

COURT OF APPEALS
STATE OF NEW YORK

-----X
MARJORIE BYRNES, individually and as a member of
the New York State Assembly, TAWNY FEENY and
SUSAN LUNDGREN,

Appellants-Respondents,

v.

THE SENATE OF THE STATE OF NEW YORK,
ANDREA STEWART-COUSINS, as the President Pro
Tempore and Majority Leader of the Senate, THE
ASSEMBLY OF THE STATE OF NEW YORK, CARL
HEASTIE, as Speaker of the Assembly,

Respondents-Appellants,

- and -

NEW YORK STATE BOARD OF ELECTIONS,

Defendants,

ROBERT ORTT, as Minority Leader of the Senate,
WILLIAM BARCLAY, as Minority Leader of the
Assembly,

Appellants-Respondents.
-----X

APL-2024-00083

Appellate Division
Case No.: CA 24-00764

(Originating Court:
Sup. Ct., Livingston Co.,
Index No.: 000778-2023)

**NOTICE OF MOTION
FOR LEAVE TO APPEAL**

Return date: July 29, 2024

PLEASE TAKE NOTICE that, upon the annexed Affirmation in Support of
Motion of Lisa A. Perillo, Esq., dated July 18, 2024, the Statement Pursuant to Rules
500.21 and 500.22 of the Court of Appeals Rules of Practice, and the exhibits annexed
thereto as well as the briefs and records filed in the Appellate Division, Fourth

Department on the prior appeal herein, and upon all papers and prior proceedings in this action, Appellants-Respondents, ROBERT ORTT, as Minority Leader of the Senate and WILLIAM BARCLAY, as Minority Leader of the Assembly (collectively the “Minority-Appellants”), by their attorneys Perillo Hill LLP, will move this Court at the courthouse of the New York State Court of Appeals, 20 Eagle Street, Albany, New York, on July 29, 2024, at 9:30 am, or as soon thereafter as counsel may be heard, for an Order:

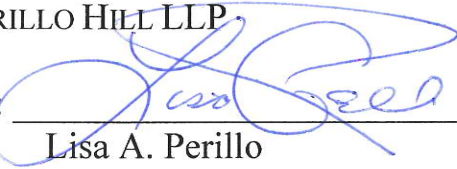
- (a) pursuant to CPLR 5602(a)(1)(i) and Rule 500.22 of the Rules of Practice of the Court of Appeals, granting the Minority-Appellants leave to appeal to the Court of Appeals from the Memorandum and Order of the Appellate Division, Fourth Department, entered on June 18, 2024 (the “Order”), whereby the Appellate Division determined that this Action should have been brought as an Article 78 proceeding, and thus dismissed the above-captioned action as time-barred, and from each and every part of such Order; and
- (b) for any such further relief as this Court may deem just, equitable and proper.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, shall be served in accordance with Rule 500.21(c) of the Rules of Practice of the Court of

Appeals.

Dated: Sayville, New York
July 18, 2024

Respectfully submitted,
PERILLO HILL LLP

By: 

Lisa A. Perillo

285 West Main Street, Suite 203
Sayville, New York 11782
(631) 582-9422
lperillo@perillohill.com

Attorneys for the Minority-Appellants
ROBERT ORTT, as Minority Leader of the
Senate and WILLIAM BARCLAY, as
Minority Leader of the Assembly

TO: Christian Browne, Esq.
McLAUGHLIN & STERN, LLP
1122 Franklin Avenue, Suite 300
Garden City, New York 11530
(516) 829-6900
cbrowne@mclaughlinstern.com

and

Bobbie Anne Flower Cox, Esq.
COX LAWYERS, PLLC
34 Palmer Ave.
Bronxville, New York 10708
(914) 779-7762
bcox@coxlawyers.com

Attorneys for Appellants-Respondents

Dustin Jacobs Brockner, Esq.
NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
The Capitol
Albany, New York 12224

(518) 776-2017
dustin.brockner@ag.ny.gov

Attorneys for Respondents-Appellants

Kevin Gordon Murphy, Esq.
NYS BOARD OF ELECTIONS
40 N. Pearl Street, Suite 5
Albany, New York 12207
(518) 474-6220
Kevin.murphy@elections.ny.gov

Attorneys for the NYS Board of Elections

And to Amici:

Susannah Providence Torpey, Esq.
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
(212) 294-4690
storpey@winston.com

Attorneys for Non-Party League of Women Voters of New York State

Ronald David Coleman, Esq.
18 Maple Avenue, no. 280
Barrington, RI 02806
rcoleman@dhillonlaw.com

*Attorney for Non-Party Equal Protection Project,
Legal Insurrection Foundation*

Christopher Augustine Ferrara, Esq.
14829 Cross Island Parkway
Whitestone, New York 11357
(718) 357-1040

cferrara@thomasmoresociety.org

Attorney for Non-Party Thomas More Society

COURT OF APPEALS
STATE OF NEW YORK

-----X
MARJORIE BYRNES, individually and as a member of the
New York State Assembly, TAWNY FEENY and SUSAN
LUNDGREN,

Appellants-Respondents,

v.

THE SENATE OF THE STATE OF NEW YORK, ANDREA
STEWART-COUSINS, as the President Pro Tempore and
Majority Leader of the Senate, THE ASSEMBLY OF THE
STATE OF NEW YORK, CARL HEASTIE, as Speaker of the
Assembly,

Respondents-Appellants,

- and -

NEW YORK STATE BOARD OF ELECTIONS,

Defendants,

ROBERT ORTT, as Minority Leader of the Senate, WILLIAM
BARCLAY, as Minority Leader of the Assembly,

Appellants-Respondents.
-----X

APL-2024-00083

Appellate Division
Case No.: CA 24-00764

(Originating Court:
Sup. Ct., Livingston Co.,
Index No.: 000778-2023)

**AFFIRMATION IN
SUPPORT OF MOTION
FOR LEAVE TO APPEAL**

LISA A. PERILLO, ESQ., an attorney duly licensed to practice in the State
of New York, hereby affirms the truth of the following under penalties of perjury,
pursuant to the CPLR:

1. I am a partner at the law firm Perillo Hill LLP, attorneys of record for
ROBERT ORTT, as Minority Leader of the Senate and WILLIAM BARCLAY as
Minority Leader of the Assembly of the State of New York (collectively the

“Minority-Appellants”) with respect to both the proceedings in the Supreme Court, Livingston County and the appeal taken from those proceedings to the Appellate Division, Fourth Department. As such, I am fully familiar with the matters addressed herein.

2. This Affirmation is submitted in support of the Minority-Appellants Motion for Leave to Appeal to the Court of Appeals pursuant to New York Civil Practice Law and Rules (“CPLR”) 5602(a)(1)(i).

3. Attached to this Affirmation as Exhibit A is a true and correct copy of the Order of the Supreme Court, Livingston County entered on May 7, 2024, which: (a) granted the Appellants-Respondents’ cross-motion for summary judgment; (b) denied the Respondent-Appellants’ motion for summary judgment; (c) declared that the New York State Legislature violated Article XIX, §1 of the New York State Constitution in adopting Senate Bill S.51002 and Assembly Bill A.41002; (d) declared those bills null and void; and (e) ordered that the proposed constitutional amendment be removed from the ballot for the November 5, 2024 general election.

4. Attached to this Affirmation as Exhibit B is a true and correct copy of the Memorandum and Order of the New York State Supreme Court, Appellate Division, Fourth Department entered on June 18, 2024, and served with Notice of Entry on June 20, 2024 (the “Order”), which reversed the lower court’s order and dismissed the complaint, finding that the complaint did not challenge “... ‘the

constitutionality of the [Respondents-Appellants'] actions, it actually challenges an erroneous application of a constitutional provision relating to the procedure by which' the proposed amendment was advanced, and therefore it would have been proper to proceed by way of a CPLR Article 78 proceeding'....thus the sole cause of action here is subject to the four-month statute of limitations and is time-barred....” Exhibit B, at p. 3.

5. The Minority-Appellants timely filed a Notice of Appeal of the Order on June 25, 2024, pursuant to CPLR 5601(b)(1) as the appellate court’s Order finally determined an action, which action directly involved the construction of New York State Constitutional language – specifically that of Article XIX, §1 concerning the regimen for amending the constitution. Attached to this Affirmation as Exhibit C is the Notice of Appeal.

6. Attached to this Affirmation as Exhibit D is a true and accurate copy of the New York State Court of Appeals Decision entered on July 11, 2024, issued after the Minority-Appellants submitted their Jurisdictional Response pursuant to 22 N.Y.C.R.R. Part 500, Rule 500.10(a) answering this Court’s June 26, 2024, Jurisdictional Inquiry letter. The Decision dismissed the appeal sua sponte, “upon the grounds that [the Minority-Appellants] are not parties aggrieved....” Exhibit D. That Decision also dismissed the appeal of Appellants-Respondents, Marjorie

Byrnes et al., “upon the ground that no substantial constitutional question of directly involved”. Exhibit D.

