May 13, 2026

Via e-mail

Heather Davis, Esq.
Chief Clerk & Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207
filecoa@nycourts.gov

if when how
Lawyering for Reproductive Justice
ifwhenhow.org

Re: *Matter of Miller v State of New York*, APL-2026-00033
Proposed Letter Brief of *Amici Curiae* If/When/How: Lawyering for Reproductive Justice et al. **("EXHIBIT A")**

Dear Ms. Davis:

If/When/How: Lawyering for Reproductive Justice submits this proposed *amicus curiae* letter brief on behalf of the below-named organizations (collectively, "Amici") to bring to this Court's attention the stakes faced by New Yorkers who voted to expand their right to equal protection under the law as a means to protect their reproductive freedom. While Amici take no position on the merits of this appeal, they urge a threshold finding that the Equal Rights Amendment created enforceable antidiscrimination protections separate from – and stronger than – what the US Constitution provides.

This Court must answer, for the first time, whether the Equal Rights Amendment ratified by New York voters in November 2024 means what voters were told it meant. The ERA, passed with overwhelming support, did not emerge from a vacuum. It came from a specific constitutional moment: the sudden loss of

protection for abortion rights and recognition that pregnant people in New York were already losing equality in law before federal rights were stripped away.

New Yorkers were promised – by the legislators who drafted the amendment, by the Governor who summoned the special session that sent it forward, by the Attorney General who defended it on the ballot, and by the State itself in its own public-facing materials – that the amendment would create real, enforceable, constitutional protection against discrimination on the basis of pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, among other categories. A reading of Section 11 that leaves it coterminous with the 1938 text it replaced cannot be squared with that promise, with the legislative history, or with the deliberate departures the amendment makes from the prior provision.

Amici write to explain why that promise was made, and what is at stake for pregnant New Yorkers if it is not kept. Against a backdrop of failures of New York law and the rapid collapse of federal jurisprudence, New York's leaders and voters both recognized that constitutional rights that cannot be given force are no rights at all. Only an immediately enforceable Section 11 could do the work voters ratified it to do: to ensure their equal footing in making decisions about their bodies without barriers or punishment.

I. INTEREST OF AMICI CURIAE

Amici are uniquely positioned to explain the stakes of this legislative judgment. They are organizations with expertise in reproductive rights, health, and justice, with a particular focus on bodily autonomy, criminalization of pregnancy outcomes, and the consequences of unequal treatment of pregnant people under New York law and the law of other states.[1]

If/When/How: Lawyering for Reproductive Justice is a nonprofit legal services and advocacy organization that uses federal and state litigation, policy strategies, and human rights reporting to ensure that everyone has the rights and resources necessary to self-determine their reproductive lives with dignity and without coercion or punishment. If/When/How has a direct interest in this case because a ruling that the ERA is not self-executing would undermine the constitutional remedies available to pregnant people who face discriminatory governmental action in medical and other settings, and would foreclose the cause of action the ERA was specifically designed to create for them.

Ancient Song, Inc. is a national birth justice organization committed to advancing reproductive justice, birth equity, and human rights in pregnancy, birth,

[1] Pursuant to this Court's Rules of Practice 500.1 (f) and 500.23 (a) (1) (i), Amici hereby disclose that each is a 501(c)(3) or (c)(4) nonprofit organization, and any parent or subsidiary entity is named in the detailed description of the amicus herein. No other person or entity has contributed to the preparation or submission of this brief. Additionally, no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief.

postpartum, and reproductive healthcare. Through community-based doula training, direct service, policy advocacy, research, and public education, Ancient Song works to ensure that marginalized pregnant and parenting people have the care, resources, and bodily autonomy necessary to make informed decisions about their reproductive lives free from coercion, discrimination, or punishment. Ancient Song has an interest in participating in this case to support the recognition and remediation of systemic violations of pregnant people's rights in medical decision-making, and to affirm that all people deserve reproductive healthcare that is dignified, equitable, evidence-based, and free from coercion.

The **American College of Obstetricians and Gynecologists ("ACOG")** is the nation's leading group of physicians providing evidence-based obstetric and gynecologic care. With more than 62,000 members, ACOG maintains the highest standards of clinical practice and continuing education of its members; advocates for equitable, exceptional, and respectful care for all people in need of obstetric and gynecologic care; promotes patient education; and increases awareness of critical issues facing patients, their families, and their communities.

Girls for Gender Equity ("GGE") is a nonprofit organization that has worked for over 24 years, through an intergenerational, Black feminist lens, to center the leadership of Black girls and gender-expansive young people of color in

reshaping culture and policy. Through advocacy, youth-centered programming, and narrative shift work, GGE advances gender and racial justice.

