Legislative Affairs
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2021-2022 Legislative Memorandum

Subject: Equality of rights and protection against discrimination S.8797 (Krueger)

Position: SUPPORT

The concept of equality under the law is a foundational principle of our democracy, yet our federal and state constitutions were written at a time when their promises of equality only protected the interests of a few. Today, our constitutional protections remain woefully inadequate. Indeed, our state constitution provides no tools for dismantling the inequality, racism and misogyny that remain deeply embedded in our social, economic and political institutions.

The New York Constitution must be amended to include robust protections against discrimination that effectively work to hold our state and its institutions accountable for dismantling systemic discrimination. S.8797 (Krueger) proposes an Equality Amendment that would do just that.

The NYCLU strongly supports this measure. Given the grave consequences of inaction, these changes cannot wait.

The Gaps in New York's Current Constitutional Equality Protections

Adopted in 1938, the New York Constitution's equal protection and civil rights provision fails to reflect our current vision of equality.[1] To begin, by its terms, the existing language of the provision only protects against discrimination based on race or religion, but fails to prohibit discrimination against other groups that have been historically targeted as the subject of discrimination.

Beyond its narrow categories of prohibited discrimination, New York's constitutional provision has been further limited by judicial interpretation in two significant ways.

First, the New York Court of Appeals has held that the first sentence of Article I, Section 11 – which in form is a classic "equal protection clause" – is "no more broad in its coverage than its … prototype" in the federal constitution.[2] So, as the federal equal protection clause prohibits

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[1] N.Y. State Constitution, Article I, §11 currently provides: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

[2] *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y.512, 530 (1949).

only *intentional* discrimination,[3] the state constitutional provision is similarly limited. But a prohibition on intentional discrimination alone fails to address the discriminatory effects of seemingly neutral policies, and is simply inadequate to dismantle systemic discrimination.

Second, the Court of Appeals has also ruled that the second sentence of Article I, Section 11 – which is regarded as a "civil rights clause" because of its prohibition of specified forms of discrimination – is not self-executing and therefore does not create a private right of action. Rather, according to the Court, this clause "require[s] legislative implementation to be effective."[4] This means that individuals in a protected category who are the subject of discrimination cannot currently assert their rights in court under the state constitution.

New York's Constitution Must Advance Meaningful Equality for All People

S.8797 proposes a new section be added to the state constitution that creates robust protections against a range of invidious and unjustified forms of discrimination. This amendment achieves four important goals.

S.8797 provides tools to dismantle systemic discrimination.

First, S.8797 importantly reaches beyond acts of intentional discrimination to prohibit policies and practices that have a discriminatory effect and should, therefore, be regarded as presumptively unconstitutional.

As described above, the New York constitution's current prohibition on discrimination has been interpreted consistently with – and no more broadly than – the federal equal protection clause.[5] This means that the state constitutional provision is simply redundant to its federal counterpart; it also means that not all types of discrimination are captured. Under current case law interpreting the federal equal protection clause, claims are limited to those in which a plaintiff can prove *intentional* discrimination; in practice, this is an exceedingly high bar that excludes many meritorious cases and places the impact of historical and structural racism beyond the federal constitution's reach.[6] This is exactly backwards. Given our country's history, we cannot hope to achieve true equality without accounting for, and remedying, systems of inequality and discrimination. Establishing a clear "disparate impact" standard is critical to addressing historically embedded and ongoing systems of inequality.

The state constitutional provision's narrow reach is demonstrated by its application in the *Levittown*[7] case. *Levittown* involved a state constitutional challenge to New York's school funding practices. Public-school children from "property-poor" districts argued that the state system for funding schools based on property taxes impermissibly discriminated against them. Although the Court of Appeals recognized "significant inequalities in the availability of financial support for local school districts," and that those inequalities reflected racial

[3] *Washington v. Davis*, 426 U.S. 229 (1976).

[4] *Dorsey, supra* at 530.

[5] *Dorsey, supra* at 530; *Brown v. State*, 89 N.Y.2d 172, 190 (1996) (Art. I §11's first sentence is self-executing and is interpreted consistently with, and no more broadly than, the federal equal protection clause.).

[6] *Washington v. Davis*, 426 U.S. 229 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252 (1977).

[7] *See Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27 (N.Y. 1982).

disparities, the court held that these disparities deserved no special constitutional scrutiny because the system did not result from intentional racial animus.

