

The New York Equal Rights Amendment Will Permanently Protect Abortion Rights in New York State

This November, New Yorkers will vote on **Prop 1, a ballot measure that would add the Equal Rights Amendment (ERA) to the New York State Constitution and protect abortion rights in New York State.**¹ Constitutional protection of abortion rights in New York is more critical than ever, as the right to abortion is under unprecedented attack across the country.

The New York Legislature Wrote and Passed the ERA Explicitly to Protect Abortion Rights Permanently in the New York Constitution

When the New York Legislature passed the ERA, it was **explicit that the ERA would enshrine the right to abortion in the New York State Constitution.** The Legislature was required to pass the ERA twice for it to be placed on the ballot for voter approval. The Legislature first passed the ERA during a special session convened in direct response to *Dobbs v. Jackson Women's Health Organization*, the Supreme Court decision that overturned *Roe v. Wade*.² The Legislature passed the ERA a second time around the fiftieth anniversary of *Roe* to double down on its commitment to protecting the right to abortion in the New York State Constitution.³

The legislative sponsor memo for the ERA explicitly states that the ERA would protect abortion. It recognizes that abortion is essential to achieving gender equality:

Increasingly across the country in virtually every state, including New York, women face criminal and civil consequences related to their pregnancies and pregnancy outcomes, including not only abortions but also miscarriages, stillbirths, or other adverse outcomes It is not possible to achieve sex equality while prosecutors and state agencies single out pregnant people for punishment because of their pregnancies, the outcomes of their pregnancies and their reproductive healthcare decisions. And **because the right to abortion is central to a pregnant person's equality, this amendment clarifies that any action that discriminates against a person based on their pregnancy, pregnancy outcome, reproductive healthcare, or reproductive autonomy is sex-based discrimination in their civil rights that would be explicitly prohibited by the State Constitution.**⁴

¹ *Text of Proposal Number One, an Amendment*, N.Y. STATE BD. ELECTIONS, <https://elections.ny.gov/2024-statewide-ballot-proposal>.

² S.B. S51002, A.B. A41002, 2021-2022 Leg., Extraordinary Sess. (N.Y. 2022).

³ S.B. S108A, A.B. A1283, 2023-2024 Leg., Reg. Sess. (N.Y. 2023).

⁴ *Sen. Introducer's Mem. in Support of 2023 NY Senate Bill S108A*, N.Y. STATE SEN. (2023), <https://www.nysenate.gov/legislation/bills/2023/S108/amendment/A>.

The New York ERA's Protection of Abortion is Essential Given the National Landscape

The New York ERA's protection of abortion rights is more critical than ever given the unprecedented nationwide rollback of abortion rights. In the wake of *Dobbs v. Jackson Women's Health Organization*, there is no longer a federal constitutional right to abortion. Nearly half of states have banned or severely restricted abortion access since *Dobbs*.⁵

Moreover, across the country, prosecutors are increasingly criminalizing people for their pregnancies, regardless of birth outcome.⁶ Under the guise of protecting “unborn life,” prosecutors have brought charges against over 1,800 pregnant individuals from 1973 - 2022, and that pregnancy-related criminalization is accelerating post-*Dobbs*.⁷

If New Yorkers approve Prop 1, they will enshrine abortion rights in the state constitution to protect the liberty, autonomy, and equality of all New Yorkers who are pregnant or who may become pregnant.

The ERA Recognizes the Right to Abortion as Fundamental to Gender Equality

The ERA frames the right to abortion as an equality issue because full gender equality cannot be realized without the right to abortion. If pregnant New Yorkers cannot access abortion—and therefore cannot determine the course of their own lives—existing inequities between the sexes would grow even deeper.

The ERA thus provides that **the right to abortion is rooted in the right to equality, commonly referred to as the right to be free from discrimination**. The text of the ERA expands the right to “equal protection” and prohibits the government from discriminating against New Yorkers based on their sex, pregnancy, pregnancy outcomes, or reproductive healthcare and autonomy. This includes the right to abortion.

The highest courts in several states, including Montana, New Mexico, Pennsylvania, and Utah, have interpreted their state ERA's promise of sex equality to protect abortion rights.⁸ **New York's ERA is even more explicitly protective of abortion rights than these other states' ERAs** in that it not only guarantees sex equality, but defines sex equality to include freedom from discrimination on the basis of pregnancy, pregnancy

⁵ Fourteen states have total abortion bans and eight additional states ban abortion at or before 18 weeks' gestation. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (July 29, 2024), <https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans>.

⁶ PURVAJA S. KAVATTUR ET AL., PREGNANCY JUST., THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT (2023), <https://www.pregnancyjusticeus.org/rise-of-pregnancy-criminalization-report>.

⁷ See *id.*; Anna North, *Pregnancy in America is starting to feel like a crime*, Vox (June 25, 2024), <https://www.vox.com/health/356512/pregnancy-america-crime-dobbs-justice>.

⁸ *Planned Parenthood of Montana v. State*, 515 P.3d 301 (Mont. 2022); *N.M. Right to Choose/NARAI v. Johnson*, 975 P.2d 841 (N.M. 1998); *Allegheny Reprod. Health Ctr. v. Penn. Dep't Hum. Servs.*, 309 A.3d 808 (Pa. 2024); *Planned Parenthood Ass'n of Utah v. State*, No. 20220696, 2024 WL 3612730 (Utah Aug. 1, 2024).

outcomes, and reproductive healthcare and autonomy.

How the ERA’s Constitutional Guarantee of the Right to Abortion Would Work in Practice

New York law has long protected the right to abortion. The Reproductive Health Act, passed in 2019, strengthened that right.⁹ But future state legislatures could always try to roll back abortion rights. **If New Yorkers approve Prop 1, the ERA will enshrine the right to abortion in the state constitution. State constitutions carry greater weight than state laws.** In practical terms:

- If a future state legislature passes a law that outlaws or restricts abortion, the ERA would allow New Yorkers to challenge that law in court.
- The ERA would allow New Yorkers to bring court actions to challenge anti-abortion actions of state agencies, the state executive, or other government entities.
- The ERA would provide a constitutional defense if a prosecutor brought criminal charges against a New Yorker based on allegations related to abortion.
- The ERA would provide a constitutional defense if a state or local prosecutor brought criminal charges against a New Yorker related to IVF or contraception.

⁹ Reproductive Health Act, S.B. S240, A.B. A21, 2019-2020 Leg., Reg. Sess. (N.Y. 2019) (codified at N.Y. Pub. Health Law § 2599-aa – § 2599-bb-1 (McKinney 2024)).