7. This Motion for Leave to Appeal is now filed and served, fewer than thirty days from the date of the written notice of entry of the appellate court’s Order and therefore is timely filed pursuant to CPLR 5513(b). The notice of entry dated June 20, 2024 is attached as Exhibit E.

8. This Court has jurisdiction over this motion because the action originated in the Supreme Court, Livingston County and is taken from a final Order of the Appellate Division, Fourth Department and, pursuant to this Court’s July 11, 2024 Decision, not appealable as of right.

9. It is respectfully submitted that the Minority-Appellants are parties aggrieved pursuant to CPLR 5511 and as such have standing to appeal. The Minority-Appellants fully participated in the motion practice resulting in the supreme court’s order appealed from to the Appellate Division, Fourth Department. Specifically, the Minority-Appellants submitted affirmations in support of the Appellants-Respondents’ cross-motion for summary judgment (joining in the motion) and in opposition to the Respondents-Appellants (then Defendants)’ motion for summary judgment. In addition, the supreme court’s order expressly states that the Minority-Appellants’ submissions were considered by the supreme court in arriving at its decision and were among the submissions upon which the Order was

based. *See* Exhibit A, p. 36 at fn. 9. The Minority Appellants' papers in support of the Appellants-Respondents summary judgment motion are part of the Record of the Appeal to the Fourth Department.¹

10. As concerns the appeal before the Appellate Division, Minority-Appellants fully participated in the appeal before the Fourth Department. The Minority-Appellants filed and submitted a Brief in Opposition (*see* copy of filed Brief submitted digitally via the Court Portal) and presented oral argument to the Appellate Division, Fourth Department in opposition to the appeal. As such, they are aggrieved by that Court's Order granting the appeal.

11. In sum, the Minority-Appellants: (1) actively joined in the motion resulting in the supreme court order; and then (2) fully, yet unsuccessfully, opposed the relief requested before the Fourth Department and are parties aggrieved by the Appellate Division's Order now appealed from. *See e.g., Ciruolo v. Melville Court Assocs.*, 221 A.D.2d 582, 582-83 (2d Dep't 1995) ("Because the third-party defendant...joined in the motion for summary judgment, *inter alia*, dismissing the plaintiff's causes of action under Labor Law §§ 240, 241, it was aggrieved by the denial of that relief, and can properly appeal from the order...."); *Voorhees v.*

¹ Specifically, the Affirmation of Lisa A. Perillo, Esq., in response to Plaintiff's Cross-Motion for Summary Judgment, filed March 5, 2024, and the Affirmation of Lisa A. Perillo, Esq., in Further Response to the Supplemental Filings, filed April 12, 2024.

Babcock & Wilcox Corp., 150 A.D.2d 677, 678 (finding that “although the appellant did not make any cross motion, the affidavit of its counsel in support of the prior motion was annexed as an exhibit, and was thus before the court on the motion to renew. Under these circumstances, we consider the appellant to have joined in the codefendant’s motion, and hence to have been aggrieved by the denial of this motion [CPLR 5511].”).

12. In addition, the Minority Appellants are representatives of a portion of the State Senate and State Assembly not represented by the Respondents-Appellants and, as such, are so “connected with the litigation” as to warrant granting their leave to appeal even if they had not already fully participated before the courts below (which they have). *See e.g., Ryder v. Cue Car Rental, Inc.*, 32 A.D.2d 143, 146 (4th Dep’t 1969)(“‘The statutory provision authorizing appeal by an aggrieved party does not preclude an appeal by persons aggrieved, who, though not strictly parties, are so connected with the litigation that they may be termed quasi parties.’ (10 Carmody Wait 2d, New York Practice, § 70:69.) Instances in which persons not originally made parties have been permitted to prosecute appeals because aggrieved by the determination sought to be reviewed may be found in *Matter of Attorney-General v. North Amer. Life Ins. Co.* (77 N. Y. 297) and in *Soto v. Lenscraft Optical Corp.* (7 N Y 2d 747).”).

13. There are a number of reasons why this Court should grant this Motion for Leave. First, because (a) this appeal raises a complex and novel legal issues of great importance to the public and New York State concerning (i) the interpretation of the Constitutional language setting forth the regime for amending the Constitution itself and whether the State Legislature’s problematic, flagrant and unconstitutional disregard of same unlawfully undermines the fundamental law of the land that created the Legislature – giving the Legislature unduly unchecked control over the very source of the Legislature’s power and authority;² and (ii) the question of whether challenges to the Legislature’s actions taken in unconstitutional disregard of constitutional language are properly brought (as they historically have been) as declaratory judgment actions or whether they can only be brought as CPLR Article 78 claims.

14. It is respectfully submitted that the lower court correctly determined that the Legislature acted unconstitutionally, disregarding (as it may not do) constitutional language. *See Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494, 511 (2022)(“Our Constitution is ‘an instrument framed deliberately and with care, and

² See e.g. *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022) (“[I]nvalidation of a legislative enactment is required when such act amounts to ‘a gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein’ (*Cohen*, 19 NY3d at 202, quoting *Matter of Sherrill v. O’Brien*, 188 NY 185, 198, 81 NE 124 [1907])”; and *Matter of King*, 81 N.Y.2d at 252 (“The legislature must be guided and governed in this particular function by the Constitution, not by a self-generated additive”).

adopted by the people as the organic law of the State’ and, when interpreting it, we may ‘not allow for interstitial and interpretative gloss . . . by the other branches of the government that substantially alters the specified law-making regimen’ set forth in the Constitution....”). The appellate division did not consider this issue at all in reversing the lower court’s order on the grounds that the action should instead have been brought as an Article 78 proceeding and as such was untimely.

15. It is further respectfully submitted that the vote on and approval of the bills (concurrently approving the proposed amendment at issue here) is unquestionably “legislative” action, and thus not subject to Article 78 review as the appellate division erroneously found. *See* Exhibit B. Moreover, although the constitutional language at issue concerns a “procedure” (to amend the Constitution) at issue in the action here is the Legislature’s “substantive” understanding of same, and not merely its “compliance” with mandatory constitutional procedure as would be in question in a mandamus proceeding. Indeed, the Legislature sees the constitutional language in question as optional -- not as ministerial or as mandatory. The question presented is not whether the Legislature has failed to perform a function or step it was duty bound to perform, but rather, more preliminarily, whether it has such a duty pursuant to the constitutional language in question. The very need for construction of the constitutional language at issue and the generalized impact (on the State public at large) of the Legislature’s action removes this action from the

realm or scope of CPLR Article 78 and its limitations period. Moreover, the challenge in this action was to the legitimacy of the vote in question (i.e. the Legislatures' vote on the bills in question). It cannot viably be argued that in so voting, the Legislature is not acting in its legislative capacity or that the result of that vote is not legislative action affecting the entirety of the State of New York and the public generally (and not an "administrative" action subject to review under an arbitrary and capricious standard). *See e.g. Lakeland Water Dist. v. Onondaga Co. Water Auth.*, 24 N.Y.2d 400, 407 (1969)("An article 78 proceeding, it is settled, may not be utilized to review legislative action [see *Matter of Southern Dutchess Country Club v. Town Bd. of Town of Fishkill*, 18 N Y 2d 870; *Matter of Paliotto v. Cohalan*, 8 N Y 2d 1065; *Matter of Neddo v. Schrade*, 270 N. Y. 97, 102-103; *People ex rel. Trustees v. Board of Supervisors*, 131 N. Y. 468, 471;...]").

16. Indeed, the appellate division's finding of untimeliness is incongruous with the tenet that unconstitutional action is a nullity and void ab initio – whether the unconstitutionality is discovered immediately or not for decades.

17. Another reason why this motion for leave should be granted is that, for the reasons set forth above, the appellate division committed an error in law and fact in rendering its decision embodied in the Order. Specifically, finding that the central question of constitutional interpretation presented in the action was somehow properly an Article 78 challenge and not a challenge to legislative action properly

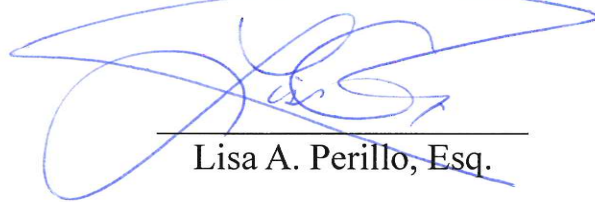
brought as a declaratory judgment claim. Indeed, the appellate division Order clearly recites that the “Plaintiffs commenced this action seeking a judgment declaring...that the New York State Legislature violated article XIX section 1 of the New York State Constitution in adopting Senate Bill S.51002 and Assembly Bill A.41002 on July 1, 2022” (*see* Exhibit B, p.2) – clearly a challenge to a legislative action. The appellate division’s recharacterization of the actual claim asserted as a challenge to the procedure by which the proposed amendment was advanced is erroneous and circular given that the vote did actually occur and was competed and is itself an unconstitutional legislative act (because of the way that proposed amendment was advanced in violation of Article XIX §1.