To address unjust outcomes of the sort demonstrated by the *Levittown* case, S.8797 explicitly extends prohibitions of discrimination beyond intentional discrimination to also include policies and practices that unjustifiably impose a disparate impact upon protected classes of individuals. This is not new territory for legislatures or courts. Indeed, disparate impact analysis has long been incorporated and applied under federal statutory anti-discrimination law and by jurisdictions such as New York City.[8]

Further, in seeking to root out systemic inequality, it is critical that we shore up New York's ability to recognize and remedy past discrimination – including via affirmative action policies. Affirmative action programs, in which the government takes account of an individual's protected status in order to remedy discrimination against members of that group (for example, race-conscious admissions policies), have been blessed by the Supreme Court since 1978. Over the past few decades, federal courts have narrowed the state's permissible use of such programs, requiring the state to identify and articulate harms against a group, holding that consideration of race can be only one consideration among many in producing diversity and remedying discrimination, and requiring the government to seek "race-neutral" methods to achieve diversity and representation.[9] Many scholars believe that the current Supreme Court is primed to further limit, or even eliminate, affirmative action programs. Explicitly protecting the ability to remedy systemic discrimination is therefore critical at the state level.

S.8797 includes language that protects the government's ability to identify systemic bigotry and discrimination, and design policies, such as affirmative action, that seek to root out such discrimination.

<u>S.8797 prohibits discrimination against a broad range of categories – and clarifies the scope of sex discrimination in the law.</u>

Consistent with evolving understandings of equality, S.8797 prohibits discrimination on account of a person's race, color, ethnicity, national origin, disability, or sex including pregnancy and pregnancy outcomes, sexual orientation, gender identity, and gender expression.[10] And although sex discrimination should be, and frequently is, interpreted to prohibit discrimination on the basis of pregnancy and pregnancy outcomes, explicitly including that language here is critical to comprehensively addressing and ending sex discrimination.

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[8] *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); Administrative Code of City of NY § 8-107 (17) (factors for establishing a disparate impact discrimination claim).

[9] *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. University of Texas*, 579 U.S. ___ (2016).

[10] The New York state constitution already contains robust protections for freedom of expression, belief, and religion. New York's existing Free Exercise Clause, Article I, Section 3 of the state constitution, provides greater protections for religion than the federal constitution, *see Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 525 (N.Y. 2006)(New York's highest court views Article I, § 3 as providing greater protection to religion than the federal constitution, and requiring a careful balancing test between the burden on the right to free exercise of religion and the interest advanced by the legislation that imposes the burden). Separately, the New York State Human Rights Law prohibits discrimination in employment, housing, and public accommodations based on actual or perceived religion, ensuring that religious New Yorkers are able to freely practice their religion in various spheres of public life.

History is clear: sex discrimination is inextricably intertwined with pregnancy and the capacity to become pregnant.[11] And while federal courts, Congress, and the EEOC have recognized that sex discrimination includes discrimination based on pregnancy within the meaning of federal statutes, a lack of clarity still exists as to whether pregnancy discrimination violates the federal and state constitutions.[12] In addition, in virtually every state across the country, including New York, women increasingly face criminal and civil consequences in relationship to their pregnancies and pregnancy outcomes, including abortions, miscarriages, stillbirths, or other adverse outcomes.[13]

The misapplication of criminal laws (such as murder, assault, child endangerment, and concealing birth) to pregnant people for the loss of their own pregnancy constitutes sex discrimination. These punishments specifically target women who are or have been pregnant by seeking to penalize them for behavior that would not have been punished as harshly, or even at all, had they not been pregnant. When the state polices pregnancy outcomes, it maintains outmoded conceptions of womanhood and reinforces the idea that some women who experience adverse pregnancy outcomes should be treated with compassion and dignity and others should be punished. This is particularly true for women at the intersection of multiple marginalized identities, namely Black women and other women of color, who are not only seen as less deserving of or fit for motherhood but experience disproportionate discrimination in our criminal law and healthcare systems.

No recognizable state objective is served by punishing women for their pregnancy outcomes. Indeed, virtually all major public health and medical organizations in the U.S. have protested the criminalization of pregnant women and urged lawmakers and law enforcement to view these issues as matters of public health rather than crime.[14] Punitive approaches deter women from seeking health care, including prenatal care; treatment for substance use disorders; or even emergency treatment for a spontaneous miscarriage.[15] When confronted with this

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[11] Historically women have been the target of pregnancy discrimination. The NYCLU recognizes that individuals who are not women face discrimination because of their capacity to become pregnant and pregnancy, including, but not limited to, non-binary individuals and transgender men.

[12] *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding an otherwise comprehensive state insurance program that excluded pregnancy benefits did not violate the Equal Protection Clause's prohibition of sex discrimination. The Court divided impacted people in to two categories: pregnant and not-pregnant people, ignoring the discriminatory impact of the policy on those who have the capacity to become pregnant, namely women.).

