



NEW YORK
CITY BAR

**REPORT ON LEGISLATION BY THE SEX AND LAW COMMITTEE,
CIVIL RIGHTS COMMITTEE,
LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER RIGHTS COMMITTEE,
MENTAL HEALTH LAW COMMITTEE, AND
WOMEN IN LEGAL PROFESSION COMMITTEE**

**A.1283
S.108-A**

**M. of A. Seawright
Sen. Krueger**

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

New York Equality Amendment

THIS BILL IS APPROVED

The New York City Bar Association, by and through its Sex and Law, Civil Rights, LGBTQ Rights, Mental Health Law and Women in the Legal Profession Committees, urges passage of the proposed New York Equality Amendment, A.1283 (AM Seawright) / S.108-A (Sen. Krueger) (“New York EA” or the “Amendment”), in order to afford constitutionally protected rights to New Yorkers regardless of sex.¹ The New York EA significantly advances equality for *all* New Yorkers by protecting the diverse subgroups that make up the people of New York State. Specifically, the Amendment makes clear that equal rights may not be denied on account of race, color, ethnicity, national origin, disability, and sex, including pregnancy and pregnancy outcomes, sexual orientation, gender identity, and gender expression.²

It is essential that the New York EA is passed with language that ensures that equal protection extends to “pregnancy” and “pregnancy outcomes.” “Pregnancy outcomes” is a

¹ The City Bar supported first passage of this Constitutional amendment as A.41002 / S.51002 (NYS 2022), *see* Statement on First Passage of New York's Equality Amendment, July 1, 2022, <https://www.nycbar.org/media-listing/media/detail/ny-equal-rights-amendment-era>. (All websites last visited Jan. 24, 2023.)

² The purpose of this report is to focus on the importance of the Amendment’s coverage of pregnancy and pregnancy outcomes, the inclusion of which has become extremely relevant and important given the Supreme Court’s decision to overturn *Roe v. Wade*. The City Bar may provide a supplement to this memo in order to address the many other beneficial aspects of the Amendment.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

common term used to refer to the final result of human fertilization, including live birth (full term or preterm birth), stillbirth, miscarriage, birth to babies that do not survive past the neonatal period, and induced abortion. Pregnancy outcomes most directly impact the lives and wellbeing of the pregnant individual. Inclusion of this language ensures critical protections for, among others, pregnant individuals, individuals seeking abortion access, and those suffering complications resulting from pregnancy. While capacity for pregnancy has historically been used as a basis to classify and discriminate against women, the experience of discrimination on the basis of pregnancy cuts across a range of marginalized gender identities, including cis-gender women, trans men, and non-binary or other gender non-conforming people.

Under current Supreme Court precedent, equal protection under the Fourteenth Amendment of the US Constitution does not extend to pregnancy and pregnancy outcomes. In fact, in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court ruled that unfavorable treatment of pregnant women did not amount to sex discrimination for purposes of equal protection pursuant to the Fourteenth Amendment. In response to the inequitable outcome in *Geduldig*, Congress passed the Pregnancy Discrimination Act of 1978, codifying pregnancy discrimination as sex discrimination under federal law. Although it is true that sex discrimination is often, and correctly, interpreted to include pregnancy discrimination based on statutory protections, pregnant individuals nevertheless still lack the fundamental guarantee of more robust constitutional protections afforded by the Fourteenth Amendment.

At present, the New York Constitution offers no better protection to pregnant individuals. Because the New York Constitution is read as coextensive with the US Constitution, it too fails to provide explicit—and therefore constitutional—protections against pregnancy and pregnancy outcome discrimination. Of course, New York is not without statutory protections for pregnant individuals and our state has continued to serve as a leader in protecting against pregnancy and pregnancy outcome discrimination. Indeed, we applaud the Legislature’s passage of the 2019 Reproductive Health Act, which codifies protections for abortion rights and removes antiquated criminal statutes that threatened abortion providers and people who seek abortions alike.³

