

## Memorandum in Support

NYSBA #11

February 26, 2019

S. 3249  
A. 271

By: Sen. Salazar  
By: M of A Seawright

Senate Committee: Judiciary  
Assembly Committee: Judiciary

S. 517  
A. 272

By: Sen. Kruegar  
By: M of A Seawright

Senate Committee: Judiciary  
Assembly Committee: Judiciary

### **THE NEW YORK STATE BAR ASSOCIATION** **SUPPORTS PASSAGE OF THE STATE EQUAL RIGHTS AMENDMENT**

The New York State Bar Association (NYSBA), through its Women in Law Section (WILS), supports the passage of A.271/S.3249, which proposes adding “sex” to the list of enumerated protected classes in Section 11 of Article 1 of the New York State Constitution:

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, sex, 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.<sup>1</sup>

By adding “sex” to the State Constitution as a protected category, we ensure that “sex” will be given the same status as race, color, creed, and religion.

Governor Andrew Cuomo included first passage of the state ERA in his 2019 budget proposal, providing that, “[e]nactment of this bill is necessary to implement the FY2020 Executive Budget as agency operations for the Division of Human Rights are dependent upon a clear definition of protected classes.”<sup>2</sup>

Additionally, NYSBA supports A.272/S.517,<sup>3</sup> which is broader in scope than A.271/S.3249 and would prohibit denial of equality of rights on the basis of “race, color, creed,

<sup>1</sup> A271 is sponsored by Seawright. See [https://nyassembly.gov/leg/?default\\_fld=&bn=A00271&Summary=Y&Actions=Y&Memo=Y](https://nyassembly.gov/leg/?default_fld=&bn=A00271&Summary=Y&Actions=Y&Memo=Y)

<sup>2</sup> FY2020 New York State Executive Budget, Equal Rights Amendment, Concurrent Resolution, Memorandum in Support, Governor Andrew Cuomo.

<sup>3</sup> A272/S517 is a concurrent resolution of the Assembly and Senate. A272 is sponsored by Assemblyperson Seawright. See <https://www.nysenate.gov/legislation/bills/2019/A272>. S517 is sponsored by Senator Krueger and co-sponsored by Senators Bailey, Benjamin,

religion, national origin, citizenship, marital status, age, gender, sex, pregnancy, sexual orientation, gender identity or expression, military status, physical or mental disability, other immutable or ascriptive characteristic, or like grounds for discrimination.<sup>4</sup>

While the narrower A.271/S.3249 would protect women, the broader A.272/S.517 would also protect gender, sexual orientation and pregnancy, in addition to other important characteristics.

Now is the time to enact an Equal Rights Amendment to the New York Constitution.

## **Background**

Neither the U.S. Constitution nor the New York Constitution guarantee women equal rights to men. About the U.S. Constitution, Justice Antonin Scalia famously once remarked:

Certainly the [U.S.] Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't.<sup>5</sup>

In fact, the only right specifically guaranteed to women in the U.S. Constitution is in the 19th Amendment's right to vote.

Since the birth of the women's movement in Seneca Falls, New York, in 1848, when Elizabeth Cady Stanton introduced the "Declaration of Sentiments" by proclaiming, "All men and women are created equal," women have been fighting for constitutional equal rights.<sup>6</sup> Following passage of the 19th Amendment, Alice Paul, lawyer and suffragist, proposed a federal equal rights amendment in 1923 to ensure constitutional equality for all. That amendment read, "Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction."<sup>7</sup>

In the 1970s, Congress finally passed the Equal Rights for Women Amendment ("ERA"). To become a constitutional Amendment, two-thirds – or 38 – states needed to ratify the ERA within a Congressionally-imposed seven-year timeframe. New York ratified the ERA on May 18, 1972. By 1977, 35 states had ratified the Amendment, but opposition to the ERA had heated up.<sup>8</sup> New York's own Representative Elizabeth Holtzman proposed a strategy to extend the deadline, but even with the new 1982 deadline, the ERA was still three states short of

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Biaggi, Breslin, Carlucci, Comrie, Hoylman, Jackson, Kaplan, Mayer, Metzger, Parker, Persaud, Sanders, Sepulveda, Serrano and Stavisky. <https://www.nysenate.gov/legislation/bills/2019/s517>

<sup>4</sup> A272/S517, Jan. 9, 2019.

