



## Questions & Answers on the Lawsuit Challenging the New York Equal Rights Amendment: *Marjorie Byrnes et al. v. The Senate of the State of New York et al.*

In October 2023, a Republican member of the New York State Assembly challenged the validity of the New York Equal Rights Amendment (ERA), alleging that there was a procedural defect in its passage by the Legislature and seeking to prevent New Yorkers from voting on it in the November 2024 election. The ERA is a proposed amendment to the state constitution that would enshrine broad anti-discrimination protections. On May 7, 2024, a Livingston County state court declared the ERA struck from the ballot – a decision subject to an ongoing appeal. This Q&A unpacks the legal issues in this case and what is at stake for New Yorkers.

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### What is the New York Equal Rights Amendment?

The New York Equal Rights Amendment (ERA) is a proposed amendment to the state constitution that would broadly increase constitutional equality protections in New York State. The ERA adds to existing equality protections in the state constitution (race, color, creed, or religion) to cover ethnicity, national origin, age, disability, and sex-based discrimination. The ERA defines sex to include sexual orientation, gender identity, gender expression, pregnancy and pregnancy outcomes, and reproductive healthcare and autonomy. Importantly, given that more than half the country bans, severely restricts, or criminalizes abortion in their state laws, the ERA clarifies that abortion is integral to sex-based equality in New York.

The ERA is the result of a five-year effort by the New York State Legislature, advocates, and stakeholders to update the New York constitution with comprehensive equality protections, explicitly enshrining reproductive rights among the state's foundational legal principles.

Amendments to the state constitution must pass in two consecutive legislative sessions followed by voter approval through a ballot referendum. The ERA was approved by the New York State Legislature on July 1, 2022 and on January 24, 2023. In November 2024, New Yorkers should have the opportunity to vote on the ERA.

Polls consistently show that an overwhelming majority of New Yorkers support the ERA across party lines and geography.

The procedural challenge to the ERA is a familiar one, used by opponents of abortion rights to derail state constitutional amendments protecting abortion rights in Michigan and Ohio. Many other state ballot measures to protect reproductive rights proposed after the United States Supreme Court reversed *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization* have faced similar legal challenges brought by opponents trying to defeat them on technical grounds rather than allowing the public to decide.



## What is the background of the case and its status?



*Marjorie Byrnes et al v. Senate of NY State et al* was filed by a Republican member of the New York State Assembly and two taxpayers challenging the procedure the Legislature followed during the ERA's first passage in July 2022.

The vote in question was held by the Legislature on July 1, 2022, yet plaintiffs filed the lawsuit nearly 16 months later in October of 2023. The substantial delay disrupts the constitutional amendment process and creates confusion for voters.

On May 7, 2024, the court hearing the challenge held that the ERA should be removed from the ballot in this November's election because the Legislature voted on the ERA *before* it received an Attorney General's advisory opinion. It is important to note that an Attorney General advisory opinion is nonbinding and is limited to the question of whether the proposed amendment would have an effect on other provisions of the state constitution; it is not a substantive evaluation of the amendment itself.

The Attorney General's office, which is tasked with defending the validity of the ERA, filed an expedited appeal and oral argument is scheduled in the Appellate Division for June 17, 2024. In light of the electoral nature of the issue, the ruling is expected shortly after oral argument, and a further appeal is expected to the Court of Appeals.



## Will the New York ERA be on the ballot in 2024?



Given the legal issues in this case, it would be surprising to see the ERA fail to appear on the November ballot; however, this question will ultimately be decided by New York courts. Although the trial court ordered the ERA removed from the ballot, an appeal is pending, and the ERA's status will not be determined with finality until the litigation is resolved. During the appeal process, advocates continue to prepare the ERA for voters' consideration in November.



## What is the legal issue raised in this case?



The legal issue in *Marjorie Byrnes et al* is based on the rules for amending the New York constitution. Section 1 of Article 19 of the state constitution provides that once a resolution to amend the constitution is proposed in the legislature, it shall be referred to the Attorney General (AG). The AG has a duty to provide a written opinion to the legislature within 20 days of the referral, explaining how the amendment might affect other parts of the constitution. In 1941, the following language was added to this provision, reinforcing the understanding that the AG's action does not affect the validity of the Legislature's vote: "neither the failure of the Attorney General to render an opinion concerning such a proposed amendment nor his or her failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon." This understanding was further confirmed by a [1961 opinion of Attorney General Lefkowitz](#), stating that, "[t]he Attorney General's opinion does not constitute a part of the legislative process for the



amendment of the Constitution. Such opinion is purely advisory, the Legislature being free to act upon a proposed amendment as it sees fit.”

In the case of the ERA, both houses of the state legislature voted on the proposed amendment on July 1, 2022, the same day that they referred the measure to the Attorney General for an advisory opinion. On July 6, 2022, the Attorney General provided the following statement, “[i]n my opinion, if adopted, the amendment will have no effect upon other provisions of the Constitution.”

Since this rule was instituted over 80 years ago, the routine practice of the Legislature has demonstrated that obtaining the Attorney General’s opinion prior to voting on proposed amendments is not mandatory. History is instructive: in approving at least 18 prior proposed amendments, the Legislature voted before receiving the AG’s opinion or waiting out the 20-day period. All of these proposed amendments advanced to the ballot. Nine were approved by voters and are in the state constitution today. With the exception of the ERA, this procedure has never been called into question.

However, the lower court accepted the challengers’ argument that the Legislature diverged from the procedure set out in Article 19 and, singling out the ERA, held that such divergence merits invalidating the proposed amendment. Yet, neither case law nor the text of the state constitution support the conclusion that the ERA should be removed from the ballot.



### Why do we need the New York ERA?

The New York ERA would modernize the state’s 19th-century constitutional provisions to bring them up to date with other states that have recognized the many ways in which their citizens experience discrimination. If approved, New York will join 29 other states in having explicit sex equality protections in their state constitutions and six states that protect against disability-based discrimination.

For more detailed analyses of the ERA, visit our [website](#).