REPORT ON LEGISLATION BY THE
LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER RIGHTS COMMITTEE,
CIVIL RIGHTS COMMITTEE,
AND CHILDREN & THE LAW COMMITTEE

A.9377	**M. of A. Shimsky**
S.8603	**Sen. Ramos**

CONCURRENT RESOLUTION proposing an amendment to the New York Constitution, in relation to the right to privacy

New York Right to Privacy Amendment

THIS BILL IS APPROVED

I. INTRODUCTION AND SUMMARY

The New York City Bar Association ("City Bar") LGBTQ+ Rights Committee, the Civil Rights Committee, and the Children & the Law Committee urge passage of A.9377 (AM Shimsky) / S.8603 (Sen. Ramos) (the "New York Privacy Amendment" or the "Amendment"), which would add an explicit right to privacy to the New York Constitution. The Amendment responds to two converging developments: the erosion of federal constitutional privacy protections, particularly those grounded in substantive due process, and the dramatic expansion of government and private-sector surveillance, data aggregation, and intrusion into intimate decision-making.[1]

The Amendment is deliberately modeled on constitutional provisions in states that provide the most expansive privacy protections in the nation, including Washington and Alaska. It provides courts with an independent and affirmative source of constitutional protection that extends beyond current federal privacy doctrine, rather than as a provision coextensive with the Fourth Amendment or with privacy guarantees emanating from the Due Process Clause of the Fourteenth Amendment.[2] Properly interpreted, the Amendment would protect decisional autonomy, restrict

[1] *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 230–31 (2022); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

[2] Tiffany Li, *State Constitutional Privacy*, 71 Fla. L. Rev. 553, 560–66 (2019) *(recognizing several state constitutional privacy provisions as independent of and more protective than federal Fourth Amendment and substantive due process doctrine)*

About the Association
The mission of the New York City Bar Association, which was founded in 1870 and has over 20,000 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.

surveillance and data exploitation, strengthen remedies in criminal cases, and safeguard private conduct even where laws are facially neutral or nondiscriminatory, thereby securing constitutional protections that operate independently of, and in addition to, existing equal protection guarantees. Embedding these protections in the State Constitution also provides essential stability and certainty, safeguarding fundamental privacy rights against political fluctuations.

II. TEXT AND INTENDED CONSTRUCTION

The Amendment provides that no person shall be disturbed in their private affairs, or their home invaded, without authority of law. This language mirrors the State of Washington's Constitution privacy clause and reflects a conscious departure from the Fourth Amendment's reasonableness-based framework.[3] Unlike the federal Constitution, which focuses on whether a search is "reasonable," the Amendment centers on whether the State has lawful authority to intrude into a person's private affairs at all.

In states with similarly worded provisions, courts have consistently held that the phrase "private affairs" has an independent meaning and extends well beyond physical searches of the home. It encompasses personal information, intimate decision-making, associational life, and freedom from surveillance. The City Bar emphasizes that the Amendment should be construed in line with Washington and Alaska precedent, which treats privacy as a structural limitation on government power – grounded in dignity, autonomy, and democratic participation.[4]

Consistent with other provisions of Article I of the New York Constitution, the Privacy Amendment should be understood as self-executing.[5] New York courts have long held that constitutional provisions are presumptively self-executing, absent express language requiring implementing legislation, and nothing in the Amendment's text conditions its enforceability on further legislative action. Like existing constitutional guarantees of free speech, protection against unreasonable searches and seizures, and environmental rights, the Amendment defines a judicially enforceable right that courts are competent to apply upon adoption. While the Legislature may enact supplementary protections consistent with the Amendment's purposes, the absence of such legislation should not delay or diminish the Amendment's effect.

To clarify, nothing in this Report should be understood to diminish existing protections under the United States Constitution or the New York Constitution. Both federal and state constitutional law continue to provide significant safeguards against unreasonable searches, seizures, and unwarranted government intrusion. New York courts, in particular, have long

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[3] *See State v. Gunwall*, 106 Wash. 2d 54, 61–62, 720 P.2d 808, 812–13 (1986) (emphasizing that Washington Constitution art. I, § 7 differs textually and substantively from the Fourth Amendment); *State v. Snapp*, 174 Wash. 2d 177, 187–88, 275 P.3d 289, 294–95 (2012) (explaining that art. I, § 7 is not grounded in reasonableness); *State v. Chacon Arreola*, 176 Wash. 2d 284, 291–93, 290 P.3d 983, 987–88 (2012).

