

**A01283 Memo: NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)**

BILL NUMBER: A1283

SPONSOR: Seawright

TITLE OF BILL:

CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY proposing an amendment to section 11 of article 1 of the constitution, in relation to equal protection

PURPOSE:

The purpose of this resolution is to amend Section 11 of Article 1 of the New York State Constitution to expand the constitutional prohibition against discrimination in civil rights to include additional protected classes.

SUMMARY OF PROVISIONS:

Section one of the resolution would expand the civil rights clause of

Section 11 of Article 1 of the New York State Constitution to add ethnicity, national origin, disability, age, and sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy to the existing list of protected classes for which discrimination in civil rights is prohibited.

It would also ensure that nothing in such section shall invalidate or prevent the adoption of any law, regulation, program, or practice which is designed to prevent discrimination on the basis of any such characteristic, nor shall any characteristic in such section be interpreted to interfere with, limit, or deny the civil rights of any person based upon any other such characteristic.

Section two of the resolution would require that such amendment be submitted to the people for approval at the general election to be held in the year 2024 in accordance with the provisions of the Election Law.

JUSTIFICATION:

New Yorkers deserve a constitution that recognizes that every person is entitled to equal rights and justice under the law regardless of who they are, whom they love, or what their families look like. Because the Bill of Rights of the New York State Constitution does not currently contain a comprehensive equal rights provision, a constitutional amendment is necessary to realize the promise of legal equality and justice for all New Yorkers and to create a clear mechanism to address and defend against violations of those rights.

The concept of equality under the law is a foundational principle of our democracy, but our understanding of which groups deserve and receive enforceable legal protections has changed dramatically over our history. The New York Constitution was last amended to address this topic in 1938 when Section 11 was first adopted, prior to the civil rights movement, the movement for gender justice, the LGBTQ movement, the disability rights movement, and the many developments in anti-discrimination law. As a beacon of our future, New York's Constitution must reflect our broad conception of justice, equal rights and the duty to protect all people in the state against discrimination. Our modern vision of equality demands comprehensive equal protection. Indeed, many individuals are themselves members of numerous communities, identities, and protected classes, and true equality and justice demand protections that recognize the interconnected nature of discrimination. This amendment is our opportunity to ensure that New York's Constitutional language reflects that commitment to full equality

and justice before the law-by providing legal protections that go above and beyond the protections of the Federal Constitution.

The purpose of this amendment is to ensure that our State Constitution extends to all New Yorkers, particularly those who have faced severe and pervasive injustice, the right to be free from discrimination. It does so by expanding the list of classes affirmatively protected by the New York Constitution in recognition of the need for comprehensive, enforceable, and intersectional equality under the law. At the same time, the amendment guarantees the validity of efforts to prevent or dismantle structural forms of inequality or discrimination against protected classes. The amendment achieves this by clarifying that it operates only to "invalidate or prevent the adoption of" state actions that do not serve such a remedial purpose.

The amendment would prohibit discrimination in "civil rights" and has been interpreted by New York courts to be "non-selfexecuting." This means that it requires specific executing legislation in order to establish a cause of action between private actors, see *Dorsey vs. Stuyvesant Corp.*, 299 N.Y. 512 (1949), or in actions for damages, see *Brown v. State*, 89 N.Y.2d 172 (1996). However, even in the absence of specific executing legislation, the section operates to prohibit the application of laws and governmental action that discriminate on the basis of an enumerated protected category. See *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). 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.

This amendment is intended to promote equality of opportunity for people with disabilities both by banning disability discrimination and by affording enforceable legal rights to people with disabilities. The term "disability" means a physical, mental, or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or a record of such an impairment or a condition regarded by others as such an impairment. No person because of disability should be subjected to any discrimination, including but not limited to actions which prevent them exercising their right to live in the community, to lead an independent life, and to be free from institutionalization. Discrimination with respect to, for instance, disability or pregnancy would include the failure to provide reasonable accommodations.

Further, by including a prohibition on sex discrimination, this amendment inherently prohibits discrimination on the basis of pregnancy, pregnancy outcomes, and reproductive healthcare and reproductive autonomy. The amendment's explicit clarification is critical. While federal courts, Congress, and the EEOC have recognized that sex discrimination includes discrimination based on pregnancy (including abortion), a lack of clarity on whether pregnancy discrimination transgresses the Federal Constitution still exists. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974). This translates into New York law as well. For example, New York State courts have held that a purported state interest in the fetus can override pregnant patients' rights to medical decision-making and bodily integrity throughout pregnancy. See, e.g., *Dray v. Staten Island University Hospital*, No. 500510- 2014(Sup. Ct., Kings Cnty. Oct. 9, 2015). Furthermore, prosecutions of pregnant people for their pregnancy outcomes demonstrate the need for explicit protections for privacy and equality in our constitutional framework. Cf. *People v. Jorgensen*, 26 N.Y.3d 85 (2015). Increasingly across the country in virtually every state, including New York, women face criminal and civil consequences related to their pregnancies and pregnancy outcomes, including not only abortions but also miscarriages, stillbirths, or other adverse outcomes. This is particularly important for women at the intersection of multiple marginalized identities, namely Black women and women of color, who are not only wrongly seen as less deserving of or fit for motherhood but

also experience disproportionate discrimination in our criminal law system and health disparities likely to lead to adverse outcomes that put them under scrutiny and surveillance.

It is not possible to achieve sex equality while prosecutors and state agencies single out pregnant people for punishment because of their pregnancies, the outcomes of their pregnancies and their reproductive healthcare decisions. And because the right to abortion is central to a pregnant person's equality, this amendment clarifies that any action that discriminates against a person based on their pregnancy, pregnancy outcome, reproductive healthcare, or reproductive autonomy is sex-based discrimination in their civil rights that would be explicitly prohibited by the State Constitution. This is critical given the Supreme Court's recission of the federal constitutional right to abortion care. As one protected pregnancy outcome, abortion is a fundamental right that is integral to a person's reproductive autonomy. Indeed, reproductive autonomy is 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 " every human being of adult years and sound mind has a right to determine what shall be done with his own body ." The State shall further not use its police power or power of the purse to 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, shall guarantee rights and access to reproductive healthcare services.

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.

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.

This amendment 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 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.

PRIOR LEGISLATIVE HISTORY:

New legislation.

FISCAL IMPLICATIONS:

None.

EFFECTIVE DATE: This amendment would be submitted to the people for approval at the general election to be held in the year 2024 in accordance with the provisions of the Election Law. If approved, it would take effect the following January 1st.