18. Submitted herewith is the Minority-Appellants’ Statement in Support of Motion for Leave to Appeal to the Court of Appeals pursuant to Court of Appeals Rules of Practice 500.21 and 500.22, which is incorporated herein as if fully set forth.

WHEREFORE, it is respectfully requested that the Court grant the Minority-Appellant's motion for leave to appeal, as well as grant other and further relief as the Court may deem just, proper and equitable.

Dated: Sayville, New York
July 18, 2024

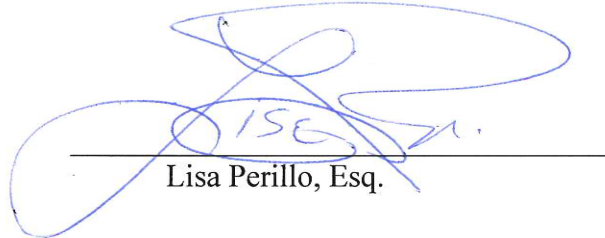
Respectfully submitted,
PERILLO HILL LLP



Lisa A. Perillo, Esq.

CERTIFICATION PURSUANT TO RULE § 202.8-b OF THE
UNIFORM COURT RULES

I HEREBY CERTIFY PURSUANT TO RULE § 202.8-b THAT THE TOTAL NUMBER OF
WORDS CONTAINED IN THE FOREGOING AFFIRMATION, INCLUSIVE OF THE
CAPTION AND SIGNATURE BLOCK, IS 2358.



Lisa Perillo, Esq.

COURT OF APPEALS
STATE OF NEW YORK

-----X
MARJORIE BYRNES, individually and as a member of the
New York State Assembly, TAWNY FEENY and SUSAN
LUNDGREN,

Appellants-Respondents,

v.

THE SENATE OF THE STATE OF NEW YORK, ANDREA
STEWART-COUSINS, as the President Pro Tempore and
Majority Leader of the Senate, THE ASSEMBLY OF THE
STATE OF NEW YORK, CARL HEASTIE, as Speaker of the
Assembly,

Respondents-Appellants,

- and -

NEW YORK STATE BOARD OF ELECTIONS,

Defendants,

ROBERT ORTT, as Minority Leader of the Senate, WILLIAM
BARCLAY, as Minority Leader of the Assembly,

Appellants-Respondents.
-----X

APL-2024-00083

Appellate Division
Case No.: CA 24-00764

(Originating Court:
Sup. Ct., Livingston Co.,
Index No.: 000778-2023)

**STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL
TO THE COURT OF APPEALS**

(Pursuant to Rules 500.21 and 500.22 of the Court of Appeals Rules of Practice)

Appellants, ROBERT ORTT, as Minority Leader of the Senate and
WILLIAM BARCLAY as Minority Leader of the Assembly of the State of New

York (collectively the “Minority-Appellants”), by their attorneys Perillo Hill LLP, submit this Statement in Support of Motion for Leave to Appeal to the Court of Appeals from an order of the Appellate, Division Fourth Department, entered on June 18, 2024, and served with Notice of Entry on June 20, 2024 (the “Order”), which reversed the supreme court’s decision and dismissed the complaint, finding that the complaint did not challenge “... ‘the constitutionality of the [Respondents-Appellants’] actions, it actually challenges an erroneous application of a constitutional provision relating to the procedure by which’ the proposed amendment was advanced, and therefore it would have been proper to proceed by way of a CPLR Article 78 proceeding’....thus the sole cause of action here is subject to the four-month statute of limitations and is time-barred....” Exhibit B, at p. 3.¹ A copy of the Supreme Court decision is annexed to the accompanying Affirmation of Lisa A. Perillo, Esq., as its Exhibit A and a copy of the Appellate Division Order is annexed thereto as its Exhibit B.

¹ Exhibits referred to herein are those annexed to the Affirmation of Lisa A. Perillo, Esq. submitted herewith.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 1, 2022, both houses of the New York State Legislature introduced and adopted the concurrent resolutions or bills that proposed an amendment to Article I, § 11 of the New York State Constitution (the “Proposed Amendment”).

Section 1 of Article XIX of the Constitution sets forth a non-discretionary amendment procedure which expressly requires that the Legislature refer any proposed amendment to the New York State Attorney General prior to a vote on same so that the Attorney General can issue an opinion regarding the proposed amendment and its anticipated effect upon the other provisions of the Constitution. This is so that the elected representatives of the people of the State of New York in both the Senate and Assembly have the benefit of a legal opinion of the overall impacts and ramifications of the proposed change to the body of the Constitution from the State’s chief legal officer *prior to* the Legislature voting on behalf of the people they represent. Specifically, Article XIX § 1 (added to the Constitution in 1938) provides that:

Any amendment or amendments to this constitution may be proposed in the senate and assembly whereupon such amendment or amendments *shall be* referred to the attorney-general whose *duty it shall be* within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution. *Upon receiving such opinion*, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals,

and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. 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.²

N.Y. CLS Const. Art. XIX, § 1 (emphasis added).

However, despite the above requirements, on July 1, 2022 -- immediately following the referral of the Proposed Amendment to the Attorney General -- both houses of the Legislature voted on and adopted the Proposed Amendment. That is, the Legislature adopted the concurrent resolutions on the very same day (July 1, 2022), the Proposed Amendment was forwarded to the Attorney General.

²This last sentence (“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”) was later added to this Section by further amendment in 1941.

An opinion letter from the Attorney General was received by the Legislature on July 13, 2022—12 days after the Proposed Amendment had already been voted upon and adopted by the Legislature.

Thus, the Legislature acted prematurely and in contravention of the Constitutional mandate by voting on and adopting the Proposed Amendment prior to receiving a written opinion from the Attorney General (and before twenty days had elapsed from the time the referral to the Attorney General had been made).

By voting on and adopting the Proposed Amendment on the same day as (and immediately following) the referral to the Attorney General, the Legislature effectively ensured that that the Constitutionally-mandated Attorney General review process expressly contemplated by Article XIX § 1 would not take place, thereby deliberately undercutting and defeating the purpose of that Section entirely.

In January 2023, the Legislature voted on and passed the Proposed Amendment for a second time and directed that the Proposed Amendment be submitted to the electorate for ratification at the next general election (November 5, 2024).

On October 30, 2023, the plaintiffs (Appellants-Respondents Marjorie Byrnes *et al.*) commenced a plenary action asserting a declaratory judgment claim seeking a declaration that the Legislature's initial adoption of the Proposed Amendment was unconstitutional and as such a nullity. The Minority-Appellants appeared in the

action, filing an Answer and thereafter motion practice ensued. All parties moved for summary judgment, with the Minority-Appellants submitting papers in support of, and joining in on, the plaintiffs' motion for summary judgment. The Supreme Court granted plaintiffs summary judgment its decision and order dated May 7, 2024 and declared the Proposed Amendment null and void and further directed that it be removed from the ballot for the November 5, 2024 general election.

The Legislature appealed the supreme court decision to the Appellate Division, Fourth Department. The Minority-Appellants opposed the appeal, submitting a brief and oral argument in opposition. The Appellate Division reversed the supreme court decision and dismissed the complaint by its Memorandum and Order entered June 18, 2024 (the "Order"). The Order did not reach the merits of the case nor touch on any of the findings of the Supreme Court concerning the merits. Rather the Appellate Division found that the action should have been brought as an Article 78 proceeding and that the challenge was barred by the statute of limitations.

The Minority-Appellants filed a notice of appeal as of right pursuant to CPLR §5601(b)(1). However, after jurisdictional inquiry, by Decision dated July 11, 2024, the Court dismissed the appeal on the grounds that the Minority-Appellants' were not parties aggrieved and also dismissed the Appellants-Respondents Marjorie Byrnes *et al.*'s appeal on the grounds that the appeal did not qualify for an "as of

right” jurisdiction. A copy of the July decision is annexed to the Perillo Affirmation as Exhibit D.

The Minority-Appellants now, by this motion, seek leave of the Court to appeal pursuant to CPLR §5602(a)(1)(i).

JURISDICTION AND FINALITY

The Minority-Appellants seek leave to appeal to the Court of Appeals pursuant to CPLR §5602(a)(1)(i).

