

The ACLU of Pennsylvania supports this proposed amendment to the Pennsylvania Constitution: Article I § 29. Prohibition against denial or abridgment of equality of rights because of race and ethnicity. Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the race or ethnicity of the individual.¹

Ballot question

On the May 18, 2021 primary ballot, Pennsylvania voters will decide this [question](#): “*Shall the Pennsylvania Constitution be amended by adding a new section providing that equality of rights under the law shall not be denied or abridged because of an individual’s race or ethnicity?*”²

Context of proposed amendment

In Pennsylvania, a proposed amendment to the constitution must pass the legislature in two consecutive sessions before it is put on the ballot as a referendum. The state House and Senate passed this proposal for the second time in February 2021, but first considered it last session in June/July of 2020. It was introduced during the wake of police brutality cases and protests³ following the death of George Floyd, who [died in police custody](#) on May 25, 2020, and members of Pennsylvania’s state House and Senate commented on the importance of the proposed amendment as a tool to work towards racial equality.⁴

In support of the proposed equality amendment

Both the U.S. and Pennsylvania constitutions currently provide some protections against discrimination: equal protection under the [Fourteenth Amendment](#) of the United States Constitution,⁵ equal protection under [Article I, § 26](#)⁶ and protection against sex discrimination under [Article I, § 28](#)⁷ of the Pennsylvania Constitution. This new amendment, if adopted, may expand protections against racial and ethnic discrimination in several ways.

The amendment will expand protections against racial and ethnic discrimination and send a clear message to Pennsylvania’s courts to stamp out such discrimination.

The proposed amendment comes at a time when Pennsylvania, like the United States as a whole, is grappling with longstanding and unaddressed racial discrimination that pervades society. The last time the question of equity was this prominent in the nation, Pennsylvania’s voters approved [Article I, § 26](#) in 1967, which was designed to strengthen protections for civil rights. Yet Pennsylvania’s courts have consistently ignored that provision’s unique language and history, interpreting it as providing no greater protections against discrimination and the protection of individual rights than the U.S. Constitution’s Fourteenth Amendment. Therefore, Section 26, like the federal law, has failed to eradicate systemic racial disparities.

Pennsylvania voters now have an opportunity to undo that mistake by adopting a constitutional provision that reflects the strongest condemnation of racial discrimination in the nation. To accomplish this goal, legislators modeled the language of this amendment on Pennsylvania’s Equal Rights Amendment (“ERA”). In the same way that the ERA in [Article I, § 28](#) provides the strongest possible protections against sex discrimination, the proposed amendment would do the same for racial discrimination.

The amendment will likely have two significant impacts on how courts can address racial discrimination in Pennsylvania that currently go unaddressed.

The Fourteenth Amendment prohibits discrimination against individuals on the basis of race. But the United States Supreme Court’s decisions have limited the reach and effectiveness of the Fourteenth Amendment, taking away its power to remedy systemic racial discrimination. That could change with the adoption of the proposed amendment by giving Pennsylvanians a critical, much-needed tool to combat such discrimination.

First, according to the U.S. Supreme Court, the Fourteenth Amendment only protects against *intentional* discrimination by the government — it does not allow people to challenge government actions or policies that have *unintentional* but disproportionate impacts on people of color (called a “disparate impact”). This has significant implications for, among other things, police accountability, where police departments engage in racist and discriminatory policing practices that disproportionately harm people of color, while leaving them few options to hold police accountable. The proposed amendment would change that by expanding state protections against racial and ethnic discrimination and allow lawsuits beyond what’s currently permitted under the Fourteenth Amendment — similar to the expanded state protections against sex discrimination provided under Pennsylvania’s ERA.⁸

Moreover, the proposed amendment would permit Pennsylvania’s courts to hold government actors accountable for *inaction* that denies “equality of rights” to people of color. This could have a significant impact on historic and ongoing inequalities associated with education, housing, policing, and other areas where the Fourteenth Amendment does not offer strong enough protections.

Second, lawsuits under the Fourteenth Amendment are limited by the “state action doctrine” — again, the U.S. Supreme Court has limited the effect of the Fourteenth Amendment by only prohibiting discriminatory actions that involve government action. But Pennsylvania courts, in interpreting the state’s ERA, have rejected the U.S. Supreme Court’s narrow interpretation of state action.⁹ The proposed amendment, by mirroring the language of the state ERA, will potentially allow the amendment to be used to challenge discriminatory actions by non-governmental entities that enforce state statutes, municipal ordinances, or regulations. As a result, the broader amendment could allow courts to stop more types of discriminatory behavior.¹⁰

In short, the proposed amendment may serve as a vehicle to attack systemic racism across Pennsylvania’s state and local governments in a way that currently goes unaddressed.

The amendment will still permit-race conscious programs that increase equality.

