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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* New York Civil Liberties Union<sup>1</sup>

Dear Ms. Davis:

The New York Civil Liberties Union submits this proposed *amicus curiae* letter-brief to provide the Court with additional background on the relevant statutory text, legislative history, and broader context regarding the passage of the Equal Rights Amendment (the “ERA”). *Amicus* takes no position on the ultimate merits of this appeal, but urges this Court to 1) reject an interpretation of the ERA that would render that statutory text meaningless, and 2) hold, on the key threshold issue squarely presented by this appeal, that the ERA instead did what its drafters and what the voters

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<sup>1</sup> **Disclosure Statements Pursuant to Rules of Practice 500.1 (f) and 500.23 (a)(1)(i):** The New York Civil Liberties Union hereby discloses that it is a non-profit 501[c][4] organization and is the New York State affiliate of the American Civil Liberties Union. 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 preparation or submission of this brief.

plainly intended: establish enforceable antidiscrimination protections stronger than those of the federal constitution.

On November 5, 2024, an overwhelming majority of New Yorkers voted to expand equal rights and protections against discrimination for certain enumerated categories of people by passing the ERA. The ERA amended Article 1, section 11 of the New York State Constitution (“Section 11”) to guarantee equality for all New Yorkers by adding additional suspect classifications to the list of characteristics demanding the highest level of protection against invidious governmental discrimination. The plain text of the newly amended Section 11, the will of the voters, and the intent of the ERA’s drafters are clear: Section 11 provides a legally enforceable cause of action to challenge state action that discriminates on the basis of newly-protected characteristics, and such alleged discrimination must now be subject to at minimum strict scrutiny in order to pass constitutional muster.

This appeal presents the first opportunity for the Court to consider a Section 11 claim since the passage of the ERA—and the threshold question of what effect the ERA had on such claims is both squarely presented and of the utmost importance to New Yorkers relying on its promised protections.<sup>2</sup> Throughout these proceedings, the State has taken the extraordinary position—adopted by the trial court in this case—that the ERA left Section 11’s protections against government discrimination unchanged from

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<sup>2</sup> See also Proposed Letter Brief of *Amicus Curiae* Legal Aid Society; Proposed Letter Brief of *Amici Curiae* If/When/How: Lawyering for Reproductive Justice et al.; Proposed Letter Brief of *Amicus Curiae* Marcy Syms Equality Initiative at NYU School of Law.

the 1938 text it amended and otherwise unenforceable to challenge any statute that targets a newly protected characteristic. That is wrong, and it presents a discrete initial question for this Court to resolve before deciding, in this case, how a post-ERA Section 11 judicial age discrimination claim should be interpreted in light of Article 6, section 25(b).

Perhaps to obscure the sweeping implications of its arguments, the State now urges the Court to decline to reach this threshold issue at all. But it relies on a single inapposite case,<sup>3</sup> and it ignores that a decision on this issue is particularly appropriate where it was the State’s own meritless arguments below that have created confusion and uncertainty for all New Yorkers relying on the ERA’s protections.

To provide much-needed clarity to those New Yorkers, and to lower courts considering state constitutional antidiscrimination claims at a time of federal upheaval, this Court should hold here that the newly amended Section 11 provides a legally enforceable cause of action for New Yorkers to seek redress for governmental discrimination on the basis of each enumerated classification. It should also hold that the standard of review applicable to all Section 11 protected characteristics must be

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<sup>3</sup> *Matter of Parents for Educ. & Religious Liberty in Schs. v Young* (44 NY3d 477, 485 [2025]), which the State relies on to argue that any decision regarding the enforceability or effect of the ERA would be “advisory” (letter brief for State respondent at 5), plainly weighs *against* the State’s position. There, the Court declined to address a specific issue that had become “moot” through legislative amendment—not at issue here—but otherwise held that it could and would squarely address “an ‘independently determinable and potentially decisive issue[ ] raised and litigated’” in that case (*Young*, 44 NY3d at 486 [quoting *Matter of Ford v New York State Racing & Wagering Bd.*, 24 NY3d 488, 493 [2014]]). The Court should do the same here.

interpreted as more protective than the federal Equal Protection Clause.

## I. INTEREST OF AMICUS CURIAE

*Amicus curiae* the New York Civil Liberties Union (“NYCLU”), the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with more than 112,000 members and supporters. The NYCLU advances civil rights and civil liberties so that all New Yorkers can live with dignity, liberty, justice, and equality. To that end, the NYCLU has been deeply involved in efforts to defend the ERA in New York courts (*see e.g. Williams v State of New York*, 239 NYS3d 435 [Sup Ct, Wayne County 2025] [NYCLU as *amicus* on same issues addressed in this brief]; *George v State of New York*, – NYS3d –, 2026 NY Slip Op 26056 [Sup Ct, Westchester County 2026] [same]), and has long litigated Section 11 claims that predate the ERA (*see e.g. Hernandez v Robles*, 7 NY3d 338 [2006] [NYCLU as *amicus* in case arguing for marriage equality under New York State Constitution]).

