NEW YORK SUPREME COURT – APPELLATE DIVISION
FOURTH DEPARTMENT

MARJORIE BYRNES, *et al*.,	Docket No. 24-00764 N.Y. Co. Sup. Ct. Index No. 000778-2023
Plaintiffs-Respondents,	
v.	**NOTICE OF MOTION OF THE EQUAL PROTECTION PROJECT FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**
THE SENATE OF THE STATE OF NEW YORK, *et al*.,	
Defendants-Appellants.	Oral Argument Not Requested

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Ronald D. Coleman, dated June 7, 2024, together with the Exhibit annexed thereto, the undersigned will move this Court, at the Supreme Court, Appellate Division, Fourth Department, 50 East Avenue, Rochester, New York on June 24, 2024 at 10:00 a.m., or as soon as counsel can be heard, for an order granting the Equal Protection Project of the Legal Insurrection Foundation leave to file and serve a brief as *amicus curiae* in support of Plaintiffs-Respondents. A copy of the proposed brief is annexed to said Affirmation.

EQUAL PROTECTION PROJECT
LEGAL INSURRECTION FOUNDATION

By: /s/ William A. Jacobson
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June 7, 2024

NEW YORK SUPREME COURT – APPELLATE DIVISION
FOURTH DEPARTMENT

MARJORIE BYRNES, *et al*., *Plaintiffs-Respondents*, v. **THE SENATE OF THE STATE OF NEW YORK**, *et al*., *Defendants-Appellants*.	Docket No. 24-00764 N.Y. Co. Sup. Ct. Index No. 000778-2023 **AFFIRMATION OF RONALD D. COLEMAN IN SUPPORT OF MOTION BY THE EQUAL PROTECTION PROJECT FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

Ronald D. Coleman, an attorney duly admitted to practice before this Court, affirms the following to be true under penalty of perjury pursuant to CPLR § 2106:

1. A copy of the brief for which leave to file is sought by this motion is attached hereto as Exhibit A.

2. I am the Litigation Director of prospective *amicus curiae* Equal Protection Project (EPP), a project of the Legal Insurrection Foundation (LIF), a Rhode Island tax-exempt 501(c)(3) devoted to the fair treatment of all persons without regard to race or ethnicity. I make this Affirmation in support of EPP's motion to file an amicus brief.

3. EPP's guiding principle is that there is no "good" form of racism. The remedy for racism never is more racism. Since the time of its creation in February 2023, EPP has filed more than a dozen civil rights complaints, in various forums, against governmental or federally funded entities that have engaged in racially discriminatory conduct in various forms, and its work is ongoing. EPP updates the public on its activities at EPP's website.

4. While EPP supports Plaintiff-Respondents' arguments in favor of affirmance of the decision by the Supreme Court Livingston County, EPP submits this brief to address only one area squarely relevant to EPP's mission: Defendants-Appellants' argument, handily and appropriately dismissed by the court below, that their studied and deliberate circumvention of the requirements for amending the New York State Constitution should be disregarded under the doctrine of "substantial compliance."

5. Given the profound impact the proposed Amendment will have in damaging fundamental New York constitutional and regulatory anti-discrimination protections, as discussed below, EPP urges this Court to firmly and explicitly reject Defendants-Appellants' non-compliance with the Constitution and thereby preserve both the rule of law but also the enforcement of anti-discrimination laws in this State.

WHEREFORE, the Equal Protection Project respectfully requests that this Court grant its motion to file a brief as amicus curiae.

June 10, 2024

RONALD D. COLEMAN

New York County Clerk's Index No. 000778-2023

New York Supreme Court

Appellate Division

Fourth Department

CASE NO
CA 24-00764

MARJORIE BYRNES, *ET AL.*,

Plaintiffs-Respondents,

v.

THE SENATE OF THE STATE OF NEW YORK, *ET AL.*,

Defendants-Appellants.