The Court has jurisdiction over this motion because the action originated in the Supreme Court, Livingston County and is taken from a final Order of the Appellate Division, Fourth Department which reversed the lower court and dismissed the complaint.

It is also respectfully submitted that the Minority-Appellants are property parties aggrieved pursuant to CPLR 5511. The Minority-Appellants actively joined in the motion resulting in the supreme court order and their submissions were expressly relied upon by that court in arriving at its determination. Further, the Minority-Appellants fully opposed the relief requested before the Fourth Department on appeal. *See Ciraolo v. Melville Court Assocs.*, 221 A.D.2d 582, 582-83 (2d Dep’t 1995) (“Because the third-party defendant...joined in the motion for summary judgment, *inter alia*, dismissing the plaintiff’s causes of action under

Labor Law §§ 240, 241, it was aggrieved by the denial of that relief, and can properly appeal from the order....”); *and Voorhees v. Babcock & Wilcox Corp.*, 150 A.D.2d 677, 678 (finding that “although the appellant did not make any cross motion, the affidavit of its counsel in support of the prior motion was annexed as an exhibit, and was thus before the court on the motion to renew. Under these circumstances, we consider the appellant to have joined in the codefendant’s motion, and hence to have been aggrieved by the denial of this motion [CPLR 5511].”). Further, the Minority-Appellants are representatives of a portion of the State Senate and State Assembly not represented by the Respondents-Appellants herein and, as such, are so “connected with the litigation” as to warrant granting their leave to appeal even if they had not already fully participated before the courts below (which they have). *See Ryder v. Cue Car Rental, Inc.*, 32 A.D.2d 143, 146 (4th Dep’t 1969)(“‘The statutory provision authorizing appeal by an aggrieved party does not preclude an appeal by persons aggrieved, who, though not strictly parties, are so connected with the litigation that they may be termed quasi parties.’ (10 Carmody Wait 2d, New York Practice, § 70:69.) Instances in which persons not originally made parties have been permitted to prosecute appeals because aggrieved by the determination sought to be reviewed may be found in *Matter of Attorney-General v. North Amer. Life Ins. Co.* (77 N. Y. 297) and in *Soto v. Lenscraft Optical Corp.* (7 N Y 2d 747).”).

TIMELINESS

This Motion for Leave to Appeal is filed and served, within thirty days of the date of the written notice of entry of the appellate court's Order (June 20, 2024). *See* notice of Entry Annexed to Perillo Affirmation as Exhibit E. This Motion is served via overnight delivery on all parties' counsel on June 19, 2024. *See* Affidavit of Service submitted and filed herewith. It is therefore timely filed pursuant to CPLR 5513(b).

DISCLOSURE STATEMENT

A disclosure statement is not required pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals.

QUESTIONS PRESENTED

1. Did the Appellate Division err in finding that Appellants were required to proceed by Article 78 proceeding to challenge the Legislature's unconstitutional action rather than by a plenary declaratory judgment claim?
2. Did the Appellant Decision err in reversing the Supreme Court's Order and Judgment which found that the Legislature violated Article XIX §1 and as such its action was a nullity?

ARGUMENT

POINT I

THE COMPLAINT WAS PROPERLY BROUGHT AS A PLENARY ACTION AND NEITHER CPLR ARTICLE 78 NOR ITS LIMITATIONS PERIOD APPLIES

The complaint presented important questions of constitutional construction of the provisions in the Constitution governing how that Constitution can be amended (specifically Article XIX, §1), and whether the legislature's intentional failure to comply with Article XIX, §1 rendered its votes on the Proposed Amendment unconstitutional and thus, void ab initio. Fundamentally, at issue in this action is not whether the procedure was followed (it was admittedly not) but rather the impact of not following same, what exactly the words used require and whether there is, or can be, discretion in compliance. These are questions that examine legislative action and concern constitutional construction and are patently not appropriately addressed via Article 78 proceeding.

Although the constitutional language at issue concerns a "procedure" (to amend the Constitution) at issue in the action is the Legislature's "substantive" understanding of same, and not merely its "compliance" with mandatory constitutional procedure as would be in question in a mandamus proceeding. Indeed, the Legislature sees the constitutional language in question as optional -- not as ministerial or as mandatory. The question presented is not whether the Legislature

has failed to perform a function or step it was duty bound to perform, but rather, more preliminarily, whether it has such a duty pursuant to the constitutional language in question. The very need for construction of the constitutional language at issue and the generalized impact (on the State public at large) of the Legislature's action removes this action from the realm or scope of CPLR Article 78 and its limitations period. Moreover, the challenge in this action was to the legitimacy of the vote in question (i.e. the Legislatures' vote on the bills in question). It cannot viably be argued that in so voting, the Legislature is not acting in its legislative capacity or that the result of that vote is not legislative action affecting the entirety of the State of New York and the public generally (and not an "administrative" action subject to review under an arbitrary and capricious standard). *See e.g. Lakeland Water Dist. v. Onondaga Co. Water Auth.*, 24 N.Y.2d 400, 407 (1969) ("An article 78 proceeding, it is settled, may not be utilized to review legislative action [see *Matter of Southern Dutchess Country Club v. Town Bd. of Town of Fishkill*, 18 N.Y.2d 870; *Matter of Paliotto v. Cohalan*, 8 N.Y.2d 1065; *Matter of Neddo v. Schrade*, 270 N.Y. 97, 102-103; *People ex rel. Trustees v. Board of Supervisors*, 131 N.Y. 468, 471;...."]). Indeed, the appellate division's finding of untimeliness is incongruous with the tenet that unconstitutional action is a nullity and void ab initio – whether the unconstitutionality is discovered immediately or not for decades.

POINT II

THE SUPREME COURT’S COMPREHENSIVE DETERMINATION ON THE MERITS WAS CORRECT, AND SHOULD HAVE BEEN UPHELD BY THE APPELLATE DIVISION

The Constitution is “‘an instrument framed deliberately and with care and adopted by the people as the organic law of the State’ and, when interpreting it, we may ‘not allow for interstitial and interpretative gloss . . . by the other branches of the government that substantially alters the specified law-making regimen’ set forth in the Constitution....” *Id.*, at 511.

It cannot be controverted that “[i]n the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect’ and ‘it must be presumed that its framers understood the force of the language used and, as well, the people who adopted it’” *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494, 511 (2022); and *see King v. Cuomo*, 81 N.Y.2d, at 253 (“When language of a constitutional provision is plain and unambiguous, full effect should be given to ‘the intention of the framers . . . as indicated by the language employed’ and approved by the People.... As we stated in *Settle v Van Evrea*: ‘It would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction

of some particular provision plain and precise in its terms.*** That would be pro tanto to establish a new Constitution and do for the people what they have not done for themselves’ (49 NY 280, 281, supra).”(Emphasis original).

A Court’s role in interpreting a constitutional provision “is to attempt to effectuate the intent of the Legislature,” and where, as is the case here, the text “is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used.” *Forest Glen Realty, LLC v. T11 Funding*, 208 A.D.3d 1312, 1315 (2d Dep’t 2022).

As *Forest Glen Realty, LLC* further indicates, “examination of legislative history” is only proper where the language is ambiguous or where “literal construction would lead to an absurd result” and that “the ‘clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof’” *Id.* (citing *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 696 N.E.2d 978, 673 N.Y.S.2d 966 [1998]; and *Astoria Gas Turbine Power, LLC v. Tax Commn. of City of N.Y.*, 14 A.D.3d 553, 557 [2d Dep’t 2005], *aff’d* 7 N.Y.3d 451 [2006]). Here there is neither an ambiguity presented nor is there a viable argument that a literal reading results in absurdity. To the contrary, Appellants’ strained misreading of the plain language results in absurdity and impermissible superfluity. In any event, even if the legislative history is reviewed (and the Lower Court did

review same), said history indicates that the amendment process set forth in the Constitution is to be strictly complied with. Amendments to the overriding law of the land – the State Constitution are not to be done lightly and any proposed amendments must be rigorously reviewed and considered and deliberated upon. The Section in question was added in 1938 and was later amended in 1941 expressly to require that the amendment process be imbued with additional deliberation (benefitting from the required legal opinion from a source outside the Legislature itself – a source ethically required to be even handed and devoid of political motivations) and to intentionally avoid hasty action.