<sup>5</sup> Interview with Justice Scalia, *California Lawyer* (January 2011).

<sup>6</sup> See Elizabeth Cady Stanton, "Declaration of Sentiments," <https://www.historyisaweapon.com/defcon1/stantonsent.html>.

<sup>7</sup> J. Neuwirth & M. Tormey, "The Time is Now for the Equal Rights Amendment" *Women@Forbes* (Mar. 7, 2018, 1:44PM).

<sup>8</sup> "The Proposed Equal Rights Amendment: Contemporary Ratification Issues," Congressional Research Services, R42979, p.15 (July 2018). Five states (Idaho, Kentucky, Nebraska, Tennessee and South Dakota) have since attempted to rescind their support (in Kentucky, the Acting Governor vetoed the rescinding resolution), but most legal scholars do not think states have the legal capacity to rescind. The states which have ratified the ERA are Hawaii (March 22, 1972), New Hampshire (March 23, 1972), Delaware (March 23, 1972), Iowa (March 24, 1972), *Idaho* (March 24, 1972), Kansas (March 28, 1972), Nebraska (March 29, 1972), Texas (March 30, 1972), Tennessee (April 4, 1972), Alaska (April 5, 1972), Rhode Island (April 14, 1972), New Jersey (April 17, 1972), Colorado (April 21, 1972), West Virginia (April 22, 1972), Wisconsin (April 26, 1972), New York (May 18, 1972), Michigan (May 22, 1972), Maryland (May 26, 1972), Massachusetts (June 21, 1972), Kentucky (June 26, 1972), Pennsylvania (September 27, 1972), California (November 13, 1972), Wyoming (January 26, 1973), South Dakota (February 5, 1973), Oregon (February 8, 1973), Minnesota (February 8, 1973), New Mexico (February 28, 1973), Vermont (March 1, 1973), Connecticut (March 15, 1973), Washington (March 22, 1973), Maine (January 18, 1974), Montana (January 25, 1974), Ohio (February 7, 1974), North Dakota (March 19, 1975), Indiana (January 18, 1977), Nevada (March 22, 2017), Illinois (May 30, 2018).

ratification. More recently, in 2017, Nevada, and in 2018, Illinois, also ratified the ERA,<sup>9</sup> leaving ratification short by one state.<sup>10</sup> Although polls indicate that up to 94% of Americans “support enshrining this right to equality in the highest law of the land,”<sup>11</sup> the hurdles to amending the U.S. Constitution— 1) lifting of the 1982 deadline and ratification by one more state (“single state strategy”), or 2) a vote by two-thirds of the House of Representatives and the Senate or a constitutional convention called for by two-thirds of the state legislatures (“fresh start strategy”)—have been and remain daunting.

At the state level, New York is not among the 22 states that already have some form of explicit protection against sex discrimination in their state constitutions.<sup>12</sup> New York’s legislature has worked to pass an equal rights amendment multiple times, most recently in 2018, but the bill stalled in the Senate Judiciary Committee.<sup>13</sup> With a one-party Governor and Legislature currently in session, a New York ERA has a stronger likelihood of passing this legislative session.