The purpose of the proposed amendment is to protect “equality of rights,” a phrase that still allows the use of race-conscious remedies to tackle entrenched historic discrimination. When used in areas like hiring and education admissions, such remedies actually *increase* equality. And we can look to Pennsylvania’s ERA for comparison — the state ERA has not been used to strike down any affirmative action programs for women, and decisions from courts in other states have demonstrated that the “absolute mandate of equality does not... bar affirmative governmental efforts to create equality in fact.”¹¹ The same would be true of the proposed amendment, since its language is the same as the state ERA.

By contrast, if an amendment was intended to prohibit this kind of affirmative government action, it would use dramatically different language. Take, for instance, an amendment to Michigan’s constitution proposed in 2006, which explicitly stated that public institutions “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”¹² Not only was Michigan’s [ballot](#)¹³ and amendment language entirely different from the proposed Pennsylvania language, it was not passed as part of or in support of Michigan’s existing constitutional [provision](#) providing equal protection under the law.¹⁴

The proposed equality amendment to Pennsylvania’s constitution has the potential to expand protections against racial and ethnic discrimination, protect against unintentional but still disproportionate impacts on people of color, challenge discriminatory actions by non-governmental entities, while still permitting race-conscious programs that increase equality.

For these reasons, the ACLU of Pennsylvania recommends **voting YES to amend the Pennsylvania Constitution with the proposed equality amendment on the **May 18, 2021** primary ballot.**

Endnotes

¹ [PA Senate Bill 2 PN 86 \(2021\)](#).

² [Joint Resolution 2021-1](#).

³ Taylor, D. B. (2021, March 28). [George Floyd Protests: A Timeline](#). The New York Times.

⁴ This connection was made explicit by Senator Vincent Hughes when he introduced the amendment language in the state Senate on June 10, 2020: “*This amendment would enshrine a long standing notion that no one should be discriminated against based on race or ethnicity. This provides that no discrimination should occur in Pennsylvania based on race or ethnicity. It is modeled after Section 28 of Article 1, which provides for equal rights under the law based on gender ... the protections that we need to have enshrined need to be lifted up at the State level by what we see happening all around us. We must seize and secure these protections at all costs. We must make sure that no one in the Commonwealth of Pennsylvania is discriminated against based on their ethnicity.*” [PA S. Jour. 2020 Reg. Sess. No. 27, p. 591](#). This was echoed by Senator Sharif Street: “*...I certainly applaud all those who believe it to be the right message to be sent, particularly in this moment in light of the murder of George Floyd and all the people who are upset...*” [PA S. Jour. 2020 Reg. Sess. No. 27, p. 598](#).

This context was also reflected in comments made in the state House on July 14, 2020 by Representative Russ Diamond: “*SB 1166 contains three distinct constitutional amendments on which we should all agree we can say, never again. Never again should anyone's individual rights be suppressed, set aside, or discriminated against because of the color of their skin or their ethnicity...*” [PA H.R. Jour. 2020 Reg. Sess. No. 45, p. 1131](#). This was underscored by Representative Jordan Harris: “*Mr. Speaker, now more than ever it is important that we reassure our communities of color that we support them. Now more than ever it is important that we let them know that we not only hear their cries, but we are willing to do something about it.*” [PA H.R. Jour. 2020 Reg. Sess. No. 45, p. 1132](#).

⁵ [U.S. Const. amend. XIV](#), “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

⁶ [Pa Const., Article I, § 26](#), “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”

⁷ [Pa Const., Article I, § 28](#), “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.”

⁸ See, e.g., [Snider v. Thornburgh](#), 436 A.2d 593, 601 (Pa. 1981) (stating, in a Pennsylvania Equal Rights Amendment case, that “facially neutral . . . policies which have the practical effect of perpetuating . . . discriminatory practices constitute discrimination by sex”) (*internal citations/quotations omitted*); [DiFlorida v. DiFlorida](#), 331 A.2d 174 (Pa. 1975) (overturning facially gender-neutral presumption that the spouse who purchased property during a marriage owned it at the time of divorce, because this ignored the equal partnership of the spouses).

⁹ [Hartford Acc. And Indem. Co. v. Insurance Com’r of Com](#), 482 A.2d 542, 586 (Pa. 1984).

¹⁰ See [Welsch v. Aetna Ins. Co.](#), 494 A.2d 409 (Pa. Super. Ct. 1985) (affirming dismissal of federal constitutional claims on grounds that no state action existed, but reversing dismissal of claim under the Pennsylvania Equal Rights Amendment). *But see* [Dillon v. Homeowner’s Select, Affinity Ins. Servs., Inc.](#), 957 A.2d 772 (Pa. Super Ct. 2008) (holding that the Pennsylvania Equal Rights Amendment does not apply to private entities).

¹¹ [Southwest Washington Chapter, Nat. Elec. Contractors Ass’n v. Pierce County](#), 667 P.2d 109, 127-128 (Wa. 1983).

¹² [Michigan Constitution, Article I, §26](#) (2006).

¹³ [Michigan Senate Fiscal Agency, Ballot Proposal Overview, September 2006](#).

¹⁴ [Michigan Constitution, Article I, §2](#) (1964), “No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.”