[4] *See State v. Gunwall*, *supra* note 3, at 62–63, 720 P.2d at 813–14; *Ravin v. State*, 537 P.2d 494, 503–04 (Alaska 1975); *White v. Davis*, 13 Cal. 3d 757, 768–71, 533 P.2d 222, 233–34 (1975); Li, *supra* note 2, at 560–66, 590–96.

[5] *See Brown v. State*, 89 N.Y.2d 172, 186–87 (1996) (constitutional provisions are presumptively self-executing absent express language requiring implementing legislation); *People v. Carroll*, 3 N.Y.2d 686, 692 (1958) (fact that a constitutional right may be further protected by legislation does not prevent it from being self-executing); *People v. Barrow*, 791 N.Y.S.2d 906, 908–09 (Sup. Ct. Bronx Cnty. 2005) (only where constitutional language expressly refers to implementing legislation is additional legislative action required.

interpreted the State Constitution as an independent source of rights that, in many contexts, affords broader protection than federal doctrine. The proposed Amendment is intended to clarify, reinforce, and future-proof these protections in light of evolving technologies and modern data practices, not to suggest that current constitutional guarantees lack force or vitality.

III. THE AMENDMENT PROVIDES EXPANSIVE PROTECTION FOR DECISIONAL PRIVACY

Decisional privacy in the most protective states is not limited to reproductive choice; it encompasses deeply personal choices concerning one's body, relationships, and autonomy.[6] Courts have emphasized that decisions cannot be meaningfully free if the State may impose criminal penalties, regulatory burdens, collect identifying data, or engage in surveillance that chills lawful conduct associated with intimate life choices.[7] For that reason, constitutional privacy protections extend beyond the outcomes of private decisions to the surrounding conditions under which those decisions are made, including freedom from monitoring, disclosure requirements, and enforcement regimes that pressure individuals to forgo care or conceal identity-related choices.[8]

Applying this reasoning, state courts have invalidated statutes that criminalize consensual sexual conduct among adults, recognized constitutional limits on government surveillance of lawful private activity, and constrained regulatory schemes that burden intimate decision-making by conditioning access to care, or privacy upon disclosure or compliance.[9] Courts have also relied on state constitutional privacy provisions to protect personal medical decision-making about bodily integrity and identity – including care related to sexual autonomy, end-of-life care, and gender identity – even where the State acts through generally applicable laws rather than overt prohibitions.[10] Taken together, these cases demonstrate that constitutional privacy protects not only against direct bans but also against enforcement regimes that deter or pressure individuals from making lawful private choices.[11] The New York Privacy Amendment would authorize similar protections, ensuring that deeply personal decisions remain insulated from evolving forms of state intrusion and beyond the reach of shifting political forces.

IV. THE PRIVACY AMENDMENT COMPLEMENTS THE EQUAL RIGHTS AMENDMENT

The Privacy Amendment complements the recently adopted New York Equal Rights Amendment by addressing constitutional harms using a different and powerful legal framework.[12]

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[6] *Gryczan v. State*, 283 Mont. 433, 444–47 (1997); Mont. Const. art. II, § 10; Haw. Const. art. I, § 6.

[7] *White v. Davis*, *supra* note 4, at 768-71; *State v. Walton*, 133 Hawai'i 66, 81–83 (2014); *State v. Gunwall*, *supra* note 3, at 62–63.

[8] *White v. Davis*, supra note 4, at 768–71; *Renderos v. Clearview AI, Inc.*, 2022 Cal. Super. LEXIS 70732, at *14–16; *State v. Gunwall*, *supra* note 3, at 61–63.

[9] *Gryczan v. State*, *supra* note 6, at 444–47; *White v. Davis*, supra note 4, at 768–71; *State v. Gunwall*, *supra* note 3, at 61–63.

[10] Haw. Const. art. I, § 6; Mont. Const. art. II, § 10.

[11] *State v. Walton*, 133 Hawai'i 66, 81–83 (2014); *State v. Gunwall*, *supra* note 3, at 61–63.

[12] *See* N.Y. Const. art. I, § 11.

The Privacy Amendment explicitly protects individuals from unwarranted government interference with private conduct, limiting the State's ability to intrude into private life through surveillance, data collection, or criminal regulation that applies equally on its face.