The NYCLU appeared as *amicus* before the Appellate Division (*Miller v State of New York*, 247 AD3d 502 [1st Dept 2026]) and the trial court (R.196.7–196.41) in this case, where the court directly addressed the NYCLU’s arguments (R.12–14). As *amicus*, the NYCLU participated in oral argument before both courts. The NYCLU also publicly advocated for the passage of the ERA to promote robust equality protections against discrimination by expanding the list of protected classes within Section 11. The NYCLU has 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.

## II. BACKGROUND

The relevant background regarding the passage of the ERA demonstrates the two key features that the drafters of the amendment intended to—and did—incorporate into the plain text of Section 11. First, they sought to add clear, enforceable antidiscrimination protections for certain enumerated categories of New Yorkers. Second, they sought to ensure the equality protections of the New York State Constitution go beyond the protections of the United States Constitution by offering a more robust set of enforceable rights to New Yorkers.

Prior to the passage of the ERA, Section 11, drafted and passed in 1938, stated in its entirety:

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.

(NY Const, art 1, § 11, *as adopted* Nov. 8, 1938, eff. Jan. 1, 1939). This Court read this language to be limited in two key respects. First, the Court found that the first sentence, the “Equal Protection Clause,” was coextensive with the federal Equal Protection Clause (*see Dorsey v Stuyvesant Town Corp.*, 299 NY 512, 530 [1949]; *see also Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344, 360 n 6 [1985] [reaffirming]; *People v Aviles*, 28 NY3d 497, 502 [2016] [same]). Practically, this meant that while the clause was “self-executing”—meaning claims brought alleging

discrimination by state actors were enforceable as a standalone cause of action without the need for additional implementing legislation or reference to any other pre-existing law—its protections did not reach beyond those of its federal analogue (*see Dorsey*, 299 NY at 530–32). Second, the Court concluded that the second sentence, the “Civil Rights Clause,” which encompassed both private and state actors, standing alone “was not self-executing and that it was implicit that it required legislative implementation to be effective” (*see id.* at 531).

This Court reached these conclusions by reading the 1938 version of Section 11 to effectuate the intent of its framers. In *Dorsey*—which upheld segregationist exclusions in housing developments at issue under then-existing law—this Court quoted the chairman of the Bill of Rights Committee of the 1938 Convention to explain that “the first sentence of section 11 ‘in effect embodies in our Constitution the provisions of the Federal Constitution which are already binding upon our State and its agencies’” (*Dorsey*, 299 NY at 530 [quoting 2 Rev Rec, 1938 NY Constitutional Convention at 1065]). Likewise, *Dorsey* repeatedly relied on the 1938 constitutional convention—at which Section 11 was first drafted—to limit the reach of the Civil Rights Clause as enacted in that year (*see Dorsey*, 299 NY at 530–31 [citing 2 Rev Rec, 1938 NY Constitutional Convention at 1144, to highlight the statement made at the convention by the chairman of the Bill of Rights Committee “to the effect that the [1938 Civil Rights Clause] was not self-executing . . . ”]; *id.* at 531 [citing 2 Rev Re, 1938 NY Constitutional Convention at 2626–27 to note that “[f]urthermore, it was stated at the

convention that the civil rights protected by the clause in question were those already denominated as such in the Constitution itself” or in statutes]; *People v Kern*, 75 NY2d 638, 651 [1990] [“The term ‘civil rights’ was understood by the delegates of the 1938 Constitutional Convention to mean ‘those rights which appertain to a person by virtue of his citizenship in a state or community’”] [quoting 4 Rev Rec, 1938 NY Constitutional Convention at 2626 (statement of Delegate H.E. Lewis)]; *see also Brown v State of New York*, 89 NY2d 172, 190 [1996] [citing *Dorsey* and the convention record to conclude the 1938 Civil Rights Clause was not self-executing]).

By contrast, the ERA was drafted and subsequently passed with the explicit purpose of decoupling an *amended* Section 11 from its federal analogue and expanding enforceable protections for New Yorkers. Following the United States Supreme Court’s ruling in *Dobbs v Jackson Women’s Health Org.* (597 US 215 [2022]), Governor Kathy Hochul called a special session of the legislature and “issued a proclamation adding equal rights to the extraordinary session agenda” 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” (*Governor Hochul Announces Historical Session of the New York State Legislature to Enshrine Equal Rights Into the New York State Constitution*, <https://www.governor.ny.gov/news/governor-hochul-announces-extraordinary-session-new-york-state-legislature-enshrine-equal> [July 1, 2022]).