The **Human Rights and Gender Justice Clinic ("HRGJ")** is devoted to defending and implementing the rights of women, advancing gender justice, and ending all forms of discrimination under US and international law. HRGJ is part of Main Street Legal Services, a non-profit clinical legal program in Long Island City, New York. HRGJ engages in litigation and advocacy, in conjunction with gender justice advocates, human rights lawyers, and grassroots organizations to promote women's human rights and gender justice. HRGJ is widely recognized for its expertise and contributions to gender jurisprudence and human rights practice and frequently provides expert testimony and files *amicus curiae* briefs in cases involving women's rights, gender justice, and reproductive health issues, including cases before New York courts, involving forced sterilization and the rights of pregnant people.

The **National Institute for Reproductive Health Action Fund ("NIRH AF")** is the political arm of the National Institute for Reproductive Health, working to create political environments that lead to pro-reproductive freedom policies necessary to protect and expand access to care, including abortion. NIRH AF supports in-state advocates, elected allies, and allied candidates to champion pro-reproductive freedom values in legislatures and on the campaign trail.

The **New York Abortion Access Fund ("NYAAF")** was founded in 2001 and supports New Yorkers, and people traveling to New York State, in accessing abortion care through financial assistance, case management, and connections to other resources. NYAAF fosters community care and builds collective power to dismantle barriers, shift systems, and advance reproductive justice. From *Dobbs* to present day, NYAAF has pledged over $7 million to directly fund abortion for people otherwise unable to afford care and supported 11,000 abortion seekers from 44 states and territories, as well as 26 countries.

Planned Parenthood Empire State Acts ("PPESA"), formerly known as Family Planning Advocates of New York State, is a not-for-profit 501(c)(4) organization that represents the five Planned Parenthood affiliates operating in New York State. It is the mission of PPESA to ensure access to all sexual and reproductive health care services across the entirety of New York State. PPESA fulfills this mission by advocating for legal and policy changes that support the provision of sexual and reproductive health care and advance reproductive rights and justice for all New Yorkers.

Pregnancy Justice is a New York-based nonprofit legal organization that works nationally to advance and defend the rights of pregnant people, whether they give birth, experience a pregnancy loss, or have an abortion, and to advocate for

pregnant people facing civil or criminal prosecution related to their pregnancies or pregnancy outcomes.

The Reproductive Justice Clinic is a legal clinic under the umbrella of Washington Square Legal Services, Inc., which seeks to use the law to uphold and advance the health and autonomy of all parents and pregnant people, the unity and integrity of families, and the fundamental right of families to be together in dignified and supportive enabling conditions, free from punishment and intervention. The Clinic supports laws, policies, and practices that aim to, and do, advance these social goods and values. Central to this mission is direct enforcement of civil rights and liberties by private and public actors where the legislature and the electorate intended as much, since rights-recognition is vital to inclusion and equal representation under the law.

The **Sex and Law Committee** of the **New York City Bar Association** is a nonpartisan group of private and public sector attorneys monitoring the intersection of gender and law, reproductive rights, and discrimination. During the New York Equal Rights Amendment (ERA) campaign, the Committee co-authored a 2024 ERA explainer, widely cited by media and legislators. This followed a 2022 report supporting the amendment's passage; in June 2026, the Committee is hosting a CLE series on the ERA's protections. The Committee is participating in this case to ensure direct legal pathways to remediate sex-based discrimination and

violations of reproductive autonomy, as intended by the amendment's drafters and voters responsible for its passage.

Amici collectively advocated for the passage of the ERA to promote reproductive rights and justice for New Yorkers by enacting robust equality protections against discrimination within the New York Constitution. They bring to this Court their special expertise regarding the context around the ERA's passage, including how the New York Legislature and voters intended for New York courts to interpret the ERA, and the harms they intended to remedy.

II. ARGUMENT

A. New Yorkers enacted the Equal Rights Amendment to provide durable, enforceable constitutional protection for reproductive freedom.

The Equal Rights Amendment is not, as the order of the trial court below would have it, a restatement of pre-existing protections in different words. It is a direct, deliberate, and publicly-debated response to the federal retreat from reproductive rights, drafted to provide enforceable constitutional protection that the prior version of Section 11 did not. Its text, its legislative history, the public statements of its proponents, and the State's own representations to voters all point in the same direction. The First Department, addressing the same amendment in the proceedings below, agreed that this was the drafters' purpose. To read the

amendment as merely echoing the 1938 provision is to render the voters' overwhelming ratification meaningless.