A law or state practice may arguably comply with equal protection guarantees yet intrude on private affairs. State constitutional privacy provisions have been used to strike down laws and practices where equal protection doctrine might be challenged, including statutes that criminalize private behavior or burden autonomy without targeting a protected class.[13]

The Privacy Amendment supplies a specific, structural constitutional limit on government power, ensuring that autonomy, intimacy, and personal decision-making are explicitly protected against intrusion itself, in addition to discriminatory treatment.[14] Together, the Equal Rights Amendment and the Privacy Amendment provide complementary constitutional protections by anchoring personal autonomy in both equality and liberty doctrines, ensuring that core rights do not depend on the stability of any single line of jurisprudence.

V. THE AMENDMENT RESTRICTS SURVEILLANCE AND DATA EXPLOITATION

Modern privacy threats increasingly arise from private-sector practices involving the large-scale collection, aggregation, and sale of personal information. Although much of this data is initially gathered by private actors, the most significant privacy harms occur when the State enables, relies upon, or incorporates these practices into the governmental system, through data purchases, information-sharing agreements, regulatory mandates, or enforcement regimes that transform commercial data into tools of surveillance, control, or coercion.[15]

The New York Privacy Amendment directly addresses this problem by constraining State action that legitimizes or amplifies private data abuse. While the Amendment applies only to State conduct, that limitation is precisely what gives it power. It restricts the State's ability to collect, purchase, access, retain, or deploy sensitive personal information in ways that disturb private affairs without sufficient legal authority. In doing so, the Amendment prevents the State from accomplishing indirectly, through private intermediaries, what it could not constitutionally do itself.[16]

Properly construed, the Amendment would limit the State's creation and use of dossiers, its reliance on data brokers, and its authorization of data-sharing and disclosure regimes that expose individuals to heightened risk of surveillance or enforcement. It would recognize that privacy injuries arise not merely from public disclosure, but from the aggregation, permanence,

[13] *See Ravin v. State*, *supra* note 4, at 503–04; *White v. Davis*, *supra* note 4, at 768–71; *Gryczan v. State*, *supra* note 6, at 444–47.

[14] *See State v. Gunwall*, *supra* note 3, at 61–63; *Brown v. State*, *supra* note 5, at 187–88; *People v. Barrow*, *supra* note 5, at 908–09.

[15] *See State v. Walton*, *supra* note 11, at 81–83; *White v. Davis*, *supra* note 4, at 768–71.

[16] *See State v. Gunwall*, *supra* note 3, at 61–63; *State v. Snapp*, *supra* note 3, at 187–88.

and secondary use of data once the State collects that information for governmental purposes.[17] These risks are especially acute where sensitive data is later shared, accessed, or repurposed in ways that facilitate out-of-state investigations or enforcement efforts targeting individuals who lawfully seek abortion care, gender-affirming care, or other protected medical services in New York.[18]

VI. PROTECTION OF NEW YORKERS FROM EXTRATERRITORIAL ENFORCEMENT AND INTERSTATE DATA EXPLOITATION

In the current legal landscape, threats to privacy and bodily autonomy increasingly arise from other states' efforts to extend their enforcement regimes beyond their borders. States hostile to abortion access, gender-affirming care, and other protected medical services have sought to rely on data trails, private surveillance, and information obtained from third parties to investigate, penalize, or deter lawful conduct occurring in New York.[19]

New York's existing shield laws provide critical protections against extradition, professional discipline, and direct cooperation with out-of-state investigations. But those measures do not fully address the ways in which sensitive personal data may still be generated, retained, or accessed within New York to facilitate interstate surveillance or enforcement. Even where care is lawful and protected in New York, the possibility that personal information may be logged, aggregated, or later repurposed can chill the exercise of those rights.[20]

The New York Privacy Amendment addresses this vulnerability by limiting the State's role in creating or legitimizing the informational infrastructure that enables extraterritorial enforcement. By constraining how sensitive personal data is collected, retained, and incorporated into governmental systems, the Amendment reduces the risk that New York becomes a source of information used to target individuals for lawful conduct protected under State law.[21]

These protections are particularly significant for individuals who travel to New York to obtain abortion care, gender-affirming care, or other sensitive medical services that are criminalized or heavily restricted elsewhere. By addressing privacy risks at the level of data generation and use, the Privacy Amendment complements existing shield laws and equality protections while providing an additional safeguard against surveillance, coercion, and future legal jeopardy beyond New York's borders.[22]

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[17] *See White v. Davis*, *supra* note 4, at 768–71; *State v. Walton*, *supra* note 11, at 81–83; *Brown v. State*, *supra* note 5, at 187–88.

[18] *See State v. Gunwall*, *supra* note 3, at 61–63; *State v. Walton*, *supra* note 11, at 81–83.