The Legislature moved to adopt the ERA in direct response, amending Section

11 in several ways, all of them departures from the floor set by the federal constitution. It added explicit prohibitions 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 1, § 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), which described the effect of the “section” as a whole and stated it would 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]).

The purpose of the ERA was “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” (R.196.31 [Sponsor’s Mem., Senate Bill S108A, <https://www.nysenate.gov/legislation/bills/2023/S108/amendment/A>] [“Sponsor’s Memo”]). The ERA’s sponsors explained that the “amendment” would achieve this 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 memo explicitly stated that the ERA was intended to be immediately legally enforceable and self-executing to prohibit discrimination on the basis of any protected category as to “government actions taken

‘pursuant to law’ . . . including action by the executive or legislative branch, local governments, or any subdivision thereof’ (*id.*).

The ERA’s drafters also expressly referenced this Court’s prior precedent with respect to self-execution and affirmed their intent to establish an enforceable cause of action to challenge unlawful government action. The Sponsors’ Memo cited *Kern*, *Brown*, and *Dorsey* to note that, while courts had historically read the prior Civil Rights Clause to be non-self-executing in certain contexts, 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 category” (R.196.31 [Sponsor’s Memo] [emphasis added]).

Thus, as evinced by their contemporaneous statements, the intent of the ERA’s framers was to build upon, not be limited by, the protections previously afforded by Section 11 and the federal constitution. Specifically, the ERA expanded New York’s protections for these newly named suspect classes, and its drafters “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*, 247 AD3d 502, 504 [1st Dept 2026]).

### **III. ARGUMENT**

#### **A. The ERA Amended Section 11, as a Whole, to Provide a Legally Enforceable Cause of Action Challenging Discrimination Based on Enumerated Protected Categories.**

After the passage of the ERA, every clause and subsection of the newly amended Section 11 must be read together to provide a legally enforceable cause of action to challenge state action—including any state law—that discriminates on the basis of newly-protected characteristics, and to subject that alleged discrimination to a higher level of scrutiny than the federal constitution would otherwise require. This interpretation is consistent with a plain reading of the text of Section 11 as amended, the intent of the New York State Legislature, and this Court’s longstanding precedent. Concluding otherwise would render the ERA a nullity, conflict with the plain language of Section 11, and make meaningless New Yorkers’ historic vote to pass a law that would “protect against unequal treatment” (R.196.38 [NY State Board of Elections Amended Certification [Aug 27, 2024]<sup>4</sup> [“Ballot Language”]). This Court should effectuate the plain meaning of the amended text of Section 11, the clear will of the voters, and the intent of the ERA’s drafters.

*i. A Plain Reading of Section 11, as a Whole, Provides a Cause of Action to Challenge Discrimination by a State Actor Based on Enumerated Protected Categories.*

In this appeal, the State broadly argues that a plaintiff “cannot assert a standalone constitutional challenge under the ERA” (First Dept brief for State respondent at 2) because “it did not alter the language that the Court of Appeals previously found

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<sup>4</sup> Also available at [https://elections.ny.gov/system/files/documents/2024/08/amended-proposal-one-certification-2024\\_1.pdf](https://elections.ny.gov/system/files/documents/2024/08/amended-proposal-one-certification-2024_1.pdf).

indicated an intent of non-self-execution” in the Civil Rights Clause (*id.* at 24; *see also* letter brief for State respondent at 4 n 4 [asserting the ERA “did not alter” the analysis for allegations of discrimination by a state actor for newly-protected characteristics]). These assertions are both inaccurate and inconsistent with the authorities on which they rely. The amended text of Section 11 *as a whole* now establishes a straightforward, self-executing prohibition: state actors “shall” not discriminate “pursuant to law” based on any listed characteristic that Section 11 now singles out for “civil rights” protections.

When interpreting a newly amended constitutional provision, “[t]he most compelling criterion in the interpretation of an instrument is, of course, the language itself” (*People v Carroll*, 3 NY2d 686, 689 [1958]; *see also People v Pabon*, 28 NY3d 147, 152 [2016] [“It is well established that since the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.”] [quotations and citations omitted]). And, when interpreting this language, the entirety of the provision should be considered (*see McKinney’s Cons. Laws of N.Y., Statutes* § 97 [commanding that “[a]statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent”]). Here, the *full* amended language of Section 11 states:

*a.* 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, ethnicity, national origin, age, disability, creed, religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be

subjected to any discrimination in their 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, *pursuant to law*.

*b. Nothing in this section shall 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, nor shall any characteristic listed in this section be interpreted to interfere with, limit, or deny the civil rights of any person based upon any other characteristic identified in this section.*

(NY Const, art. I, § 11 [amended language emphasized]).

