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FAQ on the New York State Equality Amendment

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ERA PROJECT

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Adopted in 1938, the New York State Constitution's equality protections fall far short of a modern notion of equality that would protect the rights of all New Yorkers. Legislation currently pending in the New York Legislature would update the state's constitution by prohibiting forms of discrimination that are currently unrecognized by the law.[1]

Q: What Would The Equality Amendment Add To The NYS Constitution?

The Equality Amendment would ask voters to add new provisions to the New York Constitution that would modernize constitutional equality protections for New Yorkers in three fundamental ways:

1. It would broadly prohibit discrimination by the government on the basis of **race, color, ethnicity, national origin, disability, or sex including pregnancy and pregnancy outcomes, sexual orientation, gender identity, and gender expression.**

2. It would prohibit both acts of intentional discrimination and policies and practices that have a **discriminatory impact**. Disparate impact occurs when policies, practices, rules, or other systems that appear to be neutral result in a disproportionate impact on a protected group.

3. By defining sex discrimination to include discrimination based upon a person's **pregnancy or pregnancy outcome**, the change in the law would treat restrictions on access to reproductive health care, including abortion and contraception, as a form of sex discrimination (something the U.S. Supreme Court refused to do in the *Dobbs v. Jackson Women's Health Organization* case in June 2022). So too, the amendment would prohibit criminalizing people for various pregnancy outcomes, such as prosecuting a parent for "transmitting" substances to their newborn, even if the substance was not otherwise illegal[2] or was prescribed by a doctor as necessary medication for the parent's health or safety.[3] A number of scholars and advocates have noted how laws that prohibit pregnancy discrimination have fallen short in reaching discrimination on the basis of pregnancy outcome.[4] They have shown a striking absence of laws protecting the workplace rights of people who have experienced miscarriage.[5] For this reason, it is important to include this additional term in a comprehensive Equality Amendment.

Q: If The Equality Amendment Passes, Would The New York Constitution Prohibit Discrimination Based Upon Religion?

Yes, it already does, and the Equality Amendment would not diminish or alter these protections. The New York Court of Appeals (New York State's highest court) has found that Article I, § 3, the religious liberty amendment to the constitution, provides robust protections against discrimination based on religion. This article states:

"The free exercise and enjoyment of religious profession and worship, without ***discrimination*** *or preference, shall forever be allowed in this state to all humankind."*

Cases involving discrimination against Muslims,[6] Jews,[7] Catholics,[8] Rastafarians,[9] Native Americans,[10] and religious professions generally[11] have been brought successfully under Article I, § 3. In these cases, the court has been clear that the protections contained in Article I, § 3 apply to constitutional claims of religion-based discrimination. "All religious beliefs, doctrines and forms of worship not inimical to the public peace are free, and legal discriminations based on religious differences are abolished by this section."[12]

Q: Why Protect Against Religion-Based Discrimination Under Article I, § 3 Rather Than In The Equality Amendment?

There are two fundamental reasons why the most principled place to anchor religion-based equality protections is Article I, § 3.

First, religious discrimination requires a different legal analysis than the other categories protected under the proposed change to the law. Religion-based discrimination requires a more nuanced approach to equality than other protected classes. Unlike race-based equality where the remedy for a facially neutral rule that had discriminatory impact on, for instance, Black people, would be to strike down the rule as unconstitutional, religious equality requires an employer, landlord, provider of public benefits, or other entity covered by the law to accommodate a person's religious practices. This could mean allowing a Jewish, Muslim, or Sikh employee to wear head coverings that may otherwise violate a generally applicable clothing rule; permitting a Seventh Day Adventist employee an exemption from work on Saturday; or allowing an Amish family an exemption from the state requirement that their children attend public school until the age of 17. Unlike other protected classes, protecting the equality rights of New Yorkers on the basis of their religion requires affirmative accommodation (which, in some cases, might include a complete exemption) of their religious practices from the application of a law. In this sense, religious liberty

and religion-based equality are uniquely interdependent. For this reason, Article I, § 3 has been understood by New York's highest court to protect both religious liberty and religious equality.