1. The Equal Rights Amendment was conceived as a direct response to the constitutional crisis created by Dobbs and the federal retreat from reproductive rights.

On June 24, 2022, the United States Supreme Court issued its decision in *Dobbs v Jackson Women's Health Org.* (597 US 215 [2022]), overruling *Roe v Wade* (410 US 113 [1973]), and eliminating the federal constitutional right to abortion. One week later, on July 1, 2022, Governor Kathy Hochul convened an extraordinary session of the New York Legislature and issued a proclamation adding equal rights to its agenda, expressly to "solidify the right to abortion access in the State Constitution" and to "enshrine equal rights in the State Constitution" in response to "[r]ecent Supreme Court rulings [that] have threatened the rights of New Yorkers." (Press Release, NY Governor, *Governor Hochul Announces Historical Session of the New York State Legislature to Enshrine Equal Rights Into the New York State Constitution*, [July 1, 2022][2]).

The Legislature responded that same day with first passage of the amendment. Its sponsors did not propose a stylistic refresh of the 1938 text, but a series of deliberate departures from it. The amendment added explicit prohibitions

[2] *Available at* https://www.governor.ny.gov/news/governor-hochul-announces-extraordinary-session-new-york-state-legislature-enshrine-equal [last accessed May 12, 2026].

on discrimination based on "ethnicity, national origin, age, disability," and "sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy," leaving intact the previously protected categories of race, color, creed, and religion (NY Const, art I, § 11 [a]). It clarified that the State – and any agency or subdivision of the State – cannot discriminate "pursuant to law" (*id.*). And it added an entirely new provision, Section 11 [b]), describing the effect of the section as a whole and providing that the section shall not "invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of a characteristic listed in this section" (*id.* § 11 [b]).

Senator Krueger's Sponsor's Memorandum is unambiguous about why these changes were made: "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" (Sponsor's Mem., Senate Bill S108A, ["Sponsor's Memo"][3]). The amendment achieves that goal, "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" (*id.* [emphasis added]). The Memorandum identifies the federal landscape as the

[3] *Available at* https://www.nysenate.gov/legislation/bills/2023/S108/amendment/A [last accessed May 12, 2026].

reason: "[A] lack of clarity on whether pregnancy discrimination transgresses the Federal Constitution still exists. This translates into New York law as well" (*id.,* citing *Geduldig v Aiello*, 417 US 484 [1974]). The Memorandum then identifies, by name, two paradigmatic New York cases: *Dray v Staten Island Univ. Hosp.* (Sup Ct, Kings County, Oct. 9, 2015, Edwards, J., index No. 500510/2014) and *People v Jorgensen* (26 NY3d 85 [2015]).

On the specific issue of abortion, the Memorandum is equally direct: "[B]ecause 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" (Sponsor's Memo). Prior to *Dobbs,* this Court held that "the fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our State Constitution, is at least as extensive as the Federal constitutional right" (*Hope v Perales*, 83 NY2d 563, 575 [1994], citing *Roe v Wade*, 410 US at 153-154, *Rivers v Katz*, 67 NY2d 485, 493 [1986]). The sudden absence of any federal protection for abortion rights created an immediate need for an independent guarantee by New York State. The amendment was thus designed to do precisely what the prior Section 11, read as

coextensive with the federal Equal Protection Clause (*see Dorsey v Stuyvesant Town Corp.*, 299 NY 512, 530 [1949]) could not: provide enforceable constitutional protection that does not depend on the shifting contours of federal doctrine.

2. The amendment's drafters, public officials, and the State itself told voters that the Equal Rights Amendment would create real, enforceable protection for reproductive freedom.

Whatever ambiguity might be claimed about the text alone, no such ambiguity exists about how the amendment was presented to the public. From first passage through the November 2024 ballot, the amendment's proponents – including the Governor, the Attorney General, the bill's sponsors, and the State itself in its own public materials – told voters that the amendment would create real, enforceable constitutional protection for reproductive freedom. Contemporaneous statements of those urging passage are properly consulted to determine the meaning of an enacted measure (*see Kimmel v State*, 29 NY3d 386, 400 [2017]). Here those statements are both voluminous and consistent.