First, the ERA's addition of an entirely new subsection [b] to Section 11 supports a plain language reading of subsection (a) *as a whole* to confer newly enforceable rights against governmental discrimination. Subsection 11(b) refers to the impact of "this section," as amended and in its entirety, protecting the civil rights of New Yorkers, and it does not in any way differentiate between the Equal Protection Clause (the first sentence of Section 11[a]) and the Civil Rights Clause (the second of Section 11[a]). That the Legislature needed to clarify "[n]othing in this section shall invalidate or prevent the adoption of" remedial laws designed to "dismantle" discrimination presumes that the ERA *can* be used to strike down laws and practices that do *not* dismantle discrimination. If Section 11(a) did not establish additional enforceable rights that did not exist prior to its enactment, Section 11(b) would be unnecessary or would refer only to the Equal Protection Clause, neither of which can be squared with its wording.

Next, the use of mandatory language “shall” coupled with the newly inserted “pursuant to law” language clarifies that the ERA conferred enforceable rights against public discrimination. This Court has interpreted “shall” to be a word of command that must be construed to require mandatory compliance (*see Matter of Brusco v Braun*, 84 NY2d 674, 680 [1994] [concluding that the term “shall” in a statute “commands an action”]). Thus, to give the required effect to the word “shall” in the language of “[n]o person shall be denied the equal protection of the laws” or “be subjected to any discrimination in their civil rights . . . pursuant to law,” the language must be enforceable. And when the government targets one of these newly-enumerated characteristics through state action—“pursuant to law,” as the ERA now specifies—New Yorkers must have a cause of action to challenge such prohibited discrimination in court.

This reading is also consistent with the fact that this Court “now presume[s] that constitutional provisions are self-executing” (*Carroll*, 3 NY2d at 691 [contrasting with “presumption” from decades earlier that “provisions in a Constitution were merely general directions” and not self-executing]). In “[c]onsidering, principally, the language of the section, and conjunctively the history of the provision and the presumption” of self-execution (*id.* at 692), this Court should hold that Section 11 provides a legally enforceable cause of action to challenge governmental discrimination following the ERA’s passage.

The State argues that that the ERA is not self-executing with respect to the newly enumerated protected characteristics because the amendment only altered language in the Civil Rights Clause, but not the Equal Protection Clause (First Dept brief for State respondent at 24; letter brief for State respondent at 4 n 4). This argument fails because it ignores both the addition of subsection (b) (as explained *supra* at 12–13) and the relevance of the precise placement of the newly enumerated categories of protected classes. Prior to the passage of the ERA, the enumerated protected characteristics in the Civil Rights Clause mirrored those deemed suspect classes under the Equal Protection Clause (*see Hernandez v Robles*, 7 NY3d 338, 374–75 [2006, Graffeo, J. concurring] [discussing suspect classes under state and federal constitution]; *see also Saltarelli v State of New York*, – NYS3d –, 2026 NY Slip Op 26005, \*4 [Sup Ct, Madison County 2026] [“[S]ince its inception, Article 1, § 11 has defined ‘suspect class’ in terms of those groups enumerated in the second sentence of the provision.”] [quoting *Williams v State of New York*, 239 NYS3d 435, 442 [Sup Ct, Wayne County 2025]]). The ERA therefore inserted these newly protected classes into the second sentence of Section 11, where suspect classes were already specifically enumerated. The plain language of the newly enacted Section 11 itself relies on the interplay between these clauses, builds upon it, and requires a conclusion that the ERA amended the entirety of Section 11 to expand affirmative and enforceable rights to New Yorkers.

For all these reasons, the State’s assertion that the ERA does not include “a standalone cause of action to challenge the constitutionality of a state law” (First Dept

brief for State respondent at 24) cannot be squared with the ERA's changes to the text of Section 11, and this Court should reject it.

*ii. Regardless, the Equal Protection Clause Prohibits Discrimination on the Basis of Each Newly Enumerated Suspect Class.*

Even if this Court applies its pre-ERA case law to find the post-ERA Civil Rights Clause is not “self-executing”—which for all the reasons above it should not—it would still be the case that the ERA prohibits state actors from discriminating on the basis of each newly enumerated protected category. This is because, even under pre-ERA case law, the Civil Rights Clause was read to prohibit discrimination on the basis of a protected category in any “civil right” elsewhere articulated in the constitution. The Equal Protection Clause is itself one of those civil rights.