The first sentence of Art. XIX § 1 *mandates* that the Legislature “shall” refer any proposed amendment to the Attorney General for the purpose of obtaining a written opinion on the constitutional impact of said proposed amendment. *See N.Y.S. Const. Art. XIX § 1*. That sentence also imposes an express “duty” on the Attorney General who “shall” issue said written opinion within a stated period of time (20 days from the referral by the Legislature). *Id.* Based on a plain reading of this language, both the Attorney General and the Legislature are required to act to fulfil the clear and deliberately drafted mandates of this first sentence. The second sentence sets forth what actions the Legislature make take “upon receiving” the Attorney General’s written opinion. *Id.* A plain reading of this second sentence

shows that it does not contemplate any further action on the proposed amendment by the Legislature until the written opinion is received. *Id.*

The third and last sentence serves to alleviate the potential problem presented if the Attorney General fails to timely issue the written opinion within the twenty-day period.³ This sentence prevents the untenable situation where the Legislature is left unable to act because the Attorney General chooses not to, or is unable to, timely issue the written opinion. Furthermore, none of the language contained therein is discretionary. The language mandates that the Legislature must wait for either: (a) the Attorney General's opinion letter to be received; or (b) the expiration of the 20-day Attorney General review period (whichever is first) before proceeding to vote on the proposed amendment. Any other reading of this third sentence would render the other two sentences before it impermissibly superfluous and nugatory. This sentence clearly does not (and cannot) be read to, excuse, nullify or eliminate the mandates of the first sentence. *See Matter of Hoffmann v. New York State Ind.*

³ The third sentence provides that “[n]either 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.” *Id.* Notably, neither of the contingencies contemplated by this sentence are presented in this case—the Attorney General did not fail to render an opinion nor to do so timely—the Attorney General was never provided the twenty days within which to do so. Rather, the constitutional transgression here was the Legislature's action before such time as the Constitution permits—a defect for which the third sentence of Article XIX §1 provides no cure. According to the plain and clear language of the provision, the Legislature simply could not proceed without either (a) the Attorney General opinion in hand or (b) the constitutionally mandated 20-day period expiring.

Redistricting Commn., 2023 N.Y. LEXIS 1968, *22-23, 2023 N.Y. Slip Op. 06344 (2023)(where the Court found that: “[I]n construing the language of the Constitution as in construing the language of a statute, the courts should look for the intention of the People and give to the language used its ordinary meaning’.... All parts of the constitutional provision or statute ‘must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof’ (People v Pabon, 28 NY3d 147, 152, 42 N.Y.S.3d 659, 65 N.E.3d 688 [2016], quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 98 [a]). Indeed, our well-settled doctrine requires us to give effect to each component of the provision or statute to avoid ‘a construction that treats a word or phrase as superfluous.’”); *and see Browne v. City of New York*, 213 A.D. 206, 214 (1st Dep’t 1925)(finding that, as concerns the Constitution, “[t]hat which the words declare, is the meaning of the instrument; and neither courts nor Legislatures have the right to add or to take away from that meaning. This is true of every instrument, but when we are speaking of the most solemn and deliberate of all human writings, those which ordain the fundamental law of States, the rule rises to a very high degree of significance. It must be very plain, nay, absolutely certain, that the people did not intend, what the language they have employed, in its natural signification, imports, before a court will feel itself at liberty to depart from the plain reading of a constitutional provision.’

***In *People v. Rathbone* (145 N. Y. 434)^[4] the court said: ‘The latitude allowed in the construction of legislative acts is out of place, and would be unwise, when interpreting the fundamental law. Legislation aims at arranging the mechanism of the State for the benefit of its members and the question of intention, necessarily, is often of great importance and must be open to judicial inquiry; but the Constitution, which underlies and sustains the social structure of the State, must be beyond being shaken, or affected, by unnecessary construction, or by the refinements of legal reasoning.’”).

That third sentence, in its entirety, reads as follows: “[n]either 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.” *Id.* Neither of the contingencies contemplated by this sentence are at play in the facts presented in this case—the Attorney General did not fail to render an opinion nor to do so timely. Rather, the constitutional transgression here was committed solely by the Legislature by acting before such time as the Constitution permits—a defect for which the third sentence of Article XIX §1 provides no cure because it is incurable. *See Matter of*

⁴ 145 N. Y. 434, 438, 40 N.E. 395 (1895).

Harkenrider v. Hochul, 38 N.Y.3d 494 (2022) (invalidating as unconstitutional *ultra vires* legislative action taken before constitutional predicate was satisfied).

Thus, here, the Legislature’s premature vote on the proposed amendment was violative of the Constitution, held without the benefit of the Attorney General opinion letter or the running of the 20-day Attorney General review period, unequivocally violated the Constitution as it did not conform with expressly stated, non-discretionary procedures. It is therefore void as the Lower Court correctly found and the Lower Court’s decision should have been upheld.

Although Art. XIX §1 provides that the validity of a proposed amendment or any legislative action taken thereon is not impacted by the Attorney General’s office’s failure to render the written opinion in a timely manner (*i.e.* within 20 days), this clause can only be read consistently with the rest of §1 if it contemplates that the 20-day Attorney General review period must be permitted to expire and lapse prior to a vote by the Legislature. The purpose of the referral period is to intentionally imbue the amendment process with added deliberation, consideration of broader legal impacts and guard against impetuous action with unintended consequences. Any other reading would render the Section’s initial referral and written opinion requirements impermissibly superfluous. *See Social Investigator Eligibles Ass’n v. Taylor*, 268 N.Y. 233, 237 (1935) (in interpreting the Constitution, “[t]he

fundamental law is to be read as a whole and every relevant provision of statute is to be construed, if possible, so as to give effect to every other provision.”).

Moreover, as concerns the Attorney General Opinion (1961 N.Y. Op. Att’y Gen. 52 *; 1961 N.Y. AG LEXIS)(the “1961 Opinion”) relied upon by the Legislature before the Courts below, as the Lower Court found, said Opinion is incorrect in concluding that “[t]he Attorney General’s opinion does not constitute a part of the legislative process for the amendment of the Constitution.”⁵ Such a reading is inconsistent with the plain language of Article XIX §1, which overtly mandates referral to the Attorney General and makes the Attorney General’s written opinion a part of the amendment process. That the resulting opinion may be “purely advisory,” only emphasizes the role the Attorney General’s office *is required* to undertake by the Constitution under the amendment scheme set forth in Article XIX §1.

Indeed, if intent need be reached (and it is respectfully submitted that, given the clear and unambiguous language at issue, the intent of the provision at issue is properly gleaned from the plain meaning of the words themselves and not unnecessarily “read into”), the intent behind the amendment requiring the referral to the Attorney General in the first instance was to have the Legislature act only with the benefit of having legal “advice” as to the impact of the proposed amendment on

⁵ The Lower Court also correctly found that reliance on the 1961 Opinion was based on an “recall procedure” not contemplated by the amendment procedure set forth in Article XIX. *See King v. Cuomo*, 81 N.Y.2d 247, 252-53 (1993).

the rest of the Constitution – given that constitutional amendments should not be undertaken lightly. As acknowledged by the Attorney General’s office, “the referral of a proposed amendment to the Attorney General for his opinion as to the effect thereof upon other provisions of the Constitution was added by the Constitutional Convention of 1938. Its obvious purpose is *to preserve the integrity of the Constitution and to guard against inconsistencies that might result from its amendment.*” See 1961 N.Y. Op. Att’y Gen. 52; 1961 N.Y. AG LEXIS 34 (emphasis added).

Further, it is logically problematic to rely on this Attorney General Opinion from 1961 (almost exclusively) to support a strained reading that the Attorney General’s explicit duty to render a written opinion within the 20-day period is merely a suggestion, despite the mandatory language in the Constitution to the contrary. It should be noted that this 1961 Opinion is not a contemporaneous interpretation made along with the 1941 amendment adding the third and final sentence to Article XIX §1, but rather, was prepared twenty years later – rendering it all the more unpersuasive and not entitled to any great weight as to its interpretation of the legislative intent at the time of the enactment. See *Knight-Ridder Broadcasting Co. v. Greenberg*, 70 N.Y.2d 151, 158 (1987)(“Of course, the opinion of the Attorney-General as to the scope of the statute is not binding on this court, nor is it dispositive of the intent of the Legislature.”).

It is ironic, if not disqualifying, that an *Attorney General opinion* is sought to be relied upon for the proposition that an *Attorney General opinion* is not necessary and need not be relied upon. Nevertheless, as even this 1961 Opinion concedes, although it is “[b]eyond peradventure the Legislature may act upon a proposed amendment *after the expiration of the twenty day period* without the opinion of the Attorney General perforce of the 1941 amendment” the “1941 amendment” language “treats only with the failure of the Attorney General to render an opinion or to timely do so” and does not address (in any way) whether or not the “Legislature may agree to an amendment within the twenty day period and prior to the receipt of the Attorney General’s opinion”. *Id.* The 1961 Opinion’s conclusion—that the amendment language “is quite indicative of an intent that the receipt of such opinion by the Legislature is not a *sine qua non*. [And] [i]n my opinion the validity of an amendment is not affected by the absence of the Attorney General’s opinion thereon, whether due to his failure or otherwise”—is not persuasive in light of the plain language of the Article XIX §1 and is not binding on this Court. *See Knight-Ridder Broadcasting Co.*, 70 N.Y.2d, at 158. That 1961 Opinion, based solely on speculation as to what the “intent” of the Legislature was and not on reference to any source for same, and offered without any attempt to harmonize the three sentences of Article XIX §1 in context, cannot serve to replace or usurp the Court’s role in constructing the clear and plain language of Article XIX §1. *See Settle v. Van Evrea*,

49 N.Y. 280, 281 (1872) (“Effect must be given to the intent as indicated by the language employed. Especially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State.”); *and see Matter of Peyton v. New York City Bd. of Stds. & Appeals*, 36 N.Y.3d 271, 279-280 (2020)(“In matters of statutory interpretation, ‘legislative intent is the great and controlling principle’.... Because ‘the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof’.... A statute ‘must be construed as a whole,’ and ‘its various sections must be considered together and with reference to each other’...”).