The Sponsor's Memorandum itself, as discussed above, explicitly describes the amendment as creating "comprehensive, *enforceable*, and intersectional equality under the law" (Sponsor's Memo [emphasis added]). It expressly addresses the question of self-execution. Acknowledging that the prior Civil Rights Clause had been read as "non-self-executing" in certain contexts (*see Dorsey*, 299

NY at 530–32; *Brown v State*, 89 NY2d 172 [1996]), the Memorandum explains that the amended section "operates to prohibit the application of laws and governmental action that discriminate on the basis of an enumerated protected category," citing *People v Kern*, (75 NY2d 638, 652–653 [1990]) (Sponsor's Memo). By clarifying that the amended section applies to all governmental action taken "pursuant to law," the Memorandum explains, "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" (*id.*). Legislators are "presumed to be aware of the decisional . . . law in existence at the time of an enactment," (*Arbegast v Bd. of Educ. of South New Berlin Cent. Sch.*, 65 NY2d 161, 169 [1985]); the drafters' explicit engagement with that decisional law leaves no room to doubt how they intended the amended section to interact with it.

Governor Hochul, in announcing the special session that produced first passage, declared that the amendment was "the boldest step" New York could take to ensure abortion access and would "protect reproductive health in the state of New York for generations to come" (Shannon Young, *New York's Abortion Amendment Clears Its First Major Hurdle*, Politico [July 1, 2022][4]). Attorney General Letitia James, charged with defending the amendment through the

[4] *Available at* https://www.politico.com/news/2022/07/01/new-york-abortion-amendement-00043736 [last accessed May 12, 2026].

litigation that preceded its placement on the ballot, repeatedly told the public that the amendment "was advanced to protect access to abortion care, enshrine this basic right in our constitution, and protect people from discrimination" (Press Release, NY Atty Gen, *Letitia James Releases Statement on Equal Rights Amendment,* [June 18, 2024][5]). She made similar statements throughout the ratification campaign (*see, e.g.,* Press Release, NY Atty Gen, *Attorney General James Releases Statement on Equal Rights Amendment* [July 31, 2024][6] (the amendment will "help protect New Yorkers' access to basic human rights"); Eric Harvey, *Attorney General James, Electeds, Rally in Peekskill to Say Yes to Proposition 1*, Peekskill Herald [Nov. 5, 2024];[7] Kevin Yu, *Advocacy Group Urges NY Residents to Vote 'Yes' for Equal Rights*, WSHU [Oct. 7, 2024][8]).

The State itself said the same thing in its own public-facing materials, both before and after the amendment took effect. The Governor's Office "Abortion in New York State – Know Your Rights" resource describes the Equal Rights Amendment as enshrining protections against discrimination based on "pregnancy and pregnancy outcomes, and reproductive healthcare and autonomy," and presents

[5] *Available at* https://ag.ny.gov/press-release/2024/new-york-attorney-general-james-releases-statement-equal-rights-amendment [last accessed May 12, 2026].
[6] *Available at* https://ag.ny.gov/press-release/2024/attorney-general-james-releases-statement-equal-rights-amendment [last accessed May 12, 2026].
[7] *Available at* https://peekskillherald.com/19907/news/attorney-general-james-electeds-rally-in-peekskill-to-say-yes-t/ [last accessed May 12, 2026].
[8] *Available at* https://www.wshu.org/long-island-news/2024-10-07/ny-residents-vote-equal-rights-amendment [last accessed May 12, 2026].

those protections as substantive guarantees that "went into effect on January 1, 2025" (NY Governor's Office, *Abortion in New York State – Know Your Rights*[9]). The ballot language presented to voters in November 2024 likewise stated that a "YES" vote "puts these protections in the New York State Constitution," and that the amendment would "protect against unequal treatment based on . . . pregnancy [and] reproductive healthcare and autonomy" (NY State Bd. of Elections, Amended Certification [Aug. 27, 2024][10]). New Yorkers thus voted on the amendment having been told by the Governor, the Attorney General, the bill's sponsors, the State Board of Elections, and the State's own informational materials that voting "yes" would put real, immediately enforceable protections into the State Constitution.

The First Department has now recognized as much. In the proceedings below, that court held that "[t]he sponsors of the ERA bill focused [] on enshrining comprehensive protections from discrimination given the changing national legal landscape endangering abortion rights, rights for the disabled and pregnant, and rights based on sexual orientation, gender identity, and gender expression" (*Miller v State of New York*, — NYS3d —, 2026 NY Slip Op. 01409, *4 [1st Dept Mar.

[9] *Available at* https://www.ny.gov/programs/abortion-new-york-state-know-your-rights [last accessed, May 12, 2026].
[10] *Available at* https://elections.ny.gov/system/files/documents/2024/08/amended-proposal-one-certification-2024_1.pdf [last accessed, May 12, 2026].

