Legislative Affairs
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2023-2024 Legislative Memorandum

Subject: Equal Rights Amendment S.108-A (Krueger) / A.1283 (Seawright)

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 does not provide comprehensive protections against discrimination.

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 ending discrimination. By expanding the list of protected classes within our state equal protection clause, S.108-A (Krueger) /A.1283 (Seawright) proposes an Equal Rights Amendment that would do just that.

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

New York's Constitution Must Advance Equality for All People

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

S.108-A / A.1283 proposes amending our state constitution's current equal protection clause in Article I, §11 to create broader protections against discrimination by the state and its institutions. Consistent with evolving understandings of equality, and in addition to existing prohibitions against religious and race-based discrimination, S.108-A / A.1283 prohibits discrimination on account of a person's ethnicity, national origin, age, disability, or sex

[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."

including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy.[2]

New York's Constitution Must Ensure Pathways to Accountability

And critically, S.108-A / A.1283 provides more than a mere statement of values; it expands a tool by which citizens can hold government actors accountable to commitments of equality. This means that S.108-A / A.1283 prohibits policies and practices by the state and state actors that discriminate against a protected class.

Although our equal protection clause has been interpreted by New York courts to be "non-self-executing", meaning that it requires specific executing legislation in order to establish a cause of action between private actors[3] or in actions for damages,[4] the section does operate to prohibit the application of laws and governmental action that discriminate on the basis of an enumerated protected category.[5] That means that even in the absence of specific executing legislation, a person can vindicate their rights under the ERA against the government. And by clarifying that the amended section applies to all government actions taken "pursuant to law," this amendment is intended to apply to any action with force of law, including action by the executive or legislative branch, local governments, or any subdivision thereof.

Importantly, this measure ensures accountability and a pathway to justice.

New York's Constitution Must Include and Clarify Prohibited Sex Discrimination

While sex discrimination should be, and frequently is, interpreted to prohibit discrimination on the basis of pregnancy and pregnancy outcomes as well as reproductive healthcare and autonomy, explicitly including that language here is critical to comprehensively addressing and ending sex discrimination.

History is clear: sex discrimination is inextricably intertwined with pregnancy and the capacity to become pregnant.[6] 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

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[2] 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.

[3] *Dorsey vs. Stuyvesant Corp.*, 299 N.Y. 512 (1949).

[4] *Brown v. State*, 89 N.Y.2d 172 (1996).

[5] *People v. Kern*, 75 N.Y.2d 638, 652-53 (1990)(prohibiting racial discrimination in the exercise of peremptory challenges, noting the state action involved, and limiting the permissible scope of CPL 270.25).

[6] 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.

discrimination violates the federal and state constitutions.[7] 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 outcomes.[8]

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.[9] Punitive approaches deter women from seeking health care, including prenatal care; treatment for substance use disorders; or even emergency treatment for a spontaneous miscarriage.[10] When confronted with this 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

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[7] *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.).

[8] 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.

[9] 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.

[10] 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 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).

clear that discriminating against people who do not want to continue a pregnancy implicates equality principles and already constitutes sex discrimination.[11] Further, at a moment in time when the Supreme Court has eliminated 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.

And while abortion is a fundamental right that is integral to a person's equality as well as their bodily autonomy, a person's reproductive autonomy is broader and includes the power to decide and control one's own contraceptive use, pregnancy, and childbearing. For example, people with reproductive autonomy can control whether and when to become pregnant, whether and when to use contraception, which method to use, whether and when to continue a pregnancy, and decisions in childbirth. And this is consistent with our state's long history of protecting bodily autonomy, enshrined in our common law as established in 1914 with Justice Cardozo's famous articulation of the doctrine in *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-130 (1914), that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body[.]" Because of this, the State cannot use its police power or power of the purse to discriminate (i.e. burden, limit, or favor) any type of reproductive decision making at the expense of other outcomes, and, as consistent with Article 17 of this Constitution, the state would be required to guarantee rights and access to reproductive healthcare services because of this.

Further, this amendment makes explicit that people are protected on the basis of their sexual orientation, gender identity, and gender expression. The Supreme Court telegraphed the future erosion of these rights in the federal context in *Dobbs v. Jackson Women's Health Organization*, making it critical to explicitly name these rights in our State Constitution. If, for example, the protections of *Lawrence v. Texas* were overturned by the federal courts, this amendment would prohibit the adoption of laws, policies, or practices in New York that target people for discrimination or criminal prosecution based on their sexual orientation or gender identity.

Importantly, and because freedom of belief, expression and religious liberty are fundamental components of America's democracy, this framework is intended to complement, and be analyzed consistently with, the New York State Constitution's existing protections for speech, belief, and religious liberty and practice under Section 3, Article I.

New York's Constitution Must Preserve the State's Ability to Remedy Discrimination

This section further protects the validity of efforts to prevent or dismantle structural forms of inequality and discrimination on the basis of a protected characteristic like race or sex. It specifies that the legislature retains the power to enhance the Constitution's equal protection guarantee with appropriate legislation designed to achieve the full equal rights of any class

[11] *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).

listed in this section, and it clarifies that the section will operate to "invalidate or prevent the adoption of" those laws, regulations, programs, or practices that do not serve such a remedial purpose.

This means that S.108-A / A.1283 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. In seeking to root out inequality perpetuated by the state, it is critical that we also 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.[12] 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.

Of course, New York has robust statutory anti-discrimination protections in our human rights law and civil rights statutes.[13] Amending the equal protection provision does not diminish these protections; it enhances them. By retaining the word "discrimination" as a specific term used by the courts and applied to state action, S.108-A / A.1283 will 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.108-A / A.1283 and urges the legislature to act – the time to move toward equality is always now.

[12] *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. University of Texas*, 579 U.S. ___ (2016).
[13] *See, e.g.,* N.Y. Exec. Law § 296.