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Via e-mail

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Re: *Matter of Miller v State of New York*, APL-2026-00033
Proposed Letter Brief of *Amicus Curiae* Marcy Syms Equality
Initiative at NYU School of Law

Dear Ms. Davis:

The Marcy Syms Equality Initiative at NYU School of Law's Birnbaum Women's Leadership Center respectfully submits this *amicus curiae* letter-brief urging this Court to hold that the Equal Rights Amendment to the New York State Constitution is self-executing and establishes an immediately enforceable cause of action for New Yorkers to seek redress for governmental discrimination on the basis of each enumerated protected classification. This brief advances three

arguments in support of that position. First, the structural history of constitutional amendment establishes that amendments are enacted to create rights not previously recognized and take operative effect as enforceable constitutional commands without the need for implementing legislation. Second, the legislative record of the ERA's enactment reflects an express determination by the amendment's sponsors that the ERA operates as a self-executing prohibition on governmental discrimination, enforceable against the government absent any further legislative action. Third, the standard of review applicable to ERA claims must be more protective than that afforded under the federal Equal Protection Clause—a conclusion compelled by the ERA's text, its legislative history, and the deliberate judgment of the electorate that ratified it in 2024 with full awareness of the inadequacy of existing federal doctrine. A holding to the contrary would effectively nullify the protections the ERA was ratified to secure and would render New York's most expansive constitutional commitment to equality an aspiration rather than an enforceable right.

I. INTEREST OF AMICUS CURIAE

The Marcy Syms Equality Initiative at NYU School of Law (the "Equality Initiative") is dedicated to advancing constitutional equality through academically rigorous scholarship, legal and policy advocacy, public education, and grassroots movement building. The Equality Initiative focuses on the Equal Rights Amendment (ERA)—both its ratification history and its application—and has authored policy papers, testimony, and expert briefings in numerous fora addressing threshold and interpretive questions regarding the ERA. The Equality Initiative submits this brief to offer a focused constitutional-structural argument that complements the other *amicus briefs* filed in this matter: that the constitutional

amendment process is, by its nature, additive and self-executing, and that a constitutional amendment to the New York Constitution warrants fresh interpretive treatment unencumbered by doctrinal frameworks predating the amendment's enactment.

II. PRELIMINARY STATEMENT

New York's Equal Rights Amendment ("New York ERA") reflects a considered constitutional judgment—expressed through the deliberate processes of legislative approval and popular ratification—that New York's 1938 framework of equality had failed to keep pace with the state's evolving understanding of who deserves constitutional protection and what equality requires. Article I, Section 11, in its prior form, extended its guarantees to only a fraction of the groups that experienced discrimination, leaving the vast majority of New Yorkers without express constitutional recourse against governmental discrimination on the basis of their identity (NY Const, art 1, § 11, *as adopted* Nov. 8, 1938, eff. Jan. 1, 1939 ["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"] [emphasis added]). The New York ERA is a modernization of the state constitution, bringing the constitutional text into alignment with a contemporary and more complete vision of equality. The New York ERA, amended in November of 2024 with overwhelming popular support, extended the reach of constitutional equality protections to additional enumerated categories of persons, including protections against discrimination on the basis of sex, sexual orientation, gender identity or expression, pregnancy, pregnancy outcomes, reproductive healthcare

and autonomy, ethnicity, national origin, age, and disability. (NY Const art. I, § 11(a); *Proposal 1: New York General Election Results*, CNN, available at <https://www.cnn.com/election/2024/results/new-york/issue-1> [last updated November 5, 2024] [Proposition 1 (to add the New York ERA to the New York Constitution) passed with over 62% of voters voting in favor of amendment]. Approval of the New York ERA came in the wake of the Supreme Court's elimination of federal constitutional protections for abortion, during a moment of acute federal retrenchment on equality rights, and against the backdrop of decades of evidence that New York's existing constitutional framework had left the promise of equality unrealized for too many of its residents (*See* Shefali Luthra, Grace Panetta, *New York passes equal rights amendment with abortion protections*, The 19th, available at <https://19thnews.org/2024/11/new-york-equal-rights-amendment-abortion-results/> [last updated November 6, 2024, 9:29 a.m. PT]; *NYCLU Hails Prop 1 Victory*, NYCLU <https://www.nyclu.org/press-release/nyclu-hails-prop-1-victory> [November 5, 2024]; Letitia James, *Protect abortion access in New York. Pass Proposition One, the Equal Rights Amendment*, Lohud, available at <https://www.lohud.com/story/opinion/2024/09/04/ny-equal-rights-amendment-protects-abortion-acces/75064087007/> [September 4, 2024]).