Here, given that the Legislature proceeded to vote upon the proposed amendment immediately (*i.e.* on the same day as it referred the Proposed Amendment to the Attorney General’s office), it cannot be denied that the Attorney General was not afforded the Constitutionally required twenty-day review period within which to render a written opinion prior to the vote. The Constitution was thereby violated. Thus, given that the Constitutionally mandated Amendment procedure was not followed or complied with, the vote on the Proposed Amendment must be found to be a nullity.

Significantly, the Legislature’s vote prior to receiving the Attorney General’s opinion (and on the same as the referral to the Attorney General’s office) signals to

the public that the Legislature was not at all interested in following constitutionally required procedures or in knowing the legality, impacts and constitutionality of the Proposed Amendment prior to voting to approve it. For this Court to bless this non-constitutional act would only further erode public faith in the constitutional process.

There can be no viable assertion of “substantial complainece” where the directives are clear, unequivocal and sequential in nature – a failure to comply in such cases is simply a failure to comply. *See Matter of Harkenrider v. Hochul*, 38 N.Y.3d, at 509; *and Franklin Nat’l Bank*, 26 Misc. 2d, at 731 (“Since the decision in *Marbury v. Madison* [1 Cranch (5 U.S.) 137] it cannot be questioned that all legislation, to be valid, must be enacted in conformity with the Constitution. Neither can it be questioned that...it is within the power of the courts to determine the constitutional validity of legislation with respect to both substance and procedure, and to invalidate a legislative enactment which is the product of procedure which does not fulfill constitutional requirements. When the due enactment of a statute is challenged, therefore, it will be in a judicial proceeding in which the issue becomes one of fact conformity or non-conformity to constitutional procedural requirements.”).

It cannot be a valid defense that because prior amendments were allegedly made without following expressly required, mandatory procedures and this was not

challenged that as a result said procedures can now be ignored. “Custom and practice” is only a relevant consideration where, unlike here, the Constitutional language is unclear and ambiguous. *See Matter of Harkenrider*, 38 N.Y.3d, at 511 (“Our Constitution is ‘an instrument framed deliberately and with care, and adopted by the people as the organic law of the State’ and, when interpreting it, we may ‘not allow for interstitial and interpretative gloss . . . by the other branches of the government that substantially alters the specified law-making regimen’ set forth in the Constitution....”); and see also *Anderson v. Regan*, 53 N.Y.2d 356, 362-63 (1981) (“To be sure, there have been instances in which we looked beyond the wording of a statute or constitutional provision when its applicability to a particular problem was uncertain...or when wooden application of the literal language would lead to an absurd conclusion.... Where no such difficulty is present, however, ‘the most compelling criterion in the interpretation of an instrument is, of course, the language itself’.... As we noted in *Matter of Wendell v Lavin* (246 N.Y. 115, 120), ‘sometimes the interpretation of a doubtful and obscure clause in an act of the Legislature, or in a Constitution, may be aided by the practice which has grown up under it, but plain and clear provisions of a Constitution require no such aid; they are to be enforced and brought to life early or late, and must not be smothered by the accumulations of customs or violations.’”).

CONCLUSION

This appeal raises novel legal issues concerning whether the State Legislature's actions in the amendment process should be reviewed by Article 78 challenge or by plenary action, the timeliness of same as well as questions of significant public importance to the State and the public at large concerning constitutional construction related directly to amending the constitution itself and what liberties the Legislatures may allow itself in following the constitutional requirements for amendment. As such, it is respectfully submitted that this Court should grant the Minority-Appellants leave to appeal.

Dated: Sayville, New York
July 18, 2024

Respectfully submitted,
PERILLO HILL LLP



Lisa A. Perillo, Esq.

EXHIBIT “A”

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF LIVINGSTON

MARJORIE BYRNES, individually and as a member
of the New York State Assemble, TAWN FEENEY and
SUSAN LUNDGREN,

Plaintiffs,

vs.

Decision and Judgment

Index No. 000778-2023

THE SENATE OF THE STATE OF NEW YORK,
ANDREA STEWART-COUSINS, as the President Pro
Tempore and Majority Leader of the Senate, ROBERT
ORTT, as Minority Leader of the Senate, THE
ASSEMBLY OF THE STATE OF NEW YORK, CARL
HEASTIE, as Speaker of the Assembly, WILLIAM
BARCLAY as Minority Leader of the Assembly, and the
NEW YORK STATE BOARD OF ELECTIONS,

Defendants.

Appearances:

Christian Browne, Esq., McLAUGHLIN & STERN, LLP and Bobbie Anne Flower Cox,
Esq., COX LAWYERS PLLC for the Plaintiffs
Letitia James, New York Attorney General, by Emily Fusco, Esq., and Heather
McKay, Esq., of counsel, for the New York State Senate, New York State
Assembly, and the Majority Defendants
Lisa A. Perillo, Esq., Perillo Hill LLP, for the Defendants Robert Ortt, as Minority
Leader of the Senate, and William Barclay, as Minority Leader of the Assembly

Daniel J. Doyle, J.,

This case presents novel issues concerning the New York State Legislature's actions in proposing amendments to the Constitution in derogation of the explicit process outlined in § 1 of Article XIX of the New York Constitution and the ability of citizens to challenge those actions in a plenary proceeding.

On July 1, 2022, the New York State Legislature (hereinafter "Legislature") adopted a Concurrent Resolution which sought to amend the Constitution.¹ On October 30, 2023, Plaintiffs initiated this action seeking declaratory judgment that the Legislature violated § 1 of Article XIX of the New York Constitution in adopting the Concurrent Resolution and an order removing the proposed amendment from the ballot for the general election of November 5, 2024.

Defendants, the Senate of the State of New York, Andrea Stewart-Cousins (as the President Pro Tempore and Majority Leader of the Senate), the Assembly of the State of New York, and Carl Heastie (as Speaker of the Assembly of the State of New York) (collectively, the "Majority Defendants") moved to dismiss the complaint for failure to state a cause of action (CPLR Rule 3211 [a][7]), lack of subject matter jurisdiction (CPLR Rule 3211[a][2]), lack of capacity to sue (CPLR Rule 3211 [a][3]), and lack of standing (CPLR Rule 3211 [a][5]). As the parties agreed there were no

¹ The merits of the proposed amendment to the Constitution are not an issue herein.

issues of fact, and upon notice to the parties, the Court converted the motion to a motion for summary judgment.² The plaintiffs cross-move for summary judgment on their complaint. Both parties seek a declaration in their favor.³

For the reasons that follow, the defendants' summary judgment motion is GRANTED in part, Andrea Stewart-Cousins and Carl Heastie are dismissed as defendants herein and the remaining requested relief is denied. The plaintiffs' summary judgment motion is GRANTED.

Relevant Facts

On July 1, 2022, both houses of the Legislature introduced concurrent resolutions seeking to amend § 11 of Article I of the Constitution, the "Bill of Rights". In the Senate the resolution was advanced as Senate Bill S. 51002 and in the Assembly as Assembly Bill A. 41002 (hereinafter the "Concurrent Resolution"). Immediately following the introduction of the Concurrent Resolution, it was referred to the Attorney General for her opinion, as required by § 1 of Article XIX of the New York Constitution.

§ 1 of Article XIX of the New York Constitution states (emphasis supplied):

² See Decision and Order of the Hon. Daniel J. Doyle dated March 14, 2024 (NYSCEF Docket # 41).

³ Defendant New York State Board of Elections filed a "no position" letter with the Court (NYSCEF Docket # 7).

Any amendment or amendments to this constitution may be proposed in the senate and assembly whereupon such amendment or amendments *shall be referred to the attorney-general whose duty it shall be within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution.*⁴ Upon receiving such opinion, if the amendment or amendments as proposed or as amended shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the ayes and noes taken thereon, and referred to the next regular legislative session convening after the succeeding general election of members of the assembly, and shall be published for three months previous to the time of making such choice; and if in such legislative session, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed

⁴ This language was approved during the 1938 Constitutional Convention. At that Convention, the Chairman explained the proposed amendment as follows (emphasis supplied):

Mr. Pitcher: Mr. Chairman, may I move No. 77?