BRIEF OF *AMICUS CURIAE* THE EQUAL PROTECTION PROJECT IN SUPPORT OF PLAINTIFFS–RESPONDENTS

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INTEREST OF *AMICUS CURIAE* EQUAL PROTECTION PROJECT

The Equal Protection Project (EPP) is a project of the Legal Insurrection Foundation (LIF), a Rhode Island tax-exempt 501(c)(3) organization devoted to the fair treatment of all persons without regard to race or ethnicity. Our guiding principle is that there is no "good" form of racism, the corollary of which is that the remedy for racism never is more racism.

Since the time of its creation in February 2023, EPP has filed more than twenty civil rights complaints in various forums against governmental or federally funded entities that have engaged in racially discriminatory conduct in various forms, and its work is ongoing. EPP updates the public on its activities at EPP's website.

While EPP supports Plaintiff-Respondents' arguments in favor of affirmance of the decision by the Supreme Court Livingston County, EPP submits this brief to address only one area squarely relevant to EPP's mission: Defendants-Appellants' argument, handily and appropriately dismissed by the court below, that their studied and deliberate circumvention of the requirements for amending the New York State Constitution should be disregarded under the doctrine of "substantial compliance." Given the profound impact the proposed Amendment will have in damaging

fundamental New York constitutional and regulatory anti-discrimination protections, as discussed below, EPP urges this Court to firmly and explicitly reject Defendants-Appellants' non-compliance with the Constitution and thereby preserve both the rule of law but also the enforcement of anti-discrimination laws in this State.

SUMMARY OF THE ARGUMENT

The drafters of the New York State Constitution, in their wisdom, made it difficult to advance a constitutional amendment. Section 1 of Article XIX requires that before being placed on the public ballot, a proposed amendment must be subject to a vote in two separate legislative sessions, and in the first of those sessions, an opinion concerning the provision obtained from the Attorney General, who is required to issue such opinion within 20 days. Only after the Attorney General delivered the opinion or the 20 days had passed without the Attorney General acting, the legislature could vote.

Here, a proposed constitutional amendment – cynically entitled the "Equal Rights Amendment," although its purpose was to enshrine discrimination into New York law – was passed by the Legislature near the end of its session. The legislature did not wait the 20 days. Ultimately the Attorney General opinion was issued, but only after the Legislature had voted. When challenged in this action, the Legislature asked the Supreme Court in

Livingston County to excuse its non-compliance because, it claimed, it was in "substantial compliance": it did, after all, get an Attorney General opinion. The trial court rejected that argument on the ground that substantial compliance meant non-compliance. In fact, as argued below, there is no general principle of substantial compliance that New York law makes available for courts to retroactively accept a "cure" for non-compliance with explicit constitutional requirements, even in matters of procedure. Indeed, the legislative history of Article XIX, § 1 evinces a studied determination to impose a process that would result in due deliberation concerning the enactment of constitutional amendments.

No court is empowered to disregard that procedure and where, as here, doing so would result in a patent abridgment of federal constitutional rights, nor is there a valid reason to try.

ARGUMENT

In a nation governed by the rule of law, the State of New York has long prided itself – with considerable justice – in its constitutional order and its judicial system. No small part of that pride arises from the skill and judgment its courts exercise in tempering law with equity without undermining due respect for procedures meant to ensure justice and fairness. As New York's Court of Appeals emphasized over a century ago:

> The object of a written Constitution is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers. The safety of free government rests upon the independence of each branch and the even balance of power between the three. . . . It is not merely for convenience in the transaction of business that they are kept separate by the Constitution, but for the preservation of liberty itself.