III. ARGUMENT

The question before this Court is whether the New York ERA's act of constitutional modernization will carry full legal force, or whether it will be deferred and rendered ineffectual by the same doctrinal conditions that rendered the original provision insufficient. The text of the amendment, the unambiguous intent of the legislature, and the popular mandate reflected in its ratification requires that the amendment have immediate legal effect and that laws

discriminating on the basis of any enumerated protected characteristic be subject to the most exacting standard of judicial scrutiny. Three convergent lines of authority compel this conclusion—each addressed in the sections that follow. First, the structural history of constitutional amendment establishes that amendments are enacted to create rights not previously recognized by existing courts, and that they take operative effect as enforceable constitutional commands without the need for implementing legislation. The ERA is the most recent expression of a tradition as old as the Reconstruction Amendments: that when the law has failed to protect the vulnerable, the Constitution is amended to correct it, and that correction is immediate. Second, the legislative record reflects an express determination by the ERA’s sponsors that the ERA operates as a self-executing prohibition on governmental discrimination—and that the New York ERA's vision of equality advances a substantive commitment to dismantling the structural conditions that perpetuate inequality. Third, this Court is not bound by prior interpretive frameworks in construing a constitutional provision that those frameworks neither anticipated nor could have accommodated. The ERA's vision of equality is substantive, not merely formal and it authorizes the measures necessary to dismantle structural inequality, not merely to prohibit its most transparent expressions.

The Equality Initiative takes no position on the merits of the underlying appeal or the specific relief sought. The New York Civil Liberties Union and its co-signatories have filed a separate amicus brief addressing in detail the enforceability and self-executing character of the New York ERA. The Equality Initiative endorses that analysis and offers a complementary constitutional-structural argument: that the amendment power is, by its nature, additive, and that a constitutional amendment accordingly warrants independent

interpretive treatment unencumbered by doctrinal frameworks predating its enactment. This brief's concern is with the interpretive framework this Court applies to the New York ERA. This Court's reasoning regarding the ERA's operative effect and applicable standard of review will shape the constitutional landscape for generations of New Yorkers who seek to vindicate equal protection under the law in New York courts. This Court has before it a significant opportunity: to declare authoritatively what the New York ERA means, and to ensure that New York's constitutional commitment to equality is given the full and immediate legal force that its text, history, and democratic ratification demand.

A. CONSTITUTIONAL AMENDMENTS ESTABLISH NEW RIGHTS NOT PREVIOUSLY RECOGNIZED BY COURTS

Historically, amendments have been adopted because existing constitutional doctrine, as interpreted and applied by courts, has proven inadequate to vindicate the right at issue. The term "amend" denotes alteration, correction, or modification—the introduction of something changed from what previously existed (Merriam-Webster.com Dictionary, amendment [<https://www.merriam-webster.com/dictionary/amendment>]). A constitutional amendment that does no more than restate rights already recognized by existing courts adds nothing to the constitutional order and cannot be said to alter or enlarge the rights of those it purports to protect. Such an instrument would not warrant the deliberative process the amendment procedure demands, nor the political effort its ratification requires.

This structural principle is confirmed by the most consequential episodes in American constitutional history. When the Supreme Court held in *Dred Scott v Sandford*, 60 US 393 [1857], that persons of African descent held no cognizable rights under the federal Constitution, the Constitution was amended to disestablish

