

Public comment re Equal Rights Amendment Ballot language

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To: comments@elections.ny.gov

I submit this public comment regarding the proposed language to describe the Equal Rights Amendment.

I am a resident of the State of New York, a clinical professor of law at Cornell Law School, and founder of the Equal Protection Project (equalprotect.org). I submit this comment in my individual capacity.

The proposed description contained at <https://elections.ny.gov/2024-statewide-ballot-proposal.is> materially misleading because it does not address the changes made in paragraph B of the ERA, which adds content completely new to the NY State Constitution (unlike paragraph A which modifies existing language).

Paragraph B will have a possibly disastrous impact on the cause of nondiscrimination, as already embodied in the NY State Constitution (before the amendment) and numerous state and local laws. E.g. NY Human Rights Law and NYC Human Rights Law.

Under Paragraph B, discrimination becomes a NY State constitutional right provided the discrimination is “designed to prevent or dismantle discrimination.” This embeds what is commonly referred to as “reverse discrimination” into the NY State Constitution. Discrimination against certain groups in order to protect other groups would be exempt from the sweeping protections of the current constitution and Paragraph A of the Amendment. Arguably, this would mean that the NY and NYC Human Rights Laws would be preempted merely by claiming the motivation was to “dismantle discrimination.”

The exemption under Paragraph B would severely damage efforts at fighting discrimination. It would create a loophole allowing persons engaging in objectively discriminatory programs and practices to claim that the motivation was to “dismantle discrimination.” This is the language of Critical Race Theory and Diversity, Equity and Inclusion, and would create a DEI exception to the anti-discrimination laws in NY State, contrary to our tradition of protecting individuals from invidious discrimination based on immutable characteristics.

Voters are entitled to know about the sweeping changes brought about by Paragraph B of the ERA in the way in which the ballot measure is described. To not mention this reverse discrimination impact is a material omission.

Accordingly, I request that the ballot language be modified as follows (changes in bold):

Adds anti-discrimination provisions to State Constitution. Covers ethnicity, national origin, age, disability, and sex, including sexual orientation, gender identity and pregnancy. **Creates a right to engage in reverse-discrimination.** Also covers reproductive healthcare and autonomy.

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

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

Respectfully submitted,

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