The Secretary: General Order No. 77, Int. No. 694, Pr. No. 837, by the Committee on Future Amendments. Proposed constitutional amendment to amend Article XIV of the Constitution, in relation to future amendments and future constitutional conventions.

The Chairman: If you will permit me, gentlemen, I have not the proposal here, but I can explain it. The only substantial change is that provision on lines 6 to 11 of the proposal, whereby it is provided that when a proposed amendment is submitted to the Legislature, it will immediately be forwarded to the Attorney General for his report as to its effect upon other provisions of the Constitution; **and upon this report coming back within 20 days, then the Legislature will proceed to act upon it as it sees fit.** In other words, it was thought that it would be very helpful to the Legislature if the Attorney-General made a report as to the effect of the language of the proposal on other provisions of the Constitution.

Revised Record of the Constitutional Convention of the State of New York (1938).

amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution on the first day of January next after such approval. *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 th[e] validity of such proposed amendment or legislative action thereon.*⁵

The same day the Concurrent Resolution was forwarded to the Attorney General (July 1st), both the Senate and the Assembly voted to adopt the Concurrent Resolution. At the time of their vote, neither the Senate nor the Assembly had received the opinion from the Attorney General.

The Attorney General issued her opinion on July 6th, and it was received by the Legislature on July 13th.

The Legislature referred the proposed amendment to the next session of the Legislature, and on January 24, 2023, both houses adopted the second concurrent resolution. The proposed amendment is scheduled to appear on the ballot to be voted on by the electorate on November 5, 2024.

⁵ This language was approved by the electorate in November of 1941. Neither party has provided any relevant, contemporaneous information – such as legislative memorandums or floor debate – as to the intent of the Legislature in proposing this language.

The Constitution Prevents the Legislature from Acting on a Proposed Amendment until either Receiving the Attorney General's Opinion or Twenty Days has Passed Since Referral to the Attorney General

In assessing the language of § 1 of Article XIX to the Constitution and giving it its ordinary meaning, and ensuring that the entire Article is read to avoid a construction that treats a word or phrase as superfluous,⁶ the Court concludes that it was the intent of the People to: (1) ensure that the legislators voting on a proposed constitutional amendment received the benefit of the Attorney General's opinion on its impact on other provisions in the Constitution; (2) require that the Attorney General provide the requested opinion within twenty (20) days; (3) prohibit the Legislature from acting until it received the opinion or the twenty day period had

⁶ “We have long and repeatedly held that “in construing the language of the Constitution as in construing the language of a statute, the courts should look for the intention of the People and give to the language used its ordinary meaning” (*Sherrill*, 188 N.Y. at 207, 81 N.E. 124). The “ ‘starting point for discerning legislative intent is the language of the statute itself ” (*Matter of Lynch v. City of New York*, 40 N.Y.3d 7, 13, 192 N.Y.S.3d 50, 213 N.E.3d 110 [2023], quoting *Matter of DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660, 827 N.Y.S.2d 88, 860 N.E.2d 705 [2006]), such that the “ ‘literal language of a statute controls’ ” (*Lynch*, 40 N.Y.3d at 13, 192 N.Y.S.3d 50, 213 N.E.3d 110, quoting *Matter of Anonymous v. Molik*, 32 N.Y.3d 30, 37, 84 N.Y.S.3d 414, 109 N.E.3d 563 [2018]). All parts of the constitutional provision or statute “ ‘must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof ” (*People v. Pabon*, 28 N.Y.3d 147, 152, 42 N.Y.S.3d 659, 65 N.E.3d 688 [2016], quoting *McKinney’s Cons. Laws of N.Y.*, Book 1, Statutes § 98[a]). Indeed, our well-settled doctrine requires us to give effect to each component of the provision or statute to avoid “ ‘a construction that treats a word or phrase as superfluous’ ” (*Columbia Mem. Hosp. v. Hinds*, 38 N.Y.3d 253, 271, 172 N.Y.S.3d 649, 192 N.E.3d 1128 [2022], quoting *Matter of Lemma v. Nassau County Police Officer Indem. Bd.*, 31 N.Y.3d 523, 528, 80 N.Y.S.3d 669, 105 N.E.3d 1250 [2018]).” (*Hoffmann v. New York State Indep. Redistricting Comm’n*, __ NY3d __; No. 90, 2023 WL 8590407, at *7 [Dec. 12, 2023].)

expired, and (4) authorize the Legislature to act on the proposed amendment after twenty days had passed, even if the Attorney General failed to issue the opinion, or did so after the twenty day period (and the Legislature having already acted).

“In construing the language of the Constitution[,] as in construing the language of a statute, the courts ... give to the language used its ordinary meaning” (*Matter of Carey v. Morton*, 297 N.Y. 361, 366, 79 N.E.2d 442 [1948], citing *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 207, 81 N.E. 124 [1907]).” (*Burton v. New York State Dep't of Tax'n & Fin.*, 25 NY3d 732, 739 [2015].) “In the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect” and “[i]t must be presumed that its framers understood the force of the language used and, as well, the people who adopted it” (*People v. Rathbone*, 145 N.Y. 434, 438, 40 N.E. 395 [1895]). Our Constitution is “an instrument framed deliberately and with care, and adopted by the people as the organic law of the State” and, when interpreting it, we may “not allow for interstitial and interpretative gloss ... by the other [b]ranches [of the government] that substantially alters the specified law-making regimen” set forth in the Constitution (*Matter of King v. Cuomo*, 81 N.Y.2d 247, 253, 597 N.Y.S.2d 918, 613 N.E.2d 950 [1993]).” (*Harkenrider v. Hochul*, 38 NY3d 494 [2022].)

The plain language of Article XIX begins with “the amendment or amendments shall be referred to the attorney-general whose duty it shall be within twenty days thereafter to render an opinion in writing to the senate and assembly as to the effect of such amendment or amendments upon other provisions of the constitution.” As explained in the Revised Record of the Constitutional Convention of the State of New York (1938), this language was inserted into the Article as it was believed it would be “very helpful” to the Legislature to obtain the Attorney’s General’s opinion on the proposed amendment. The language imposes a duty upon the Attorney General to provide the opinion in twenty days.

“Upon receiving such opinion,” the Legislature may thereafter vote on the proposed amendment. This language compels the conclusion that the People intended for the Legislature to wait to receive the Attorney General opinion prior to voting on the proposed amendment. This is the only reasonable interpretation and is supported by the characterization provided by the Chairman of the 1938 Constitutional Convention when he stated: “upon this report coming back within 20 days, **then the Legislature will proceed to act upon it** as it sees fit” (emphasis supplied).

The Majority Defendants, however, refer to the language added by amendment in 1941 to argue that regardless of the language outlined above, the

Legislature need not wait the required 20 days and can act on the proposed amendment prior to receiving an opinion from the Attorney General. The Court declines to adopt their interpretation.

In 1941 Article XIX was amended to add the following: “[n]either 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 th[e] validity of such proposed amendment or legislative action thereon.” Although the parties do not provide any contemporaneous legislative memorandums or statements by other officials that elucidate why this amendment was proposed by the Legislature, the most reasonable inference is that it was to prevent a “pocket veto” by the Attorney General of the proposed amendment. Thus, the language addresses two possibilities of non-compliance by the Attorney General: (1) the Attorney General refuses to submit an opinion, and (2) the Attorney General delays providing the opinion beyond the twenty (20) day limit.

The first clause (“[n]either the failure of the attorney-general to render an opinion concerning such a proposed amendment”) prevents the Attorney General from thwarting the passage of the proposed amendment by refusing to follow his or her duty in providing the opinion. The second clause (“nor his or her failure to do so **timely** shall affect th[e] validity of such proposed amendment or legislative

action thereon” [emphasis supplied]) allows the Legislature to proceed with the vote on the proposed amendment after the period of twenty (20) days has expired. The use of the word “timely” as a modifier to the word “failure” compels the conclusion that the language refers to the duty to provide the opinion within twenty days, and the issuance of the opinion after that period does not require invalidation of legislative action taken after the period had expired but prior to the receipt of the opinion.