the institution of slavery with the 13th Amendment, grant citizenship rights to Black people with the 14th Amendment, and prohibit race discrimination in voting with the 15th Amendment, each of which directly repudiated a settled judicial interpretation and established a new constitutional regime in its place (US Const, 13th, 14th, 15th Amends). When the Court sustained the exclusion of women from professional life in *Bradwell v Illinois*, 83 US 130 [1873], the constitutional answer again came through amendment—the 19th Amendment, and ultimately the Equal Rights Amendment itself (US Const, 19th Amend; ABA Resolution 601 [August 2024] ["the American Bar Association urges federal, state, local, territorial, and tribal governments to support implementation of the Equal Rights Amendment . . . to the Constitution . . . and . . . urges all bar associations and the legal community as a whole to support implementation of the ERA"]; *See Statement from President Joe Biden on the Equal Rights Amendment*, The White House, accessible at <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2025/01/17/statement-from-president-joe-biden-on-the-equal-rights-amendment/> [January 17, 2025] ["It is long past time to recognize the will of the American people. In keeping with my oath and duty to Constitution and country, I affirm what I believe and what three-fourths of the states have ratified: *the 28th Amendment is the law of the land, guaranteeing all Americans equal rights and protections under the law regardless of their sex*"] [emphasis added]).

The consistent logic of this history is that constitutions are amended precisely because legislatures and courts have declined to recognize a right. To condition an amendment's effectiveness upon implementing legislation inverts this logic entirely. It interposes the legislative branch—which may itself have been complicit in the very inequality the amendment was adopted to remedy—between the constitutional command and the people the amendment was enacted to protect,

subordinating a popular constitutional mandate to the continued discretion of the branch it was designed to constrain.

In addition, the Supreme Court has never required Congress to enact separate implementing legislation before constitutional amendments became enforceable as constitutional commands (*See, e.g., Strauder v State of W. Virginia*, 100 US 303, 25 L Ed 664 [1879], *abrogated by Taylor v Louisiana*, 419 US 522, 95 S Ct 692, 42 L Ed 2d 690 [1975] ["The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable"]; *see, e.g., The Civil Rights Cases*, 109 US 3, 20 [1883] [Asserting that the Thirteenth and Fourteenth amendments are "undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstance."]). As *The Civil Rights Cases*, 109 US 3 [1883], and the decisions that followed reflect, the operative debates concerned the *scope* of those amendments' self-executing effect—not whether such effect existed (*See The Civil Rights Cases*, 109 US at 20; *see also Jones v Alfred H. Mayer Co.*, 392 US 409, 440 [1968] [considering the scope of the Thirteenth Amendment and finding that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation"]). To the contrary, the enforcement clauses of the 13th, 14th, and 15th Amendments were understood to vest in Congress an affirmative power to enact legislation giving those amendments their full practical realization—not as a precondition to the Amendments' operative effect, but as a constitutional authorization to ensure that the rights they guaranteed would not remain merely declaratory (*See Katzenbach v Morgan*, 384 US 641, 651 [1966] [construing the 14th Amendment's enforcement clause as a grant of remedial legislative power to "enforce" rights already

guaranteed by the Constitution's own terms]). The distinction is constitutionally significant: implementing legislation serves to *realize* a self-executing constitutional command—to give it practical effect across the full range of circumstances to which it applies, not to supply the command's operative force in the first instance. An amendment that awaits legislative activation before it binds the government is not an amendment but a legislative proposal. The New York ERA, like the Reconstruction Amendments before it, is the former. This Court should apply the same presumption accordingly.

B. THE LEGISLATIVE RECORD REFLECTS A CLEAR AND DOCUMENTED INTENT: A MODERN, SUBSTANTIVE, AND IMMEDIATELY OPERATIVE EQUALITY GUARANTEE FOR ALL NEW YORKERS

The legislative record of the New York Equal Rights Amendment's enactment reflects a clear and documented purpose: to modernize New York's constitutional framework by extending enforceable equality protections to all New Yorkers, and to operate as an immediately effective constitutional command. That purpose is expressed with unmistakable clarity in the Sponsors' Memorandum accompanying S.108-A / A.1283 (Sponsor Mem, Senate Bill S108A, <https://www.nysenate.gov/legislation/bills/2023/S108/amendment/A>).