However, statutory protection is not enough. The rampant hostility toward reproductive freedom witnessed across the country, the overturning of *Roe v. Wade*, 410 U.S. 113 (1973), and the ongoing wave of restrictive actions taken by other state legislatures, pose grave risks to pregnancy and pregnancy outcome protections. We cannot sit idly by, relying on potentially vulnerable statutory provisions to protect our citizens against pregnancy and pregnancy outcome discrimination. There is an urgent need for robust, enduring New York constitutional protections for pregnancy and pregnancy outcomes. This is the moment for New York to reflect in its Constitution that people’s reproductive capacity and decision-making bears on their equal participation in society and therefore must be explicitly protected from discrimination.

³ The City Bar supported passage of the Reproductive Health Act; see Updated Report in Support of the Reproductive Health Act, Jan. 11, 2019, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/updated-report-in-support-of-the-reproductive-health-act>.

REASONS FOR SUPPORT

There are numerous reasons why it is essential that the New York EA be passed and include both pregnancy and pregnancy outcome.

First, the failure to protect individuals based on pregnancy outcomes directly means that pregnant people are always vulnerable to discrimination, which consequently limits the opportunities to succeed for people with the capacity to become pregnant. As an example, when an employer does not provide leave or accommodation for a person who has experienced an adverse pregnancy outcome, this person's ability to recover is impacted, potentially limiting their workplace performance and ability to make career advancements. Similarly, if an employer refuses to employ a person who they are aware may choose to terminate a pregnancy at some point, this judgement is a discriminatory practice which demands protection. By protecting "pregnancy and pregnancy related outcomes" we can undo the historic underpinning of sex discrimination that continues to falsely assume that actual or possible pregnancy is a basis from excluding people from public life. Without explicit constitutional protection against discrimination for pregnancy or pregnancy outcomes, New Yorkers continue to remain vulnerable to discrimination on the basis of sex in the workplace.

Second, discrimination based on pregnancy and the ability to become pregnant has been used as a way to control individuals capable of becoming pregnant and their bodies. Such discrimination essentially institutionalizes an invasion of the right to privacy that *Roe* was meant to protect. Even when women had the constitutional right to abortion under *Roe*, "state and local antiquated criminal abortion laws, fatally ambiguous 'unborn victims of violence,' and other criminal laws susceptible to misuse" led to the criminal prosecution of pregnant people for terminating their pregnancies, whether purposefully, as the result of medical necessity, or even inadvertently.⁴ For example, throughout the United States, there are more than a thousand documented arrests and prosecutions of pregnant women who have experienced adverse pregnancy outcomes (such as miscarriages, stillbirths, and neonatal death) or of women who have ended their own pregnancies. Prosecutors continue to criminally prosecute women who experience miscarriage, stillbirth and/or infant death, attributing these experiences entirely to actions or inactions that occurred during the woman's pregnancy.⁵

New York is not exempt from this national trend. For example, after Long Island resident Jennifer Jorgenson underwent an emergency premature cesarean delivery due to extensive injuries she sustained in a car accident, she faced a prison sentence of three to nine years for manslaughter after the death of her six-day old child. While ultimately her conviction was overturned by the Court of Appeals, which recognized that the prosecutor was impermissibly applying the homicide

⁴ Farah Diaz-Tello, Melissa Mikesell & Jill Adams, *If/When/How: Lawyering for Reproductive Justice* (formerly SIA Legal Team) *Roe's Unfinished Promise: Decriminalizing Abortion Once and for All* (2018), <https://dx.doi.org/10.2139/ssrn.3082643>.

⁵ Lynn M. Paltrow and Jeanne Flavin, Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health, *J Health Polit Policy Law* (2013) 38 (2): 323–343, <https://read.dukeupress.edu/jhpl/article/38/2/299/13533/Arrests-of-and-Forced-Interventions-on-Pregnant>.

statute in a way that the Legislature had never intended, the state has no outright prohibition against such discriminatory prosecutions.⁶ Moreover, such prosecutions dangerously exacerbate other forms of discrimination and inequity. Black, Indigenous, and other people of color, who are most likely to experience adverse pregnancy outcomes, are also those more likely to experience surveillance and punishment by the state.