### **Equality Under the Law**

The primary purpose of an Equal Rights Amendment is to embed in the Constitution equality for women as a fundamental right.<sup>14</sup> Today, under federal law and in New York, the right of women to be free of discrimination exists only through a patchwork of laws and legal interpretation, subject to fickle jurists and lawmakers. The Fifth and Fourteenth Amendments to the U.S. Constitution promise equal protection under the law and have been extended to sex discrimination by courts, but are limited to federal or state governmental action (respectively), and classifications based on sex are subject only to intermediate scrutiny (i.e., law must be substantially related to achieving an important government objective).<sup>15</sup> Title VII of the Civil Rights Act of 1964 prohibits employers with 15 or more employees from discriminating based on the sex of a job applicant or employee, leaving out hundreds of thousands of small business employees.<sup>16</sup> Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational programs, but only when the educational program is the recipient of federal funding.<sup>17</sup>

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<sup>9</sup>

Id.

<sup>10</sup>

It is unclear whether post-1982 ratifications are constitutionally acceptable or if a “fresh start” of the process will be required by Congress. Congress members Jackie Speier and Carolyn Maloney have introduced legislation to lift the 1982 ratification deadline. ERA Coalition Press Release (Jan. 29, 2019). See also Congressional Research Service, supra, p. 16. Rep. Maloney (D-N.Y.) has reintroduced a federal ERA at least 11 times without traction. In support of an ERA she states, “U.S. women lack the tools they need to demand equal treatment in a variety of areas, including pensions, taxes and law enforcement. Women lag behind men in clout positions, including board and executive positions. The wage gap has been virtually unchanged for more than 20 years.” (citations omitted).

<sup>11</sup>

Women@Forbes, supra.

<sup>12</sup>

See Wharton, Linda J., “State Equal Rights Amendments Revisited: Evaluating their Effectiveness in Advancing Protection Against Sex Discrimination,” (2005) 36 Rutgers LJ 1201-1292 at 1202, and the Appendix setting out the text of state equal rights amendments. See also Linton, P., “State Equal Rights Amendments: Making a Difference or Making a Statement?” (1997) 70 Temple L.R. 907-944 at 908.

<sup>13</sup>

See <https://www.nysenate.gov/legislation/bills/2017/a7990>.

<sup>14</sup>

See S. Russell-Kraft, “Why the Equal Rights Amendment Still Matters,” The New Republic, (June 14, 2018) (“[T]he ERA is not just a relic of second-wave feminism. It is still necessary today, as equality for women is not enshrined in the Constitution; it is merely a matter of legal interpretation.”).

<sup>15</sup>

“Sex Discrimination and the United States Supreme Court: Developments in the Law,” Congressional Research Service, RL30253, p.1 (Dec. 2015).

<sup>16</sup>

Id., p.6-17. Hundreds of thousands probably underrepresents that actual number by hundreds of thousands. See “Small Business Profile,” U.S. Small Business Admin, Office of Advocacy (2018) (estimating that of the 56.8 million people employed by small business, 17.3 percent, or 9.8 million, are employed by businesses with 19 or fewer employees).

<sup>17</sup>

Id., p.17-20.

Protections against discrimination on the basis of sex are more robust in New York. The New York State Human Rights Law (codified as N.Y. Executive Law, Article 15) prohibits discrimination in the workplace (as of March 2018, by employers of any size), in housing and in places of public accommodation.<sup>18</sup> The Equal Pay Act prohibits employers from paying employees of one sex less than employees of the opposite sex for work at the same establishment where the work requires equal skill, effort and responsibility, and is performed under similar working conditions.<sup>19</sup> In March 2018, the New York Legislature bolstered the sexual harassment laws by adopting a revision of state laws to ban most nondisclosure agreements and mandatory arbitration of sexual harassment complaints, and requiring government employees found responsible for committing harassment to refund taxpayer-financed payouts.<sup>20</sup>

New York City has expanded protections for women even further, banning prospective employers from inquiring about salary history, strengthening anti-harassment laws, and prohibiting gender-based discrimination in the workplace regardless of the employer's size.

### **Analysis**

Even today, however, with fresh legislation aimed at expanding protections for women, not all women in New York State or City who are discriminated against are protected. The protections that exist are piecemeal, not comprehensive, and, importantly, not unassailable by future courts and lawmakers.