People ex rel. Burby v. Howland, 155 N.Y. 270 (1898). Here, too, Supreme Court Livingston refused an attempt by the Legislature not to overstep its bounds vis-à-vis another branch of government, but this State's Constitution itself. Specifically, it violated the procedure set forth in § 1 of Article XIX requiring that no vote to placing an amendment to the New York Constitution be placed on the public ballot until after the Attorney General of the State issue an opinion concerning the proposed amendment. In a meticulous, 31-page opinion, Supreme Court Livingston found that because the Legislature violated the procedure required by the State Constitution, the vote adopting the measure was void and ordered that the proposed amendment be removed from the ballot. This appeal followed.

In a detailed and well-argued opinion, the court below refused to credit Defendant-Respondents' argument that their naked disregard for § 1 of Article XIX's requirement that the Attorney General issue an appeal before a vote regarding a potential amendment be placed on the ballot, this resulted in a

mere “no harm, no foul” situation because such an opinion did issue a few days later. This, they urged the trial court, amounted to “substantial compliance.” The trial court rejected this, writing as follows:

> The Court declines to adopt the arguments advanced by the Majority Defendants that the Legislature "substantially complied" with requirements of Article XIX, or to apply the "harmless error doctrine", or that the relief herein should be limited to the Court determining that Article XIX was violated but refusing to remove the proposed amendment from the ballot. The Constitution is the supreme will of the People. Its amendment should be undertaken by strict adherence to the will of the People as expressed in Article XIX. "Substantial" compliance is not compliance, and this Court cannot condone actions taken by the Legislature in derogation of the expressed will of the People. The Legislature's vote on the Concurrent Resolution prior to receiving the opinion of the Attorney General frustrated the deliberative process intended by the People in § 1 of Article XIX.

Decision and Judgment at 29 (NYSCEF DOC. NO. 81). These words perfectly express what New York law required here, and which EPP respectfully suggests this Court approve explicitly.

There is, in fact, no broad “doctrine,” in equity or otherwise, of “substantial compliance” that is available for New York courts to utilize whenever a party – much less the government – chooses to dispense with a legislative, much less a constitutional, procedural requirement. Substantial compliance, rather, is a rule of contract law, albeit with roots in equity, meant to protect the contracting parties’ expectations in the event of technical failure

of performance. See, *Swalm St. Realty LLC v. Victory Env't Servs*., *Ltd*., 10 Misc. 3d 128(A) (App. Term 2005).

The Court of Appeals has rejected the suggestion that this principle of contract law may be used as a "get out of jail" card to excuse non-compliance with a statute, much less the Constitution. In *New York State Bankers Ass'n, Inc. v. Wetzler*, 81 N.Y.2d 98 (1993) the New York State Bankers Association moved for partial summary judgment in an action claiming that an audit fee provision of a state operations budget bill violated Article VII, § 4 of the State Constitution because the measure was added as a legislative amendment to the budget bill after its submission to the Legislature by the Governor, who subsequently signed the bill. 81 N.Y.2d 98, 100. The State, arguing in part that the lawsuit was not justiciable, urged that the defect in question was a "purely technical judicial roadblock into the consensual budget process" that should be disregarded, because "the Governor and Legislature are in agreement on the necessity of a change in a budget bill . . ." *Id*. at 103. "[I]t makes absolutely no sense," the State's argument concluded, "to apply section 4 to forbid the change simply because it may technically have been added by the Legislature." *Id*.

The Court rejected the argument that compliance with constitutional form is a "mere technicality," describing a scenario that was almost a perfect

parallel with the one here: "Without even a semblance of conformity, the Legislature simply proceeded to alter the Budget Bill submitted by the Governor in outright disregard of the dictates of the Constitution. It is self-evident that total noncompliance cannot amount to substantial compliance," *id*. at 104, *citing In re Sherill*, 188 N.Y. 185, 198 (1907).

