN CIVIL LIBERTIES UNION
North Dakota

P.O. Box 1190
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February 5, 2021

Dear Chairman Vedaa and Members of the Senate Government and Veterans Affairs Committee:

I write today on behalf of the ACLU of North Dakota, which opposes SCR 4010, legislation that would rescind North Dakota's ratification of the Equal Rights Amendment to the Constitution.

In 1975, North Dakota's 44th Legislative Assembly voted to ratify the proposed 1972 Equal Rights Amendment to the U.S. Constitution. This was a principled and important decision that signaled to North Dakotans and the nation that women deserve equality. The ERA would, for the first time, provide an explicit guarantee in the U.S. Constitution of equal rights for all without regard to gender. The proposed amendment states that "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex," and has been ratified by 37 states. In order for ratification to happen, a minimum of 38 states must ratify the bill. But today, North Dakota legislators want to rescind their support of the Equal Rights Amendment.

The ACLU of North Dakota disagrees with supporters' assertions or analysis that North Dakota's approval to ratify the Equal Rights Amendment expired 40 years ago. In fact, attempts to "rescind" or limit a ratification have never been effective.

Article V of the U.S. Constitution speaks only to the states' power to ratify an amendment but not to the power to *rescind* a ratification. Looking to Congress' historical practice of not validating the rescissions from state legislatures in the context of constitutional amendments, it is likely that Congress would act accordingly in the case of the ERA. The Supreme Court decision in *Coleman v. Miller*, 307 U.S. 433 (1939) asserts that Congress retains wide discretion in shaping the ratification process. The Supreme Court explicitly held that *Congress* has the sole power to determine whether an amendment is sufficiently contemporaneous, and thus valid, or whether, "the amendment ha[s] lost its vitality through the lapse of time" and that congress can fix a reasonable time for ratification. The Court in *Coleman* concluded that, "Article V, speaking solely of ratification, contains no provision as to rejection. Nor has the Congress enacted a statute relating to rejections."

To put it another way, a ratification is something that happens at a moment in time—for North Dakota, in 1975–and once it's done, it's done. For example, that's why, in the case of the 14th Amendment, all three branches of the federal government treated that amendment as fully ratified and effective even though two of the necessary states had ratified but later voted to rescind. During the ratification process of the 15th Amendment, New York rescinded its vote before the last state necessary to ratify voted in favor in 1870. Despite this, New York was still listed as a ratifying state. Congress is likely to follow its historical pattern and not count rescissions.

Although a District Court in Idaho court held in 1981 that a state does have the power to rescind its ratification of the ERA, the Supreme Court vacated that decision after the ERA deadline had passed, so it is no longer on the books.[1] Thus, effectively, the Coleman decision is the leading authority.

[1] *State of Idaho v. Freeman* 529 F. Supp. 1107 (D. Idaho 1982).

Therefore, it is most likely that if SCR 4010 advances, the vote to rescind North Dakota's ratification of the ERA is a legal nullity.

The Equal Rights Amendment is as critical today as it was in 1972. In 2021, women are still not treated equally in our society. More than 50 years after the Equal Pay Act was passed, women are on average paid only 80 cents on the dollar nationally compared to men, and, for women of color, the wage gap is even greater. Women in North Dakota fare much worse being paid a mere 71 cents for every dollar paid to a man in the state, amounting to an annual wage gap of $15,026.[2] Women are vastly overrepresented among those living in poverty and women are disproportionately impacted by gender-based violence and other forms of harassment. Women are also vastly underrepresented among those holding political office and other positions of power.

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Leveling the playing field between women and men should be a priority for North Dakota legislators. The ERA would ensure that discrimination and exclusion on the basis of pregnancy is recognized as sex discrimination under the Constitution, and authorize Congress to enact legislation to protect women against such discrimination. At the ACLU of North Dakota, we've heard from women whose employers refuse to accommodate their pregnancies at work or force them to pump breast milk in dirty supply closets. This discriminatory treatment is often based on paternalistic notions and outdated misconceptions about whether pregnant women should be working and is particularly prevalent in physically demanding or male-dominated fields. We cannot just pay lip service to the notion of gender equity. If we want equal participation – if we want women to be able to work to support their families and communities to benefit from their participation in professional and civic life – we must start from a place of equality.

In 1975, North Dakota legislators took a bold and principled position—that equality of rights shall not be denied or abridged on account of sex. The ACLU of North Dakota urges legislators vote **do not pass** on SCR 4010 and send a strong message: North Dakotans continue to value equality just as they did in 1975.

Sincerely,

Libby Skarin
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[2] https://www.nationalpartnership.org/our-work/economic-justice/wage-gap/the-wage-gap-in-north-dakota.html