The Sponsors' Memorandum opens with an acknowledgment that New York's existing constitutional framework had failed to keep pace with the state's evolving understanding of equality. Article I, Section 11, last amended in 1938,—prior to the civil rights movement, the women's movement, the LGBTQ rights movement, and the disability rights movement—was inadequate and the New York ERA was the legislature's answer to the obligation to necessarily “reflect our broad conception of justice, equal rights and the duty to protect all people in the state against discrimination” going “above and beyond the protections

of the Federal Constitution" (*id.*). The New York ERA's vision was explicitly intersectional and substantive: "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" (*id.*). This is not the language of formal equality. It is the language of a legislature enacting a new constitutional standard, one calibrated to the reality of how discrimination operates rather than to the symmetrical neutrality that formal doctrine demands.

On the threshold question of the ERA's legal effect, the Sponsors' Memorandum addressed it directly and unambiguously. Acknowledging that the existing Article I, Section 11 had been interpreted as "non-self-executing" with respect to private actions and damages claims, the sponsors nonetheless made clear that the provision "operates to prohibit the application of laws and governmental action that discriminate on the basis of an enumerated protected category" even in the absence of implementing legislation—and that the New York ERA was "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.*). The legislature accordingly understood the New York ERA to be operative against the government from the moment of its ratification, without requiring further legislative action to trigger its protections.

The New York ERA was designed to protect, rather than to imperil, affirmative action and other targeted measures directed at the remediation of systemic discrimination. The amendment "guarantees the validity of efforts to prevent or dismantle structural forms of inequality or discrimination against protected classes" and operates only to "invalidate or prevent the adoption of" state actions that do not serve such a remedial purpose (*id.*). In the legislature's own

words, the ERA was designed not merely to prohibit discrimination but to affirmatively "ensure that New York's Constitutional language reflects that commitment to full equality and justice before the law" (*id.*).

Among the most urgent and deliberate of the New York ERA's enumerated protections are those addressing pregnancy, pregnancy outcomes, reproductive healthcare, and reproductive autonomy. The legislative record makes plain that these protections were not incidental additions to the amendment's text—they were among its central purposes, grounded in a documented record of constitutional failure and enacted with full awareness of the specific harms produced (*id.* ["Increasingly across the country in virtually every state, including New York, women face criminal and civil consequences related to their pregnancies and pregnancy outcomes . . . 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"]).

The New York ERA was designed to supply the constitutional clarity that federal doctrine had lacked—establishing beyond question that discrimination on the basis of pregnancy, pregnancy outcomes, reproductive healthcare, and reproductive autonomy constitutes sex discrimination prohibited by the New York State Constitution. The New York ERA clarifies a fundamental gap in existing constitutional doctrine that federal law had never clearly established: whether pregnancy-based discrimination constitutes sex discrimination under the Constitution (*See Geduldig v Aiello*, 417 U.S. 484 [1974], in which the Supreme Court declined to treat pregnancy discrimination as sex discrimination under the federal Equal Protection Clause).

The New York ERA was also specifically designed to remedy the concrete and disproportionate harms resulting from the increased "criminal[ization] and civil consequences related to . . . pregnancies and pregnancy outcomes, including not only abortions but also miscarriages, stillbirths, or other adverse outcomes" (Sponsor Mem). New York courts had held that a purported state interest in the fetus could override pregnant patients' rights to medical decision-making and bodily integrity (*See, e.g., Dray v Staten Island University Hospital*, No. 500510-2014 [Sup. Ct., Kings Cnty. Oct. 9, 2015]). The Legislature identified these developments as constitutional failures—making explicit what existing doctrine had left uncertain, that "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" (Sponsor Mem).

The New York ERA's reproductive protections were thus understood by the legislature as inseparable from its broader commitment to substantive, intersectional equality (Sponsor Mem). The Legislature was equally direct about the ERA's intersectional significance, noting that these harms fall with particular severity on those at the intersection of multiple marginalized identities (*id.*). Black women and women of color, as noted in the Sponsors' Memo, "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" (*id.*).

The urgency of these protections was significantly heightened by the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 US 215 [2022], which the sponsors cited as rendering it "critical" that New York

make clear that constitutional protections for reproductive rights "independently remain within our state constitution" (Sponsor Mem). The New York ERA was thus enacted not only to fill a pre-existing doctrinal gap, but to establish an affirmative and independent state constitutional floor to protect New Yorkers' reproductive rights. As the Legislature concluded, "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" explicitly prohibited by the New York State Constitution. (Sponsor Mem).