As this Court held in *Kern*, the Civil Rights Clause has always “prohibit[ed] discrimination[.]” as to “civil rights which are elsewhere declared by Constitution” (*Kern*, 75 NY2d at 651 [internal quotations omitted]). And the Equal Protection Clause undisputedly establishes an equal protection right—that is, a civil right to equal protection under the law, a cause of action against state actors, and a “right[.] which appertain[s] to a person by virtue of his citizenship in a state or community” (*id.* at 650–51 [cleaned up]). This right to equal protection is thus a civil right expressly declared by the constitution, and the Civil Rights Clause prohibits discrimination on the basis of any protected category in the provision of that civil right—which in the past included “race” and “religion” (*see id.*; *see also Dorsey*, 299 NY at 531 [confirming Civil Rights

Clause protects “against discrimination in civil rights” including those that are “already denominated as such in the Constitution”] [cleaned up]) and now, after the passage of the ERA, also includes “sex,” “disability,” and “age.” The Equal Protection Clause establishes a general right to equal protection of the laws, and the Civil Rights Clause gives specificity to the protected characteristics pursuant to which equal protection—*and all other civil rights*—must apply.

Prior to the passage of the ERA, it was unnecessary for courts to examine this textual interplay between the Equal Protection Clause and the Civil Rights Clause because the Civil Rights Clause did not previously contain any enumerated protected categories that did not already receive strict scrutiny under the federal Equal Protection Clause. But now that the Civil Rights Clause extends equality and antidiscrimination protections to classes of people beyond those that receive strict scrutiny under federal equal protection jurisprudence, the fact that the Equal Protection Clause establishes a civil right is legally significant for the first time.

Only one court has erroneously held that equal protection cannot be a civil right under the Civil Rights Clause: the trial court in this appeal. It incorrectly determined that this straightforward reading of the ERA would render the language shielding New Yorkers from “any discrimination in their civil rights” as “superfluous and unnecessary” (R.13–14). But the opposite is true. To require that New Yorkers point to a civil right elsewhere defined *separate from the right to equal protection* would render the ERA itself “superfluous”—because it would provide no more protection against

governmental discrimination than already existed prior to its passage. Thus, adopting the trial court’s analysis, as urged by the State (*see* letter brief for State respondent at 4 n 4), would leave many different groups of New Yorkers vulnerable to official discrimination and would improperly reduce the “Civil Rights Clause to a mere redundancy” (*Kern*, 75 NY2d at 651).

For all these additional reasons, under this reading—and under any reading consistent with this Court’s precedent—post-ERA, Section 11 first establishes that New Yorkers have a right to equal protection under law and then establishes that no entity may abridge that right based on an enumerated protected characteristic under the Civil Rights Clause. Any contrary reading of the ERA cannot be squared with this straightforward application of the plain text of Section 11, and it must fail.<sup>5</sup>

*iii. The ERA’s Legislative History and Historic Context Confirm That Section 11 is Immediately Legally Enforceable.*

If there were any ambiguity in the meaning of the plain text of the ERA—and, as discussed in the previous sections, there is not—the legislative history and historic context in which the ERA passed would resolve it (*see Hoffman v New York State Ind Redistricting Commn*, 41 NY3d 341, 351–52 [2023] [relying on legislative memoranda

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<sup>5</sup> As discussed in Parts A(i)-(ii) of this brief, holding that the ERA established enforceable protections for newly-enumerated classes is both required by the text of the provision and wholly consistent with any reasonable interpretation of this Court’s existing precedent. There is therefore no cause to overrule or otherwise reconsider *Dorsey*, *Kern*, or *Brown*. Regardless, if the Court finds that any aspect of those decisions creates ambiguity in interpreting the modern, amended text of Section 11, the Court may of course overrule it. (*See Flanders v Goodfellow*, 44 NY3d 57, 68 [2025] [noting the appropriateness of overruling precedent that “no longer serves the ends of justice” or “creates more questions than it resolves”] [internal quotation marks omitted].)

to determine the purpose of a state constitutional amendment]; *see also Dorsey*, 299 NY at 531 [relying on extensive analysis of legislative records and drafters' contemporaneous statements to determine effect of Civil Rights Clause]). These all demonstrate the ERA must be construed to effectuate the drafters' and voters' clear intent to add enforceable protections to Section 11 and provide a cause of action for challenging government discrimination.

The legislative history is summarized above, and it is absolutely unequivocal (*see supra* at 7–9). Of particular note, the Sponsor's Memo is directly on point: "The purpose of this amendment is to ensure that our State Constitution extends to all New Yorkers, particularly those who have faced severe and pervasive injustice, the right to be free from discrimination." (R.196.31 [Sponsor's Memo]). It further explains that "[the ERA] does so by expanding the list of classes affirmatively protected by the New York Constitution in recognition of the need for comprehensive, enforceable, and intersectional equality under the law" (*id.*). The memo repeatedly refers to the "section"—Section 11—as a whole, reinforcing the interplay of the Equal Protection and Civil Rights Clauses and confirming Section 11's expanded list of suspect classes increases the strength of "enforceable" rights and "affirmative" protections (*see id.*).