[19] *See State v. Walton*, *supra* note 11, at 81–83; *White v. Davis*, *supra* note 4, at 768–71.

[20] *See White v. Davis*, *supra* note 4, at 768–71; *Brown v. State*, *supra* note 5, at 187–88.

[21] *See State v. Gunwall*, *supra* note 3, at 61–63; *State v. Snapp*, *supra* note 3, at 187–88; *State v. Walton*, *supra* note 11, at 81–83.

[22] *See State v. Gunwall*, *supra* note 3, at 61–63; *White v. Davis*, *supra* note 4, at 768–71.

VII. THE AMENDMENT STRENGTHENS PROTECTIONS IN CRIMINAL CASES AND MOTIONS TO SUPPRESS

The Amendment would significantly strengthen privacy protections in criminal cases by providing an independent state constitutional basis for suppressing evidence obtained through unauthorized intrusions into private affairs. Federal Fourth Amendment doctrine has been narrowed over time through exceptions such as attenuation, inevitable discovery, and the third-party doctrine, which often permit the use of evidence derived from intrusive surveillance or data collection. This remedial function is separate from, and complements, the Amendment's broader role in restricting surveillance practices that invade private affairs even when they never lead to criminal charges.[23]

State courts interpreting expansive privacy clauses have rejected this narrow federal approach, recognizing that individuals may retain a legitimate expectation of privacy in information shared with third parties for limited purposes, particularly when that information is later disseminated or repurposed. Under this framework, the constitutional injury lies in the disturbance of private affairs itself, not merely in the use of evidence at trial.[24]

The New York Privacy Amendment would support suppression where the State obtains digital data, location information, communications records, or database-derived evidence without lawful authority, even if federal doctrine would permit its admission. In doing so, the Amendment would restore meaningful remedies for privacy violations and reaffirm that constitutional rights are vindicated through exclusion, not balanced away through cost-benefit analysis.[25]

VIII. THE AMENDMENT RESTRICTS GOVERNMENT SURVEILLANCE AND PREVENTS POLICING OF LAWFUL CONDUCT

Courts in states with strong constitutional privacy protections have long recognized that surveillance itself can violate constitutional rights, even where it does not result in arrest or prosecution. Suspicionless monitoring, dossier-building, and political surveillance have been correctly condemned as incompatible with constitutional commitments to privacy and freedom. These protections apply regardless of whether surveillance leads to arrest or prosecution, and address constitutional harms that arise before any criminal case begins.[26]

The New York Privacy Amendment should be construed to limit the use of modern surveillance technologies and practices that disturb private affairs without sufficient legal authorization. These include facial recognition systems, geofencing and keyword warrants,

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[23] *See State v. Gunwall*, *supra* note 3, at 61–63; *State v. Snapp*, *supra* note 3, at 187–88.

[24] *See State v. Walton*, *supra* note 11, at 81–83; *White v. Davis*, *supra* note 4, at 768–71.

[25] *See State v. Gunwall*, *supra* note 3, at 61–63; *State v. Snapp*, *supra* note 3, at 187–88; *Brown v. State*, *supra* note 5, at 187–88.

[26] *See White v. Davis*, *supra* note 4, at 768–71; *State v. Gunwall*, *supra* note 3, at 61–63; *State v. Snapp*, *supra* note 3, at 187–88.

predictive policing tools and databases, and social media monitoring, particularly when deployed against communities engaged in lawful activity.[27]

Such practices threaten not only individual privacy but democratic participation. Surveillance chills expression, association, and dissent, and disproportionately impacts communities confronting marginalization. The Amendment provides a constitutional basis for courts to assess these harms directly, without waiting for legislative action or relying on diminished federal protections.[28]

The New York Privacy Amendment offers a historic opportunity to modernize and restore constitutional privacy protections in an era of digital surveillance, data commodification, and diminished federal safeguards. By modeling the Amendment on the most protective state constitutions and construing it accordingly, New York can ensure meaningful limits on government and private intrusion, protect decisional autonomy, and reaffirm privacy as a cornerstone of democratic freedom. Moreover, it enables New York to set an example for the 38 states that have not enacted privacy legislation.

For these reasons, the City Bar urges the legislature to advance A.9377 (AM Shimsky) / S.8603 (Sen. Ramos).

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[27] *See White v. Davis*, *supra* note 4, at 768–71; *State v. Walton*, *supra* note 11, at 81–83.

[28] *See State v. Gunwall*, *supra* note 3, at 61–63; *State v. Snapp*, *supra* note 3, at 187–88; *Brown v. State*, *supra* note 5, at 187–88.