This Court has recognized that constitutional provisions must be interpreted in light of the purposes they were designed to serve and the conditions that gave rise to them (*See, e.g., Matter of Donahue v Cornelius*, 17 NY2d 390, 395 [1966]). Applied to the ERA, that principle compels an interpretation that gives full operative effect to the legislature's documented finding of constitutional inadequacy, that treats the ERA as a self-executing prohibition on discriminatory governmental action, and that construes its guarantees consistently with the legislature's express authorization of remedial measures. To condition the New York ERA's enforceability upon subsequent implementing legislation is to disregard the legislative record, contravene the popular mandate that ratified the amendment, and misapprehend the structural purpose of constitutional amendment.

C. THE NEW YORK ERA ESTABLISHES A NEW AND INDEPENDENT SOURCE OF CONSTITUTIONAL RIGHTS EMBRACING A STANDARD OF REVIEW GROUNDED IN SUBSTANTIVE EQUALITY

The New York ERA's text and legislative record make clear that New York's vision of equality is not merely the absence of overt discrimination—it is the active dismantling of the structural conditions that perpetuate inequality. Realizing that vision requires this Court to recognize that the ERA is not constrained by the

interpretive frameworks that preceded it. The New York ERA was not adopted in 2024 to restate the protections already afforded by the Equal Protection Clause of the 14th Amendment (*See* Sponsor Mem [expressing the legislature's intent that the New York ERA protects New Yorkers by "providing legal protections that go above and beyond the protections of the Federal Constitution"; *see Explainer on "Proposal 1": The New York Equal Rights Amendment on the Ballot*, ERA Project, available at <https://msei-bwlc.org/research/ny-prop-1> [July 7, 2024] ["Under the New York ERA, substantive equality measures could dismantle existing inequalities and transform the equality landscape for the better. This will distinguish New York constitutional law from the 'neutral' approach to equality developed under the federal Constitution"]). The amendment—prohibiting discrimination on the basis of sex, sexual orientation, gender identity or expression, pregnancy, pregnancy outcomes, and reproductive healthcare—extends considerably beyond existing federal equal protection doctrine and is not bound by the interpretive frameworks this Court applied prior to the amendment's ratification (NY Const art. I, § 11). The Sponsors' Memorandum states clearly that the New York ERA would operate not merely as a prohibition on discriminatory classifications but as an affirmative constitutional commitment to equality—one that authorizes governmental measures directed at the elimination of structural disadvantage rather than the preservation of formal parity alone:

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 (Sponsor Mem).

Interpreting the New York ERA in lockstep with the 14th Amendment's "intermediate scrutiny" standard does not reflect the legislative intent of this amendment and would substantially diminish the amendment's guarantees. The intermediate scrutiny standard for sex equality was developed by the U.S. Supreme Court in the absence of any constitutional text expressly prohibiting sex discrimination—a standard fashioned to address a constitutional lacuna rather than to give effect to an explicit constitutional command (*See Intermediate Scrutiny*, Legal Info. Inst., available at https://www.law.cornell.edu/wex/intermediate_scrutiny [last accessed May 11, 2026]). The New York ERA does not require the same judicial accommodation; it presents an affirmative textual prohibition that is entitled to be construed in accordance with its own terms and purposes, not by reference to the doctrinal tests developed in its absence.

The inadequacy of existing federal doctrine is not an incidental feature of the constitutional landscape—it constitutes the precise condition that rendered amendment necessary. The Supreme Court's equal protection jurisprudence embodies a model of "formal equality": the requirement that similarly situated individuals be treated similarly, assessed by reference to whether a law's classifications are facially neutral and evenhandedly applied (*See Ting Ting Cheng et al., ERA Project, Realizing Sex Equality: A Model Policy Agenda for State Equal Rights Amendments* at 10 [Nov. 2024]). Under this framework, constitutional analysis proceeds without reference to whether the law under review produces, entrenches, or perpetuates substantive inequality. (*id.*). The consequence is that policies designed to remedy historic and structural sex-based inequality will fail the formal equality framework's neutrality requirement precisely because they acknowledge the discrimination they seek to address—leaving the architecture of

structural discrimination constitutionally insulated from the targeted intervention it requires (*See, e.g. Vitolo v Guzman*, 999 F3d 353 [6th Cir 2021] [striking down COVID-19 pandemic federal funding process that prioritized support to restaurant owner applicants who were women or people of color as impermissibly imposing race and sex classifications, despite these "socially and economically disadvantaged" business owners having disproportionately struggled during the pandemic and having historically faced discrimination and hardship resulting in inequality]; *see also Students for Fair Admissions, Inc. v President and Fellows of Harvard Coll.*, 600 US 181 [2023] [finding college admissions programs that sought to remedy historical racial discrimination and inequality violated the 14th Amendment's Equal Protection Clause because they impermissibly considered race in admissions]).