[13] Lynn M. Paltrow and Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, J HEALTH POLIT POLICY LAW (2013) 38 (2): 299–343, https://doi.org/10.1215/03616878-1966324; *see also*, Editorial Board, *A Woman's Rights*, NY TIMES, Dec. 28, 2018, https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html.

[14] Major medical organizations oppose prosecution and punishment of pregnant women, including the American Medical Association, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, American Academy of Family Physicians, National Perinatal Association, March of Dimes, and the American Public Health Association. *See*, *Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women*, NATIONAL ADVOCATES FOR PREGNANT WOMEN, March 2017, http://advocatesforpregnantwomen.org/Medical%20and%20Public%20Health%20Group%20Statements%20revised%20March%202017.pdf.

[15] Neither maternal health nor a child's health are served by arresting pregnant women for using a controlled substance. While our state must encourage and support conditions of safety and health during pregnancy, a carceral approach has proven to be counterproductive and, because of this, is widely rebuked by

evidence, the state's true intent becomes clear: surveilling, policing, and locking up women for perceived deviations from gendered social expectations.

To be sure, opponents of gender equality may focus attention on abortion in an attempt to make this amendment a social wedge issue. However, courts have already made abundantly clear that discriminating against people who do not want to continue a pregnancy implicates equality principles and already constitutes sex discrimination.[16] Further, at a moment in time when the Supreme Court is positioning itself to eliminate federal constitutional protections for abortion, it is more important than ever that New York make clear that these protections independently remain within our state constitution. This amendment provides that clarity along with ensuring that punishing and prosecuting women because they are pregnant or have an adverse pregnancy outcome is not only the wrong policy response from a public health perspective, it is sex discrimination.

S.8797 prohibits discrimination in the public realm.

Systems of oppression and inequality in the United States rely on the cooperation, consent, and power of private actors to flourish. S.1268 applies against the state, entities acting in concert with or on behalf of the state, as well as any private entity in its provision of public accommodations, employment, or personnel practices. This ensures that discrimination and bigotry have no place in our public spaces.

S.8797 is an effective tool to combat discrimination.

Lastly, S.8797 expressly provides that the constitutional promise set forth in Article I, Section 19 shall be self-executing and shall not require implementing legislation to be enforceable. As noted, prior decisions by New York's highest court have interpreted the existing constitutional equality protections to require specific legislation before people may vindicate their individual rights.[17] Individuals in a protected category who are the subject of discrimination should be able to assert the rights that arise from the provision in court. S.8797 provides more than a mere statement of values; it creates a practical tool by which citizens can hold government actors accountable to commitments of equality.

Of course, New York has robust statutory anti-discrimination protections in our human rights law and civil rights statutes.[18] Amending the equality provision does not diminish these protections; it enhances them. By retaining the word "discrimination" as a specific term used

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established medical organizations. *See* April L. Cherry, *Shifting Our Focus from Retribution to Social Justice: An Alternative Vision for the Treatment of Pregnant Women Who Harm Their Fetuses*, 28 J.L. & HEALTH 6, 24 (2015).

[16] *See, e.g., Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994); *Turic v. Holland Hospitality* (85 F.3d 1211, 6th Cir. 1996); *Doe v. C.A.R.S. Protection Plus, Inc.* (527 F.3d 358, 3rd Cir. 2008); *DeJesus v. Fla. Cent. Credit Union*, No. 8:17-CV-2502-T-36TGW, 2018 WL 4931817 (M.D. Fla. Oct. 11, 2018); *Ducharme v. Crescent City Deja Vu, L.L.C.*, No. CV 18-4484, 2019 WL 2088625 (E.D. La. May 13, 2019).

[17] *Dorsey*, 299 N.Y. 512 (holding that privately owned housing projects are not bound by Art. I §11 of N.Y. Const. and can discriminate on the basis of race. The Court of Appeals reached this conclusion by relying (i) on the text, which protects only against "discrimination in . . . civil rights" and (ii) the record of the relevant constitutional convention. That record demonstrated "that the provision in question was not self-executing and that it was implicit that it required legislative implementation to be effective" and that the "civil rights protected by the clause in question were those already denominated as such in the Constitution itself, the Civil Rights Law or in other statutes."); *see also Brown*, 89 N.Y.2d at 190.

[18] *See, e.g.,* N.Y. Exec. Law § 296.

by the courts, S. 8797will ensure that these protections, and the way that courts have interpreted them, remain in place. And these protections will be elevated to our state's founding document – the New York Constitution – where they belong.

The NYCLU strongly supports passage of S.8797 and urges the legislature to act – the time to move toward equality is always now.