12, 2026]). The First Department did not reach the question of self-execution, having resolved the case on other grounds (*see id.* at *5), but its conclusion about the drafters' purpose forecloses any reading of the amendment that would render that purpose unrealized.[11]

Reading the amendment as coterminous with the 1938 text would do exactly that. As one trial court has already correctly concluded, looking to the same legislative history, "[t]he sponsors noted that, while courts had historically read the Civil Rights clause to be non-self-executing, specifically citing *Kern*, *Brown*, and *Dorsey* cases, the amended section would establish a self-executing prohibition on the application of laws and governmental action that discriminate on the basis of an enumerated protected categor[y]" (*Saltarelli v State of New York*, — NYS3d —, 2026 NY Slip Op. 26005, *10 n 10 [Sup Ct, Madison County 2026]). That conclusion follows directly from the text, the history, and the public ratification campaign. Anything else would treat as a nullity an amendment that voters ratified in reliance on detailed, repeated, and consistent public assurances that it would do real work.

[11]The Supreme Court for Wayne County reached a similar conclusion about the scope of the amended Section 11 in *Williams v. State of New York*, (239 NYS3d 435, 442 [Sup. Ct., Wayne County 2025]), recognizing that the ERA expanded the categories of protected classes under Section 11 beyond what federal equal protection jurisprudence requires and concluding that, on a challenge to statutory law alone, petitioners' equal protection argument "might have been deemed meritorious" – though the court ultimately dismissed because petitioners also sought to invalidate a separate, standalone provision of the State Constitution (*id.*).

B. The Equal Rights Amendment's protections are necessary to end the subordination of people who can become pregnant when concern for a pregnancy outcome is invoked.

The need for a self-executing Section 11 is borne out by the real experiences of the New Yorkers the amendment was designed by the legislature and passed by the people to protect. Two cases identified by name in the Sponsor's Memorandum – *Dray* and *Jorgensen* – illustrate the persistent pattern: assertions of concern for a pregnancy outcome being deployed to deny pregnant New Yorkers their fundamental rights, with existing remedies proving slow, contested, or unable to prevent the harm in the first place. And those cases are not anomalies. They reflect a structural pattern of mistreatment, surveillance, and discrimination in pregnancy and childbirth that falls hardest on Black New Yorkers and other people of color.

1. New York courts and prosecutors have repeatedly used asserted concern for a pregnancy outcome to deny pregnant people their fundamental rights, and existing remedies have proven inadequate to prevent or promptly redress those violations.

Justice has eluded Rinat Dray for more than a decade after she suffered a forced cesarean to deliver her child. Ms. Dray entered Staten Island University Hospital in 2011 in labor, having made a considered decision to protect her health and future fertility by delivering vaginally after two prior cesareans. She communicated that choice clearly and repeatedly. And yet she was forced to undergo a cesarean over her competent objection, pursuant to the hospital's

"Managing Maternal Refusals of Treatment Beneficial to the Fetus" policy – an undisclosed written protocol authorizing the hospital to override a pregnant patient's medical decisions when the hospital judged the fetus's interests to require it (*see* Brief for Amicus Curiae State of New York at 6, *Dray v Staten Island Univ. Hosp.*, App Div 2d Dept, 2025-01312 [Nov. 10, 2025] ["AG *Dray* Amicus"]).

By the time the trial court ruled last year on whether Ms. Dray could even cross the threshold of the courthouse door with her human and civil rights claims, the New York State Department of Health, the New York City Commission on Human Rights, and the Attorney General had all spoken to the question and reached the same conclusion: a hospital policy that overrides a pregnant patient's informed refusal of treatment because of concern for a pregnancy outcome is sex-based discrimination prohibited by the New York State and City Human Rights Laws (*see* 47 RCNY § 2-09[b][1][vi] [NYCCHR rule providing that "a hospital policy [that] allows medical providers to override the informed consent of a patient with capacity to provide consent only when the patient is pregnant" facially violates the NYCHRL]; AG *Dray* Amicus 6). The trial court nonetheless dismissed Ms. Dray's discrimination claims. It did so without applying the standard analysis for discrimination claims under the State and City Human Rights Laws. Instead, it relied on "abortion jurisprudence that has been overruled, and New York laws criminalizing abortion that have been repealed," to find a state interest in fetal life

that, in its view, justified overriding a pregnant patient's competent refusal (AG *Dray* Amicus 9). More than a decade after the surgery, even against the weight of all the authority repudiating subordination of pregnant patients cloaked in concern for a pregnancy outcome, New York courts have failed to provide Ms. Dray redress.