The formal equality model applies with equal force to the powerful and the powerless alike, affording no greater constitutional protection to those who bear the burden of structural discrimination than to those who benefit from it. The equal protection framework has become progressively more demanding with respect to discrimination claims brought by women and gender minorities, while simultaneously being deployed with increasing frequency and success to challenge remedial measures specifically designed to address documented structural sex-based disadvantage (*See, e.g., Vitolo*, 999 F3d 353; *see, e.g., Strickland v United States Dept. of Agric.*, 736 F Supp 3d 469 [ND Tex 2024] [issuing a preliminary injunction against USDA's practice of prioritizing relief funds for "socially disadvantaged farmers" (including, specifically, women) with the "goal of remedying the persistent effects of past discrimination" because the practice could not pass intermediate scrutiny and constituted impermissible sex discrimination under Equal Protection Clause of the 5th Amendment]). Under prevailing formal

equality doctrine, legislative action directed at the economic and institutional consequences of sex discrimination may itself be found to constitute impermissible discrimination (*See, e.g., Vitolo*, 999 F3d 353; *Students for Fair Admissions, Inc.* 600 US 181). The constitutional mechanisms of remedy are thereby rendered constitutionally precarious. A doctrine that affords identical protection to those who benefit from structural disadvantage and those who bear its consequences cannot, as a matter of structural logic, dismantle that disadvantage.

Substantive equality, by contrast, assesses governmental action by reference to its effects on those subject to structural disadvantage and evaluates whether those effects entrench or ameliorate the underlying conditions of inequality (*See Realizing Sex Equality* at 10). This framework—which underlies the equality guarantees of numerous constitutional democracies and the principal instruments of international human rights law—does not require that constitutional protection operate with formal symmetry (*id.*). It requires that protection be functionally adequate to address the inequality it is designed to reach (*id.* ["[A] substantive equality framework does not require treating everyone as if their needs are the same, and instead affirmatively addresses existing disparities"]). The New York ERA was ratified against the backdrop of formal equality's doctrinal failure (*See, e.g., Vitolo*, 999 F3d 353; *Students for Fair Admissions, Inc.* 600 US 181). Interpreted in light of its text, legislative history, and the doctrinal conditions that made it necessary, the New York ERA embodies this substantive model and must be construed accordingly.

Under a substantive equality framework, legislative measures specifically designed to address documented discrimination are not constitutionally suspect; they are constitutionally authorized. A legislature that responds to structural barriers confronting, for example, women and gender minorities in employment,

healthcare, or access to the courts is not acting in derogation of the New York ERA's guarantees (*See* UN Human Rights Council, *Substantive Gender Equality: Guidance Document of the Working Group on Discrimination Against Women and Girls* at 3 [Mar. 14, 2025, A/HRC/WG.11/42/1] ["Addressing those [systemic gender] inequalities requires proactive efforts by States, including through governments, legislatures and judiciaries, and by social, political, economic, cultural and religious actors, to dismantle the structures and practices that perpetuate the inequalities"]). It is acting in pursuance of them. This distinction—between laws that perpetuate subordination and measures that remedy it—is the central interpretive question the New York ERA was enacted to resolve, and the legislative record confirms that the legislature understood it as such.

This interpretation is grounded in and required by the ERA's text. New York's ERA enumerates pregnancy, pregnancy outcomes, and reproductive healthcare among the prohibited bases of discrimination—categories defined by reference to characteristics and experiences that are, by biological and social reality, distributed differently across sexes and gender identities (NY Const art. I, § 11(a)). The legislature's decision to enumerate these categories reflects a determination that genuine constitutional equality requires the capacity to acknowledge constitutionally relevant differences rather than to obscure it through the application of formally neutral standards (Sponsor Mem). That determination instantiates the anti-subordination principle: the constitutional guarantee of equality is violated not by measures that acknowledge sex or gender, but by laws and governmental practices that employ those characteristics as a basis for subordination.