NYSBA agrees with the reasoning in the sponsor's justification in support of A.272/S.517, which underscores key points why this ERA Bill should be enacted. They include:

- Equal rights for women are noticeably absent from the list of protected categories.
- Most New Yorkers assume incorrectly that the State Constitution already provides equal rights to women.
- We can build on the momentum from the New York State Assembly's 2017 passage of a resolution with bi-partisan support and without negative votes calling on Congress to pass the federal ERA.

Further, and critically, a state ERA would help to prevent rollback of women's rights in education, health, employment, and domestic violence at the federal level from affecting women in New York.<sup>21</sup> It would clarify the legal status of sex discrimination for the courts and make sex discrimination legally coequal with discrimination based on race, color, creed, and religion. It would provide women with better standing in cases of discrimination in public education, divorce, child custody, domestic violence and sexual assault.<sup>22</sup> It would give weight to employment laws relating to the prevention of sex discrimination in hiring, firing, promotions and benefits.<sup>23</sup> It would help prevent policies that discriminate against pregnant women. It

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18 NY Exec. Law Sec. 290 *et seq.*

19 NY Labor Law Sec. 194 *et seq.*

20 V. Wang, "New York Rewrites Harassment Laws, but Some Say the Changes Fall Short," NY Times (March 30, 2018).

21 "Need for Equal Rights Amendment for Women Highlighted This Women's History Month" Queens Gazette (Mar. 14, 2018).

22 Id.

23 Id.

would help bring about equal pay for equal work, important because, despite decades of Title VII,<sup>24</sup> women, including women attorneys, are still not paid the same amount for the same work as their male counterparts.<sup>25</sup>

In short, we need these fundamental protections enshrined in an Equal Rights Amendment to the State Constitution. As long as women do not have constitutional equality, women will not be fully recognized as equal citizens in this country and state – despite the fact that we are expected to contribute our fair share to government and public services through local, state, and federal taxes.

If either the narrower Bill A.271/S.3249 or the broader A.272/S.517 Bill pass in New York State, not only will the women of our state be better protected than they are now, it may also encourage more states to support constitutional protection of women from discrimination and aid in the passage of a federal ERA.

The time is ripe to pass a state ERA.

### **Conclusion**

Our State and Federal Constitutions should proclaim that it is women’s fundamental right to be treated equal to men under the law. Despite this state’s ratification of the federal ERA in 1972, the New York Constitution still does not protect women from sex discrimination as it protects against discrimination based on race, color, creed and religion. If either the narrower A271 or broader A.272/S.517 New York State Bill passes, a state ERA would give women much better protection from discrimination than they have now in a wider variety of contexts, provide a backbone to legal disputes regarding equal pay, and assist victims of sex discrimination to address the harm.

Based on the foregoing, the NYSBA **SUPPORTS** passage of A.271/S.3249, which proposes adding “sex” to the list of enumerated protected classes in Section 11 of Article 1 of the New York State Constitution or, in the alternative, the broader A.272/S.517, which provides protection to more categories of persons.

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<sup>24</sup> See e.g., *Cnty. Of Washington v. Gunther*, 452 U.S. 161 (1981); *Am. Fed’n of State, Cnty., & Municipal Emps., v. Washington*, 770 F.2d 1401, 1407 (9<sup>th</sup> Cir. 1985), cited by MacKinnon, Catherine A. at 575, n.28.

<sup>25</sup> Data released by Governor Andrew M. Cuomo’s office on January 10, 2017, shows that women in New York State earn 87 cents on the dollar in comparison to what men earn. Women of color, compared to white men, fare worse: African-American women earn on average 69 cents on the dollar and Latinas 58 cents on the dollar. A study in August 2016, commissioned by New York City public advocate Letitia James adds that women in New York State earn some \$20 billion less than men annually. In New York City, women are paid nearly \$6 billion less than men annually.