On the question of self-execution, the Sponsor's Memo also specifically discusses *Kern*, *Dorsey*, and *Brown* and states that "even in the absence of specific executing legislation," Section 11 as amended by the ERA "operates to prohibit the application of laws and governmental action that discriminate on the basis of an

enumerated protected category” (*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]), and here the drafters’ explicit discussion of that decisional law demonstrates exactly how they intended their amendments to interact with it. Specifically, in light of those cases: “by clarifying that the amended section applies to all governmental actions taken ‘pursuant to law,’ *this amendment is intended to apply to any action with force of law*, including action by the executive or legislative branch, local governments, or any subdivision thereof.” (R.196.31 [Sponsor’s Memo] [emphasis added]). This unambiguous language makes clear that Section 11 was intended to be immediately legally enforceable to prohibit discrimination on the basis of any protected category, at the very least as to “governmental action” (*id.* [providing as an example any “action by the executive or legislative branch, local governments, or any subdivision thereof”]). The court in *Saltarelli v State of New York* found the legislative history to be instructive on this exact point, highlighting how “[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 . . . enumerated protected categories” (– NYS3d –, 2026 NY Slip Op 26005, \*5 n 10 [Sup Ct, Madison County 2026]).

The broader context in which the ERA was passed also demonstrates that Section 11 was intended to be immediately legally enforceable and precludes the State’s proposed interpretation. In particular, the ballot language that went to New York voters at the polls in November 2024 specifically stated:

This proposal would *protect against unequal treatment* based on ethnicity, national origin, age, disability, and sex, including sexual orientation, gender identity and pregnancy. It also *protects against unequal treatment* based on reproductive healthcare and autonomy.

A “YES” vote *puts these protections in* the New York State Constitution.

A “NO” vote leaves these protections out of the State Constitution.

(R.196.38 [Ballot Language] [emphasis added]). The ballot language explicitly states that the ERA will “protect against unequal treatment” on the basis of these newly enumerated categories. New Yorkers thus voted for the ERA on the promise that it would create actual enforceable protections against inequality (*see id.*).

Indeed, the New York Attorney General publicly confirmed that in her view the ERA would affirmatively “[p]rotect[] against unequal treatment by New York and local governments”—which on its face would require the ERA to include enforceable protections and a cause of action to sue the State (*see* R.196.41 [Attorney General Proposed Ballot Language]). An unenforceable nullity would not “protect” anyone from unequal treatment “by New York and local governments,” nor would it “protect” abortion. Attorney General Letitia James’s statements were frequent and consistent on this issue (*see Kimmel v State of New York*, 29 NY3d 386, 400 [2017] [looking to

statements of then-governor Mario Cuomo in signing the bill in question to support legislative history and interpretation of the text]). For example, she released the following press release after the Fourth Department issued a ruling putting the ERA back on the ballot in November 2024 after a lower court had ordered it removed:

Today’s decision to put the Equal Rights Amendment back on the ballot in November is a huge victory in our efforts to protect our basic rights and freedoms. The ERA was advanced to protect access to abortion care, enshrine this basic right in our constitution, and protect people from discrimination. We will continue to do everything in our power to protect these rights and ensure everyone can live safely and freely in the great State of New York.

(Press Release, *New York Attorney General Releases Statement on Equal Rights Amendment*, <https://ag.ny.gov/press-release/2024/new-york-attorney-general-james-releases-statement-equal-rights-amendment> [June 18, 2024]). The Attorney General made other similar statements throughout the ERA Campaign (*see* Eric Harvey, *Attorney General James, Electeds, Rally in Peekskill to Say Yes to Proposition 1*, *Peekskill Herald*, Nov. 5, 2024;<sup>6</sup> Kevin Yu, *Advocacy Group Urges NY Residents to Vote ‘Yes’ for Equal Rights*, *WSHU*, Oct. 7, 2024<sup>7</sup>). These public promises, which informed voters’ understanding of the ERA’s meaning and effect, simply cannot be squared with interpreting the ERA as a nullity coterminous with the 1930s-era protections provided by the prior version of Section 11.

Indeed, on the specific issue of abortion, it is notable that the trial court decision

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<sup>6</sup> Available at <https://peekskillherald.com/19907/news/attorney-general-james-electeds-rally-in-peekskill-to-say-yes-t/> [last accessed May 13, 2026].

<sup>7</sup> Available at <https://www.wshu.org/long-island-news/2024-10-07/ny-residents-vote-equal-rights-amendment> [last accessed May 13, 2026].

below, adopting the State’s arguments, appears to suggest that New Yorkers seeking to challenge a future state statute prohibiting abortion—one of the core scenarios the ERA’s drafters and supporters pointed to in the post-*Dobbs* days leading up to its initial passage<sup>8</sup>—would not be able to do so under the ERA, since it found the ERA does not “create causes of action” to challenge an allegedly discriminatory statute (R.12). Such a result would be wholly inconsistent with what the ERA’s drafters intended and what New York’s voters overwhelmingly supported.