Jennifer Jorgensen's case followed a similar trajectory in a different forum. Ms. Jorgensen was prosecuted, convicted, and sentenced for second-degree manslaughter on the theory that a car crash she was in during her seventh month of pregnancy caused injuries that led to the death of her daughter days after her emergency cesarean delivery. After two trials and an appeal, she finally made it to this Court for relief; the Court of Appeals reversed her conviction (*People v Jorgensen*, 26 NY3d 85 [2015]). It did so to resolve a case that should never have been brought, because, as this Court acknowledged, the law plainly did not authorize criminalizing a neonatal loss in those circumstances (*id.* at 92 ["[T]he imposition of criminal liability upon pregnant women for acts committed against a fetus that is later born and subsequently dies as a result of injuries sustained while in utero should be clearly defined by the legislature, not the courts."]). But the law's failure to authorize the prosecution did not prevent it. By the time she was vindicated, Ms. Jorgensen had been investigated, indicted, tried, convicted, and

sentenced – a process that took years in the midst of a personal tragedy that no later reversal could restore.

These cases were not academic illustrations chosen at random. They were identified, by name, in the Sponsor's Memorandum as examples of why the amendment was needed (*see* Sponsor's Memo, citing *Dray* and *Jorgensen*). The drafters identified them as the problem; the voters ratified an answer. A reading of Section 11 that leaves the next Rinat Dray or the next Jennifer Jorgensen exactly where they would have been before November 2024 cannot be reconciled with that history.

2. These cases reflect a structural pattern of mistreatment in pregnancy and childbirth that falls hardest on Black New Yorkers and other people of color.

The discrimination *Dray* and *Jorgensen* expose is not exceptional. It reflects a structural pattern that public health authorities, including New York's own, have documented at length and have called out as a matter of urgent concern. That pattern falls disproportionately on Black New Yorkers and other people of color, for whom the consequences of pregnancy-based subordination are not only deprivations of dignity and autonomy but, with disturbing frequency, deprivations of life.

In the most recent reporting period, New York City's pregnancy-associated mortality ratio was 52.3 deaths per 100,000 live births (NYC Dept of Health &

Mental Hygiene, *Pregnancy-Associated Mortality in New York City, 2022* [Sept. 2025][12]). Of these, 86.4% were deemed to have had at least a "good chance" of being prevented; discrimination was a contributing factor in an astonishing 68.2% of the deaths (*id.* at 6-7). Black non-Hispanic women and birthing people were approximately five times more likely to experience a pregnancy-associated death than white non-Hispanic women and birthing people, and the Black-White disparity is worsening: the five-year average pregnancy-associated mortality ratio for Black women rose 11.5 percent between the 2017–2021 and 2018–2022 reporting periods (*id.* at 2). The NYC Health Department itself attributes these inequities not to biology but to "historical and current intentional underinvestment in neighborhoods where Black non-Hispanic women and birthing people live and receive health care, multigenerational trauma and interpersonal racism that epigenetically and physically weather the bodies of Black people earlier than white people, and anti-Blackness and modern-day medical apartheid in health care" (*id.*). Among the manifestations the Department identifies: Black non-Hispanic women and birthing people are "not being listened to or [are] having their concerns

[12] *Available at* https://www.nyc.gov/assets/doh/downloads/pdf/data/maternal-mortality-annual-report-2025.pdf [last accessed May 12, 2026].

dismissed or downplayed" (NYC Dept of Health & Mental Hygiene, *Pregnancy-Associated Mortality in New York City, 2016–2020* at 11[Sept. 2024][13]).

New York State's own taskforce reached similar conclusions. The Taskforce on Maternal Mortality and Disparate Racial Outcomes, convened in 2018, found that the maternal mortality rate for Black women in New York State was approximately three times that of white women, and that "[s]tudies find that stress caused by racial discrimination plays a significant role in maternal mortality" (NY State Taskforce on Maternal Mortality and Disparate Racial Outcomes, *Recommendations to the Governor to Reduce Maternal Mortality and Racial Disparities* at 5 [Mar. 2019][14]). The Taskforce identified hospital quality, implicit bias, and the unequal distribution of high-quality obstetric care as drivers of disparate outcomes (*id.* at 5–6).

The Sponsor's Memorandum identified this very pattern as part of the rationale for the amendment, and identified a particular consequence of the absence of constitutional protection: "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

[13] *Available at* https://www.nyc.gov/assets/doh/downloads/pdf/ms/pregnancy-associated-mortality-report-2016-2020.pdf [last accessed May 12, 2026].
[14] *Available at* https://www.health.ny.gov/community/adults/women/task_force_maternal_mortality/docs/maternal_mortality_report.pdf [last accessed May 12, 2026].