The State's recasting of that same argument as merely a matter of "substantial compliance" was no more successful:

> Defendant maintains, alternatively, that if we do not agree that there was substantial compliance, we should, nevertheless, declare the Audit Fee Provision valid by ignoring the constitutional violation. The argument is that the purpose of article VII, § 4—harmony between the legislative and executive branches in implementing the budgetary process—was achieved inasmuch as the Governor and the Legislature both acted to show their approval of the Audit Fee Provision. In view of this accord between the two branches, defendant says, the identical measure could have been enacted constitutionally if the Governor had exercised his right to include the provision in the Budget Bill by amendment after its submission . . . and the Legislature thereafter adopted it. Thus, according to defendant, the desired result has been achieved, albeit not in accordance with, and there is no cause for complaint. The violation, therefore, is of no moment.
>
> The argument is patently flawed. That something which is done illegally could have been done legally, of course, does not excuse the illegality. Beyond that, article VII, § 4 is not, as defendant suggests, a mere procedural requirement in a constitutional process aimed at facilitating agreement in adopting the budget, a requirement which may be waived if the executive and legislative branches agree on it. To the contrary, article VII, § 4 is part of a constitutional scheme for adoption of the budget

> under which, in general, the Governor is required to initiate and propose the budget legislation.

81 N.Y.2d at 104. The comparison to the situation here, of course, is obvious. Just as Article VII, § 4 is part of a constitutional scheme for adoption of the budget – a scheme that is inviolate precisely because it is enshrined in the Constitution – Article XIX, § 1 is and must be inviolate because it is part of a constitutional scheme for placing nothing less than a constitutional amendment before the electorate. "The constitutional command," this Court concluded, "is unambiguous." *Id*.

Not only is there no equitable exception to a mandatory constitutional procedure, but there is also no reason to invent one here – and at least one very good reason not to: namely, the profound impact such an approach would have on equal protection law. The proposed amendment at issue was a rushed reaction to the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, Oyez, No. 19-1392, 597 U.S. 215 (2022), Democrats in the Legislature were determined to ensure that the politically potent issue of abortion appear on New York ballots in the 2024 election, notwithstanding the lack of any threat to abortion availability in this State. The legislative session was coming to an end, however, so the Legislature

chose to dispense with the requirements of Article XIX, § 1 and continue full speed ahead with its strategy.

As Supreme Court Livingston observed, however, the history of Article XIX, § 1 reflects a deliberate decision to require deliberation in so grave a matter as constitutional amendments. And grave indeed it would be for any court to rewrite the Constitution to change the procedure by which it is itself amended – especially here, where the proposed amendment would frankly embed racial discrimination into New York law. As set forth in EPP's position statement on the amendment,[1] the ERA adds an entirely new paragraph to Article 1, Section 11 of the Constitution which, under the rubric of permitting discrimination "designed to prevent or dismantle discrimination" embeds what is commonly referred to as "reverse discrimination" into the New York State Constitution.

Besides violating the federal Constitution, –as held in *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023), incorporating such a principle into New York law would actually preempt Human Rights Laws of both the State and the City of New York, among many others, as long as the discriminating party could advance a claim that its conduct was intended to

[1] See, https://legalinsurrection.com/2024/04/equal-protection-project-opposes-proposed-dei-amendment-to-the-ny-state-constitution/.

"dismantle discrimination." Given the dramatic impact of this amendment on the substantive and procedural rights of New Yorkers, there is no equitable reason to excuse the legislature's non-compliance with constitutionally mandated procedure.

Amicus curiae EPP asks the Court, therefore, to reinforce the core precept of our State's jurisprudence that the New York State Constitution means what it says, in affirming the judgment of Supreme Court Livingston.

CONCLUSION

For the foregoing reasons, the ruling by Supreme Court Livingston denying the motion by the Defendants below and striking the proposed amendment to the New York State Constitution from the ballot should be affirmed.

Respectfully submitted,

EQUAL PROTECTION PROJECT
LEGAL INSURRECTION FOUNDATION

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June 10, 2024

PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 NYCRR) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, Times New Roman typeface was used, as follows:

Typeface: Times New Roman
Point size: 14 pt
Line spacing: 28 pt

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 2,521.