Second, the inclusion of protections against actions that are discriminatory in their "impact or effects" does not make sense for religion-based discrimination. Again, the unique mandate to eliminate religion-based discrimination by accommodating religious practices, recognized by Article I, § 3, addresses the way that generally applicable rules may have a discriminatory impact on religious practice. Agencies charged with enforcing religious discrimination protections have found that a failure to accommodate religious practice amounts to disparate treatment—or intentional discrimination—not disparate impact discrimination. "The Commission recognizes th\at harassment and denial of religious accommodation are typically forms of disparate treatment in the terms and conditions of employment."[13]

Finally, it is worth noting that New York State's constitutional protections for religious liberty and against religion-based discrimination have been found to be more generous than that contained in the U.S. Constitution. "New York's free exercise clause is "more protective of religious exercise" than its federal counterpart."[14]

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[1] To amend the NYS constitution, an amendment must pass both chambers of the state legislature in two successive legislative sessions. Then it is placed on the ballot for a statewide voter referendum and must be approved by a majority of voters.

[2] *Court Rules New York State Child Endangering Law May Not Be Used To Punish Pregnant Woman for Health Problems: Charges Against Stacey Gilligan Dismissed*, NAPW. Available at: https://www.nationaladvocatesforpregnantwomen.org/court-rules-new-york-state-child-endangering-law-may-not-be-used-to-punish-pregnant-woman-for-health-problems-charges-against-stacey-gilligan-dismissed/.

[3] Matt Payne, *District Attorney, County Entities Target Pregnant Drug-Abusers*, The Daily Ardmoreite, (Dec. 5 2017), available at https://www.swtimes.com/story/news/state/2017/12/05/district-attorney-oklahoma-county-entities/16903983007/. See 21 O.S. § 843.5 the Oklahoma child neglect statute under which the majority of prosecutions have fallen.

[4] See e.g. Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & Feminism 15 (2009).

[5] Jessica Silver-Greenberg and Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, New York Times, October 21, 2018; Tasha Murrell, *A Paycheck Or A Healthy Pregnancy? We Shouldn't Have To Choose*, The Hill, December 17, 2021, https://thehill.com/blogs/congress-blog/labor/586269-a-paycheck-or-a-healthy-pregnancy-we-shouldnt-have-to-choose.

[6] Clark v. City of New York, 18 Civ. 2334 (AT) (KHP) (S.D.N.Y. Sep. 17, 2021) (successful challenge to police policy requiring that arrestees remove their religious head coverings, a Hijab/Headscarf, for an official booking photograph).

[7] Ackridge v. Aramark Corr. Food Servs., No. 16 Civ. 6301, 2018 WL 1626175, at *22 (S.D.N.Y. Mar. 30, 2018) (denial of Kosher meals and religious services).

[8] Holland v. Alcock, 108 N.Y. 312, 16 N.E. 305 (1888) (challenge to will leaving estate to the Catholic church).
[9] Francis v. Keane, 888 F. Supp. 568, 578 (S.D.N.Y. 1995) (case alleging that grooming standards related to hair discriminated against Rastafarians).
[10] Rourke v. New York State Dep't of Correctional Servs., 159 Misc.2d 324, (Sup.Ct. Albany Co. 1993), aff'd, 201 A.D.2d 179, 615 N.Y.S.2d 470 (3d Dep't 1994) (Mohawk tribal member claimed discrimination in employment based on rule requiring he cut his hair).
[11] People v. Brossard, 33 N.Y.S.2d 369 (Co. Ct. 1942) (case challenging business regulation that discriminated against fortune tellers).
[12] Holland v. Alcock, 108 N.Y. 312, 16 N.E. 305 (1888).
[13] U.S. Equal Employment Opportunity Commission, Guidance, Section 12, Religious Discrimination, Compliance Manual on Religious Discrimination, 12-I COVERAGE, EEOC-CVG-2021-3 (Jan. 15, 2021), available at: https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.
[14] Clark v. City of New York, 18 Civ. 2334 (AT) (KHP) (S.D.N.Y. Sep. 17, 2021), citing Catholic Charities of Albany v. Serio, 859 N.E.2d 459, 466 (N.Y. 2006).