Nor should this Court regard itself as constrained by pre-amendment precedents constructed without reference to the New York ERA. A new

constitutional provision necessarily supersedes interpretive frameworks developed in its absence—any other conclusion would render constitutional amendment prospectively inert, incapable of displacing the very doctrinal conditions that made amendment necessary. New York's ERA is more expansive in scope and more explicit in its enumerated protections than any other ERA in the nation. To interpret it more narrowly than its textual breadth requires, or to tether it to a standard of review developed in the absence of any express constitutional text, would be anomalous and contrary to established principles of constitutional construction. Recognition that the New York ERA establishes a substantive, outcomes-oriented equality guarantee—enforceable as a self-executing constitutional command—would provide New York constitutional law with an interpretive framework commensurate with the scope of the inequality the ERA was enacted to address, the breadth of the constitutional text the electorate ratified, and the express legislative authorization for remedial measures the Sponsors' Memorandum makes plain.

IV. CONCLUSION

When New York voters amended the New York Constitution in 2024, they exercised the highest form of democratic authority available to them and used it to demand more from their government's commitment to equality. They did so with knowledge of what the existing framework had failed to provide—and with the intention of establishing something better (*See* Shefali Luthra, Grace Panetta, *New York passes equal rights amendment with abortion protections*; *see* Anthony Izaguirre, *New York voters pass constitution change that supporters say will protect abortion and trans rights*, The Associated Press, available at <https://apnews.com/article/new-york-ballot-measure-abortion-transgender-c6fa789a0f98da44eb52b74eb25e4b80> [last updated November 5, 2024 6:50 PM PDT]).

The question before this Court is whether the judiciary will honor that act of democratic self-governance, or whether procedural doctrine will once again be deployed to postpone the constitutional rights the people have already claimed.

The Equality Initiative respectfully submits that this Court should decline to adopt the position that the New York Equal Rights Amendment is not self-executing against governmental actors or requires implementing legislation before it may be given effect. That position is irreconcilable with the structural logic of constitutional amendment, inconsistent with the legislative record, and contrary to the understanding of the ERA's operative effect that its sponsors expressly articulated. The New York self-execution precedents—including *Dorsey v Stuyvesant Town Corp.*, 299 N.Y. 512 [1949], *Brown v State*, 89 NY2d 172 [1996], and *People v Kern*, 75 N.Y.2d 638 [1990]—arose in the context of race discrimination claims in which the self-execution doctrine was deployed, with varying results, to limit enforcement of constitutional protections against private actors. This Court has the occasion in the present proceeding to ensure that the New York ERA's protections are not foreclosed by the same doctrinal mechanisms that once forestalled the constitutional rights of those the law was supposed to protect.

The New York ERA is both a legal standard and a statement of values—a declaration, made through the democratic processes of legislation and popular vote, about what kind of state New York intends to be. New York is at a crossroads in the longer arc of its commitment to equality: a state that has long led on civil rights, is now called upon to say, authoritatively, that its most expansive constitutional guarantee of equality reaches every New Yorker it was written to protect.

The Equality Initiative respectfully submits that this Court should hold the New York Equal Rights Amendment to be self-executing against government action and should embrace it as an independent and additive constitutional provision that requires an interpretive framework grounded in substantive equality, evaluated by reference to outcomes and structural effects rather than formal symmetry alone; that provides constitutional authorization for targeted measures directed at the redress of structural sex-based disadvantage; and that gives full operative effect to the democratic judgment of the legislature and the electorate that ratified it. This is New York's opportunity to declare, with the authority of its highest court, that the ERA is not a promise deferred—it is a foundational constitutional mandate and a cornerstone of our democracy.

Respectfully Submitted,

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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 and 14-point single-spaced block quotations. The total number of words in the brief, inclusive of point headings and footnotes is 5665.

Dated: May 13, 2026
New York, N.Y.

Respectfully submitted,



Ting Ting Cheng

Counsel for Amicus Curiae