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" (Sponsor's Memo). New York's existing statutory framework, however valuable, has not been sufficient to dismantle that pattern. A reading of Section 11 that adds nothing to the prior, non-self-executing version cannot be expected to change it.

C. The federal erosion of reproductive rights makes state constitutional protection urgent, and a non-self-executing constitutional provision is no protection at all.

Section 11 was amended at a particular historical moment, in response to a particular set of legal developments, and against the backdrop of a particular history in New York. Each of those points bears on the question this Court must answer. The federal floor on which New York's reproductive rights regime once partly rested (*see Hope v Perales*, 83 NY2d 563) has been removed and continues to erode. New York's own pre-2019 history shows what happens when constitutional rights depend on statutory implementation: pregnant New Yorkers cannot use them. And the only reading of Section 11 that responds to those realities – and thus does what voters ratified the amendment to do – is one in which the section is immediately enforceable against discriminatory governmental action.

1. The Equal Rights Amendment was drafted to go beyond federal equal protection because federal doctrine on pregnancy, sex, and bodily autonomy is unreliable and shrinking.

The Sponsor's Memorandum identified, as a principal reason for amending Section 11, the inadequacy of federal constitutional doctrine on pregnancy. "[A] lack of clarity on whether pregnancy discrimination transgresses the Federal Constitution still exists," the sponsor observed, citing *Geduldig v Aiello* (417 US 484 [1974])(Sponsor's Memo). This concern was prescient. Far from being narrowed, *Geduldig*'s footnote 20 – the proposition that classifications concerning pregnancy are not necessarily classifications concerning sex – has been repeatedly used to try to curtail pregnant people's rights.

In *Dobbs* itself, the US Supreme Court stated in dicta that "the regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny" (*Dobbs*, 597 US at 236). In *United States v Skrmetti* (605 US 495 [2025]), the Court extended *Geduldig*'s logic outside the pregnancy context for the first time, deploying the same footnote to conclude that a state law restricting gender-affirming care for minors did not classify on the basis of sex. As Justice Sotomayor observed in dissent, the resuscitation of *Geduldig* – "widely rejected as indefensible even 40 years ago" – confirms that federal doctrine in this area is not a stable foundation (*Skrmetti,* 605 US at 600 [Sotomayor, J.,

dissenting]). That is, the US Supreme Court has followed the exact trajectory the ERA's sponsor predicted.

Beyond doctrine, the federal landscape continues to deteriorate in ways that bear directly on what New York's constitutional protections must do. The attacks on abortion care did not end with *Dobbs*. Even today, federal threats to medication abortion – which stand to affect New Yorkers – have rendered access unpredictable from day to day (*see* Ann E. Marimow, *Supreme Court Continues Access to Abortion Pill by Mail, for a Few Days*, NY Times, May 11, 2026[15]). And across the country, the consequences of the absence of constitutional clarity are visible in the form of escalating pregnancy criminalization. Advocates have documented at least 412 pregnancy-related prosecutions in the first two years after *Dobbs*, in sixteen states; 398 of the 441 charges asserted some form of child abuse, neglect, or endangerment, demonstrating how readily ordinary criminal statutes can be repurposed to criminalize pregnancy when constitutional protection is absent or unclear (*see* Pregnancy Justice, *Pregnancy as a Crime: An Interim Update on the First Two Years After Dobbs* [Sept. 2025][16]). The same dynamic is reinforced by healthcare provider uncertainty: research shows that provider

[15] *Available at* https://www.nytimes.com/2026/05/11/us/politics/supreme-court-abortion-pill-mifepristone.html [last accessed May 12, 2026].
[16] *Available at* https://www.pregnancyjusticeus.org/wp-content/uploads/2025/09/Pregnancy-as-a-Crime-An-Interim-Update-on-the-First-Two-Years-After-Dobbs.pdf [last accessed May 12, 2026].

confusion about the legal status of pregnancy outcomes is itself a primary vector through which pregnant people are reported to law enforcement (Huss et al., If/When/How, *Self-Care, Criminalized: The Criminalization of Self-Managed Abortion from 2000 to 2020* at 31 [2023][17]). New Yorkers ratified the Equal Rights Amendment against this backdrop. They were entitled to expect that ratification would mean something.

2. New York's own pre-2019 experience shows that a constitutional right that depends on statutory implementation is not a meaningful right in practice.