Major public health and medical organizations in the country have protested the criminalization of pregnant women and urged lawmakers and law enforcement to reframe these issues as matters of public health rather than crimes. Organizations including, but not limited to, the American Medical Association and the American College of Obstetricians and Gynecologists have adopted policies opposing the prosecution and punishment of pregnant women, recognizing that the “fundamental principle against compelled medical procedures should control.”⁷ Indeed, “every leading medical and public health organization to address the issue of pregnant women and drug use has taken a position opposing punitive approaches as dangerous to maternal, fetal and child health.”⁸ This also includes the American Bar Association, which adopted a resolution against criminalization of people for self-managed abortion or for any pregnancy outcome.⁹ These expert groups and associations warn that civil and criminal consequences deter women from seeking the health care they need to live safe and healthy lives, including prenatal care, treatment for substance use disorders, and emergency treatment for a spontaneous miscarriage.

Finally, including pregnancy outcomes as a protected category in the Amendment will prevent New York State from intervening in health care decisions of pregnant people in ways that would interfere with medical decision making. For example, after New Yorker Rinat Dray was forced to have a cesarean surgery over her objection, she sued her doctors and hospital for negligence and civil rights violations. In its defense, the hospital claimed that its actions, which were carried out pursuant to an undisclosed internal policy, were legal because it was enforcing the state’s interest in the protection of potential life. In 2018, The New York Supreme Court’s Appellate Division held that New York’s Patient Bill of Rights, which is given to every patient who is admitted to a hospital in the state, does not provide a private right of action for people who experience treatment that directly violate the rights described.¹⁰ Ms. Dray’s case will be heard before the Appellate Division again in 2022, this time to determine whether she has claims under New York civil and human rights protections. While important action has been taken since this ruling, including that the New York City Commission on Human Rights subsequently recognized

⁶ People v. Jorgensen, 26 N.Y 3d 85 (2015).

⁷ The American College of Obstetricians and Gynecologists, Statement of Policy: Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period (December 2020), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period>.

⁸ National Advocates for Pregnant Women, Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women (June 1, 2021), https://www.nationaladvocatesforpregnantwomen.org/medical_and_public_health_group_statements_opposing_prosecution_and_punishment_of_pregnant_women_revised_june_2021/.

⁹ American Bar Association, Resolution (Feb. 22, 2021), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/107a-midyear-2021.pdf>.

¹⁰ Rinat Dray v. Staten Island University Hospital et al., No. 500510/14 (2d Dep’t 2018).

that policies to override pregnant patients’ decisions are impermissible discrimination, Ms. Dray’s experience underscores the need for explicit constitutional protection for discrimination on the basis of pregnancy and pregnancy outcomes.

CONCLUSION

It is a critical moment in U.S. history to formally enshrine fundamental protections against discrimination based on pregnancy and pregnancy outcomes. With the Equality Amendment, our state has the historic opportunity to live up to its role as a leader and amend our Constitution so that New Yorkers do not lose their rights on the basis of their pregnancy or pregnancy outcomes. In doing so, we will not only permanently ensure that New Yorkers have protection from discrimination, but also that our state is a beacon for those seeking pregnancy-related health care, regardless of geography, income, or documentation status.

For these reasons, and in light of the current climate and our opportunity to create robust protections against sex discrimination, the New York City Bar Association urges passage of the New York EA to give pregnancy and pregnancy outcomes the Constitutional protections that justice demands.

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* The Sex and Law Committee thanks members Natalie Birnbaum, Susan Cersovsky and Kyla Magun for their work on this report.

** This report was first issued in May 2022 during the terms of the following committee chairs: Geoffrey L. Wertime, Co-Chair, Lesbian, Gay, Bisexual, Transgender and Queer Rights Committee; Karen P. Simmons, Chair, Mental Health Law Committee; and Judith A. Archer, Chair, Women in the Legal Profession Committee.