In sum, Section 11 must be interpreted to give effect to the law’s plain language, the clear legislative intent, and the wider context surrounding the passage of the ERA. This Court should hold that Section 11 was intended to be immediately enforceable.

**B. The New York ERA Heightened the Standard of Review for All Section 11 Protected Categories.**

The ERA amended the plain language of Section 11 specifically to disentangle New York’s equal protection jurisprudence from its federal analogue. The legislative history confirms that the drafters and voters envisioned a standard of judicial review that is distinct from and goes above and beyond what the federal constitution currently requires. Accordingly, the ERA makes discrimination on the basis of each protected category “suspect” and subject to heightened levels of judicial scrutiny, meaning that each challenged restriction must undergo careful judicial analysis to determine whether

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<sup>8</sup> See e.g. Shannon Young, *New York’s Abortion Amendment Clears its First Major Hurdle*, Politico (July 1, 2022) (quoting Governor Kathy Hochul stating the ERA would “protect reproductive health in the state of New York for generations to come”), <https://www.politico.com/news/2022/07/01/new-york-abortion-amendment-00043736> [last accessed May 13, 2026].

that restriction is constitutionally permissible.

The text of Section 11—which now specifically describes an effect that differs from the federal Equal Protection Clause (*see* NY Const, art I, § 11[b])<sup>9</sup>—lists each of its enumerated protected categories alongside one another and does not distinguish between them. Under Section 11’s plain language as amended by the ERA, “no person shall be denied the equal protection of the laws” and “[n]o person shall, because of race, color, ethnicity, national origin, age, disability, creed, religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be subjected to discrimination in their civil rights . . . .” (NY Const, art 1, § 11[a]). Each enumerated classification must therefore receive the same level of constitutional scrutiny. There is no way to read Section 11’s equality protections as written—in an undifferentiated list—to classify only some enumerated categories as suspect classes, and they certainly cannot be read to suggest that each newly-enumerated category should somehow be evaluated exactly as it was *prior* to being expressly protected, as the State argues (*see* letter brief for State respondent at 4 n 4). That the ERA added to a list of pre-existing protected categories

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<sup>9</sup> Section 11(b) prohibits courts from using the “section” to “invalidate” any “law, regulation, program or practice that is designed to prevent or dismantle discrimination on the basis of” a protected characteristic (NY Const, art 1, § 11[b]; *see also* Sponsor’s Memo [noting “the amendment guarantees the validity of efforts to prevent or dismantle structural forms of inequality or discrimination against protected classes”]). This language is a pointed and explicit departure from current federal equal protection jurisprudence, which places limitations on laws or practices that aim to serve a remedial purpose in certain contexts (*see e.g. Students for Fair Admissions v Harvard*, 600 US 181, 213–25 [2023] [finding that race-conscious university admissions policies violated equal protection in that case]).

that all received strict scrutiny review further illustrates that it was meant to raise the constitutional floor for all enumerated categories.

The Sponsor’s Memo is clear on this exact point. It states that the ERA was intended to create legal protections that are broader than those in the federal Constitution, including through the introduction of additional suspect classes entitled to stronger protection from discrimination:

Our modern vision of equality demands comprehensive equal protection. Indeed, many individuals are themselves members of numerous communities, identities, and protected classes, and true equality and justice demand protections that recognize the interconnected nature of discrimination. This amendment is our opportunity to ensure that New York’s Constitutional language reflects that commitment to full equality and justice before the law—*by providing legal protections that go above and beyond the protections of the Federal Constitution.*

(R.196.30–196.31[Sponsor’s Memo] [emphasis added]).

Several trial courts have directly considered the level of scrutiny afforded to Section 11’s enumerated classes post-ERA, and the majority have reached the same conclusion: at minimum strict scrutiny applies. In *Saltarelli v State of New York*, the court declared that the mandatory judicial retirement age in Judiciary Law § 23 was unconstitutional under the ERA as applied to City Court Judges outside New York City (– NYS3d –, 2026 NY Slip Op 26005, \*7 [Sup Ct, Madison County 2026]). It determined “that ‘age’ is a suspect class under the equal protection clause of the ERA” and “that a strict scrutiny standard of review is warranted” because, in part, “one of the direct purposes of the ERA was to expand the list of suspect classes, including that of ‘age’” (*id.* at \*5–6).