New York does not have to look outside its borders to see what happens when constitutional protections depend on statutory implementation. It can look at its own recent history. From the early 1970s until the Reproductive Health Act of 2019, New York's Penal Law continued to criminalize abortions performed after twenty-four weeks except where necessary to preserve the pregnant person's life, (*see* former Penal Law § 125.05[3] [repealed 2019]), notwithstanding the then-intact recognition of a constitutional right to abortion to preserve health as well as life (*Planned Parenthood v Casey,* 505 US 833, 879 [1992]), and notwithstanding a formal opinion of the New York Attorney General reading the constitutional exceptions into the statute (NY Atty Gen Formal Op. No. 2016-F1 [Sept. 7, 2016]).

[17] *Available at* https://ifwhenhow.org/wp-content/uploads/2023/10/Self-Care-Criminalized-2023-Report.pdf [last accessed May 12, 2026].

The Constitution said one thing, the statute said another; providers, facing felony exposure, declined to provide care that the Constitution permitted. Patients who needed later abortions on health grounds traveled out of state, carried unwanted or dangerous pregnancies to term, or went without care (*see* Editorial Board, *The Cost of Complacency About Roe*, NY Times, Jan. 19, 2019[18]). The Reproductive Health Act eventually fixed the statutory problem in 2019 – but only after years of advocacy, and only at the cost of the patients and providers who were forced to navigate the gap between the Constitution and the Penal Law in the meantime.

The lesson is straightforward, and is not limited to abortion. When a constitutional protection requires a future legislative act, sympathetic prosecutorial forbearance, or another lawsuit before it can be enforced, people lose the right in practice. They lose it when the next provider declines to act in the face of a contrary statute. They lose it when the next prosecutor proceeds notwithstanding a contrary constitutional command. They lose it when the next litigant cannot wait the years it takes to vindicate a right that should have been operative on its own terms. A non-self-executing Section 11 reproduces precisely this dynamic across every category the amendment was designed to protect, including the categories –

[18] *Available at* https://www.nytimes.com/interactive/2018/12/28/opinion/roe-wade-new-york.html [last accessed May 12, 2026].

pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy – that the drafters added in direct response to *Dobbs*.

3. The stakes for pregnant New Yorkers demand that Section 11 is self-executing and provides a direct cause of action against discriminatory governmental action.

Amici join, and need not duplicate here, the doctrinal analysis presented by the Proposed Letter Brief of *amicus curiae* New York Civil Liberties Union. As that brief explains, the plain text of Section 11 as amended, read as a whole, establishes a self-executing prohibition on discriminatory governmental action; the legislative history confirms it; and longstanding Court of Appeals precedent supports it. The Sponsor's Memorandum's express engagement with *Kern*, *Brown*, and *Dorsey* – the very precedents that had previously cabined the prior version of Section 11 – demonstrates that the drafters intended the amended section to operate differently, and to operate immediately.

The stakes for pregnant New Yorkers set out above confirm why that reading is necessary. A nullity reading would not merely disappoint voters who were repeatedly told that their "yes" vote would put real protections into the State Constitution. It would, in practice, leave the next New Yorker to face a forced cesarean, or baseless pregnancy prosecution, or the next *Dobbs*-era encroachment exactly where they would have been before November 2024. It would deprive the amendment of the very work the drafters identified as its central purpose. And it

would do so at a moment when the federal floor on which New York once partly relied has been removed and continues to recede. The Court should not adopt a reading that produces those consequences when the text, the history, and the public ratification campaign all point the other way.

III. CONCLUSION

For the reasons set forth above, the Court should hold that Section 11 of Article I of the New York Constitution, as amended by the Equal Rights Amendment, is self-executing and provides a direct cause of action to challenge discriminatory governmental action on the basis of any enumerated protected characteristic, including pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy.

Respectfully Submitted,

If/When/How: Lawyering for Reproductive Justice, by:

Farah Diaz-Tello
106 W 32nd St Ste 112
New York, NY 10001
Tel: (347) 974-7337
farah@ifwhenhow.org

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to the State of New York, Court of Appeals Rules of Practice, 22 NYCRR Part 500.1 §§ (j)(1) and Part 500.11 §§ (j) and (m), I certify that the foregoing letter brief was prepared on a word processor, using 14-point Times New Roman proportionally spaced typeface, double-spaced, with 12-point single-spaced footnotes. The total number of words in the letter brief, inclusive of point headings and footnotes is 6,445.

Dated: May 13, 2026
New York, NY

Respectfully submitted,

Farah Diaz-Tello

Attorney for Amicus Curiae