

To: The Senate Judiciary Committee
From: The ACLU of Vermont
Re: Proposal 4
Date: 3/15/24



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We appreciate the goals behind this proposed amendment and fully support its passage. As you have heard from others' testimony, despite Vermont's longstanding commitment to equality, Vermont does not currently have an equal protection or equal rights amendment that prohibits differential or discriminatory treatment or impacts based on core aspects of a person's identity. And, because of the U.S. Supreme Court, the federal equal protection clause has consistently fallen short in protecting individuals from discrimination or in dismantling systemic barriers to equality—and under the present Supreme Court, the federal jurisprudence is likely to get even worse. From the testimony of the witnesses and legislators who introduced this amendment, there is a clear intent to fill this gap, provide greater protections to the people of Vermont than currently exist under federal equal protection and address the many ways in which federal equal protection law is insufficient.

To that end, we propose several changes to PR 4 that will enable it to fully realize these goals. These proposed changes can be found in the attached document titled "ACLU Proposed Edits," which is substantially similar to the document submitted to the committee on March 1st, 2024, but includes additional language addressing religion. Of the proposed changes we present, we think the second and third points are the most important for guaranteeing that Vermont's equal rights amendment does not repeat the insufficiencies of federal law.

1. *Creating a Standalone Article:* Many of the witnesses have spoken about why they believe it is beneficial that this language be added to the constitution as a standalone article instead of amending Article 7. We agree and would support this change because it would be cleaner, more understandable, and could help avoid confusion about interpretation.
2. *Intent and effect:* There is consensus that one of the largest failures of federal equal protection law is that it is limited to addressing intentional discrimination or "animus," which is narrowly defined and often impossible to prove. We propose adding "in intent or effect" to the new article so that it would read "the government shall not deny equal treatment and respect under the law in intent or effect". This is an important change to make it clear that courts may find a violation of this article when the government has acted with either the intent or effect of denying equal protection, and is necessary to address the most prevalent and enduring forms of contemporary discrimination, which often lack a central decision-maker or proof of invidious intent.
3. *Self-executing:* We also propose adding language to make it clear that this article would be self-executing, meaning that individuals would have a right to bring suit for violations of the article. The Supreme Court of Vermont has found that some articles are self-executing while others are not. It seems that the intent of this amendment is to allow for people to seek remedies for a violation, so we wanted to make that explicit in the language so there was no risk that victims of discrimination would have to await a Supreme Court

decision to confirm they could vindicate their rights. Instead, they could do so immediately.

4. *Protected categories:*

- **Add Economic Hardship:** In the list of protected categories, we propose adding “economic hardship.” As the current purpose section of the amendment makes clear, discrimination against those experiencing poverty or facing economic hardship creates enormous barriers to Vermonters exercising their full rights; it is undisputed that people who have lower incomes can face discrimination that can make it harder for them in almost all aspects of daily life. This change would mirror the intent section as currently written and ensure that people experiencing economic hardship are not subject to discrimination at the hands of their government. While we think this is very important, we also recognize that this amendment could still be effective if this was not listed as a protected category, though it might not capture a major portion of society that needs greater protections under the law.

- **Religion:** The Committee has made clear that it seeks to include religion within the amendment’s list of protected categories. Of course, religion may constitute a core aspect of an individual’s identity and is deserving of protection along with other fundamental characteristics. However, as you know, religious freedom is already protected under Article 3. To avoid confusion and to preserve existing protections for religious liberty that have flowered from Article 3, we propose making clear that while religion is of course a protected category, this Amendment would not supplant existing, and well-developed, law protecting religious freedom, instead retaining Article 3 as the chief mechanism for enforcing religious freedom. We note that this approach—which reaffirms religion as a protected characteristic but does not disrupt well-developed existing law—is identical to the one taken by New York in its proposed equal rights amendment.

- **Inclusion of protected categories under the umbrella of sex:** We propose changing the language slightly to include the protected categories of sexual orientation, gender identity or gender expression under the category of “sex” because courts have traditionally conceptualized these types of discrimination as a form of sex discrimination. We have also included the language “including but not limited to” to show that while these have traditionally been aspects of “sex” discrimination, there may be other, distinct forms or concepts of gender-based subordination or discrimination that will also fall within this umbrella, and it is important to make clear that the definition of “sex” is expansive enough to encompass these harms while not foreclosing future forms of gender or sex-based subordination.



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