In *Williams v State of New York*, the trial court similarly rejected the State’s arguments “that the Equal Rights Amendment does not elevate age to a ‘suspect class’ because its inclusion of age and other classes in the amendment did not alter the first sentence of §11” (239 NYS3d 435, 442 [Sup Ct, Wayne County 2025]). The court reasoned that “since its inception, Article 1, §11 has defined ‘suspect class’ in terms of those groups enumerated in the second sentence of the provision” (*id*). Therefore, the court held that “it would appear that one of the direct purposes of the Equal Rights Amendment was to designate age as a suspect class” (*id*).<sup>10</sup>

These courts rightly recognized that any differential treatment by a state actor on the basis of a protected category enumerated in Section 11 must, at minimum, meet the requirements of strict scrutiny. This Court has held that “[w]here governmental action disadvantages a suspect class . . . the conduct must be subjected to ‘strict scrutiny,’ and will be upheld only if the government can establish a compelling justification for the

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<sup>10</sup> The State, in justifying its countertextual interpretation of the ERA’s protections, suggests that applying heightened scrutiny to age discrimination claims would result in a “drastic” and unworkable set of challenges to age-based classifications (First Dept brief for State respondent at 26–28). But performing a familiar constitutional analysis that considers and weighs legitimate governmental interests related to age would not create a blanket ban on all age-based restrictions in law or result in any parade of horrible outcomes. Any age-based restriction that could survive the appropriate level of scrutiny would remain in place. Federal, state, and local laws have long prohibited many forms of age discrimination, and courts have been tasked with differentiating between invidious age discrimination and permissible age-based classifications for many years (*see e.g.* 29 USC § 623 [Age Discrimination in Employment Act]; Executive Law § 296 [New York State Human Rights Law]; Administrative Code of City of NY § 8-107 [New York City Human Rights Law]). The ERA merely enshrines similar protections against age discrimination in the constitution itself.

action” (*People v Aviles*, 28 NY3d 497, 502 [2016]). The ERA plainly added newly enumerated suspect classes to Section 11.

Courts across the country that have interpreted their state Equal Rights Amendments—most of which are not nearly as expansive as New York’s—have similarly concluded that “at minimum” strict scrutiny applies to newly enumerated protected categories, or they have held that a standard even more protective than strict scrutiny applies (*see e.g. Southwest Wash. Ch., Natl. Elec. Contractors Assn. v Pierce County*, 100 Wash 2d 109, 127 [Wash 1983] [holding that Washington’s “ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional ‘strict scrutiny’”]; *Silver State Hope Fund v State of Nevada*, No. A-23-876702-W, 2024 WL 5716730 at \*6 [Nev Dist Ct, Clark County, Aug. 8, 2024] [holding that under Nevada’s ERA, “at a minimum, strict scrutiny applies to state action that classifies or discriminates on the basis of” a newly enumerated protected category]; *Allegheny Reproductive Health Ctr. v Pennsylvania Dept. of Human Services*, 309 A3d 808, 891 [Pa 2024] [holding that under Pennsylvania’s ERA, “a sex-based distinction is presumptively unconstitutional”]).

For all these reasons, any contention that Section 11 provides no protections beyond what existed before the ERA passed has no basis in the provision’s text or history, and adopting such an interpretation would be an affront to the people of New York who voted by an overwhelming majority to pass the ERA to prohibit and

dismantle discrimination in New York State. Laws that discriminate based on any newly enumerated category must survive at least strict scrutiny.

#### IV. CONCLUSION

For the reasons articulated above, *amicus curiae* respectfully requests that this Court find that 1) the amended Section 11, as a whole, provides a standalone cause of action to challenge allegations of discrimination by state actors, like those raised here, and is self-executing, and 2) the standard of review applicable to all allegations of discrimination on the basis of a protected characteristic enumerated in Section 11 must be interpreted as more protective than the federal Equal Protection Clause, and more specifically that, at minimum, strict scrutiny applies.

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 and exclusive of the disclosure statement required by 22 NYCRR 500.1(f) is 6,980.

Dated: May 13, 2026  
New York, NY

Respectfully submitted,

*s/Jessica Perry*  
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COURT OF APPEALS  
STATE OF NEW YORK

ROBERT J. MILLER, RICHARD J.  
MONTELIONE, ORLANDO  
MARRAZZO

Petitioners-Plaintiffs-Appellants,

-against-

THE STATE OF NEW YORK and NEW  
YORK STATE OFFICE OF COURT  
ADMINISTRATION,

Defendants-Respondents

Court of Appeals Docket  
No. APL-2026-00033

Appellate Division  
Docket No:  
2025-07659

**AFFIRMATION OF SERVICE**

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss:

I, **Jessica Perry**, affirm this 13th day of May, 2026, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

1. I am not a party to the above-captioned action, am 18 years of age or older, and am an employee of the New York Civil Liberties Union.
2. All parties to this action have consented to electronic service.
3. I served one (1) true and correct copy of the Letter Request to File Brief of *Amicus Curiae* New York Civil Liberties Union and Participate in Oral Argument and the Proposed Letter Brief of *Amicus Curiae* New York Civil Liberties Union, attached as Exhibit A, via electronic mail on all parties at the following electronic mail addresses:


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