The Majority Defendants argue that this language requires the conclusion that the Legislature is free to act on the proposed amendment at any time- even prior to the expiration of the twenty-day period as occurred here - regardless of whether the Attorney General provides an opinion.⁷ This interpretation, however, would require the Court to ignore the plain language of the Article and would render meaningless the intent of the People (to aid the deliberative process). It would also require the Court to conclude that the language “whose duty it shall be within

⁷ The Court agrees with the Majority Defendants’ position that the issuance of the Attorney General opinion contemplated by Article XIX is not a condition precedent that must be satisfied prior to the Legislature acting upon the proposed amendment. The Legislature is free to act after the opinion is received or the twenty-day period has expired. However, the intent of the People in delineating the procedure outlined in the Article is to provide to the Legislature relevant information (deemed “very helpful” by the drafters) to assist them in their deliberative process. Article XIX compels the Attorney General to act in issuing the opinion, and compels the Legislature to wait for that opinion, unless the Attorney General disregards his or her duty to provide the opinion within twenty days. Only then is the Legislature free to act.

twenty days thereafter to render an opinion” and “upon receiving such opinion” is superfluous. In essence, the Majority Defendants argue for an interpretation that would render the Attorney General’s duty to submit an opinion meaningless as the Legislature could act on the proposed amendment at any time, as they did here.⁸

In adopting the 1941 amendment, the People did not remove the phrase “[u]pon receiving such opinion.” To harmonize that phrase with the language added by the 1941 amendment the Court must conclude that the intent of the People expressed in Article XIX is to provide the Legislature the authority to act on the proposed amendment only after the Attorney General has provided the opinion or failed in his or her duty to provide the required opinion with the twenty-day period. “When language of a constitutional provision is plain and unambiguous, full effect should be given to “the intention of the framers * * * as indicated by the language employed” and approved by the People (*Settle v. Van Evrea*, 49 N.Y. 280, 281 [1872]; see also, *People v. Rathbone*, 145 N.Y. 434, 438, 40 N.E. 395).” (*King v. Cuomo*, 81 NY2d 247, 253 [1993].)

⁸ It is true that the Legislature is free to act upon the proposed amendment regardless of what is contained in the Attorney General’s opinion. But that fact is irrelevant. The People’s intent under Article XIX is to aid in the deliberative process by requiring the Legislature to consider information provided by the Executive Branch as it considers adopting a proposed amendment, not to provide the Executive Branch the power to prevent it from acting.

The Majority Defendants argue that their position is supported by historical precedents and the fact that the Governor has the authority to call the Legislature into “extraordinary” session at which a proposed amendment may be voted. The Court finds those arguments unavailing.

First, the historical precedent of how the Legislature has proposed amendments after the 1941 amendment to Article XIX – if contrary to the intent of the People as defined by the plain language of the Constitution – is irrelevant. (*King v. Cuomo, supra.*) Second, the Governor’s authority to call the Legislature into extraordinary session does not obviate the intent of the People (as expressed in Article XIX) that amendments to the Constitution be pursued by the Legislature in a deliberative manner and with the input of Attorney General. Notably, the Attorney General is not required to wait twenty days to provide his or her opinion. Presumably, should the need to seek an expeditious amendment to the Constitution exist (a dubious proposition), the Attorney General would provide his or her opinion with equal alacrity.⁹

⁹ Additionally, it is clearly the intent of the People not to allow amendment to the Constitution except by an informed, deliberative process. The procedure requires not one vote of the Legislature, but two votes, with the second vote occurring after the next election for members of the assembly (“ . . . and referred to the next regular legislative session convening after the succeeding general election of members of the assembly”). The entire process is designed to take many months, and two informed votes of two Legislatures, and a vote by the electorate. Nothing about the process is “expedient”. “There is little room for misapprehension as to the ends to be achieved by the safeguards surrounding the process

Finally, the Majority Defendants cite to a 1961 Opinion of the Attorney General as support for their position. However, a close examination of that opinion establishes that it does not support the Majority Defendants' position. In that opinion the Attorney General wrote (emphasis added):

. . . In my opinion the validity of an amendment is not affected by the absence of the Attorney General's opinion thereon, whether due to his failure of otherwise.

Since the Legislature may recall a concurrent resolution if in the Attorney General's opinion, the proposed Amendment will affect some other provision of the Constitution, the purpose of the opinion would not be frustrated by the Legislature's acting upon the proposal prior to the receipt of the opinion.

The Attorney General based his opinion upon the fact that at the time the 1961 opinion was issued, the Legislature had the presumed authority to recall a bill it had passed. However, the ability of the Legislature to recall bills was curtailed by *King v. Cuomo, supra*. "In *King*, the Presentment Clause of the New York Constitution (art IV, § 7) was held violated by the bicameral practice of "recalling" or "reacquiring" passed bills after presentment to the Governor, but prior to gubernatorial action on the bill. *King* concluded that the Legislature's practice "undermine[d] the integrity of the law-making process as well as the underlying

of amendment. The integrity of the basic law is to be preserved against hasty or ill-considered changes, the fruit of ignorance or passion." (*Browne v. City of New York*, 241 NY 96, 109 [1925].)

rationale for the demarcation of authority and power in this process” (*id.*, at 255, 597 N.Y.S.2d 918, 613 N.E.2d 950).” (*Campaign For Fiscal Equity, Inc. v. Marino*, 87 NY2d 235, 239 [1995].)

Although *King v. Cuomo*, *supra*, concerned bills passed by both houses and sent to the Governor, the procedure outlined in Article XIX does not contemplate a “recall” procedure and instead mandates that upon approval the proposed amendment must be referred “to the next regular legislative session. . .”¹⁰ Thus, referral to the next legislature is mandated by the clear words of the Constitution. Upon such referral, the legislature no longer has the authority to “recall” the bill. As the Court of Appeals noted in *King v. Cuomo*, *supra*:

The putative authority of the Legislature to recall a passed bill once it has been formally transmitted to the Governor “is not found in the constitution” (*People v. Devlin*, 33 N.Y. 269, 277). We conclude, therefore, that the practice is not allowed under the Constitution. To permit the Legislature to use its general rule-making powers, pertaining to in-house procedures, to create this substantive authority is untenable. As this Court stated in *Devlin* “[w]hen both houses have * * * finally passed a bill, and sent it to the governor, *they have exhausted their powers upon it*” (*id.*, at 277 [emphasis added]).”

(*King v. Cuomo*, 81 NY2d at 252–53.)¹¹

¹⁰ “. . . shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments **shall** be entered on their journals, and the ayes and noes taken thereon, **and referred to the next regular legislative session . . .**” (§ 1 of Article XIX, emphasis supplied.)

¹¹ See also *Campaign For Fiscal Equity, Inc. v. Marino*, 87 NY2d 235, 238–39 (1995): “We hold that the practice of withholding from the Governor those bills on which both houses of the

Since the Legislature cannot “recall” a concurrent resolution it has passed,¹² the 1961 Attorney General Opinion is no longer supportive of the Majority Defendants’ position. In fact, considering the holding of *King* and its progeny- and the language of Article XIX requiring referral of the proposed amendment to the next legislative session - the 1961 Attorney General opinion supports the plaintiffs’ position in that the purpose of seeking the opinion of the Attorney General prior to voting on the proposed amendment “would [] be frustrated by the Legislature’s acting upon the proposal prior to the receipt of the opinion.”¹³

Legislature have formally acted is violative of article IV, § 7. To hold otherwise would be to sanction a practice where one house or one or two persons, as leaders of the Legislature, could nullify the express vote and will of the People’s representatives. This requirement is constitutionally required and would not interfere with the usual and appropriate interaction of the executive and legislative branches in the making of laws.”

¹² The Majority Defendants rely upon a treatise on the New York Constitution that states “[t]he legislature can also recall a proposed amendment by concurrent resolution if the attorney general finds it is inconsistent with other parts of the constitution”. (Peter J. Galie & Christopher Bopst, *The New York State Constitution* 350 [2d ed 2012].) However, there is no constitutional language cited, statutory citation, or caselaw citation supporting this assertion and it appears it may be based upon the 1961 Attorney General Opinion.

¹³ Additional language in the opinion supports the plaintiffs’ position that the opinion of the Attorney General is important to the deliberative process undertaken by the Legislature in considering proposed amendments to the Constitution. Earlier in the opinion the Attorney General noted that the “obvious purpose is to preserve the integrity of the Constitution and to guard against inconsistencies that might result from its amendment.” The Attorney General also noted that “[b]eyond peradventure the Legislature may act upon a proposed amendment after the expiration of the twenty day period without the opinion of the Attorney General perforce of the 1941 amendment.” However, the Attorney General’s opinion that it was permissible for the Legislature to act prior to the expiration of the prior to the receipt of the opinion within the twenty-day period, as noted above, is predicated upon the belief – now invalidated – that the Legislature could recall the concurrent resolution approving of the amendment. (1939 Atty. Gen. 358.)

The Plaintiffs Claims are Justiciable

The Majority Defendants argue that the plaintiffs' cause of action is not justiciable, arguing that: (1) the separation of powers bars judicial review of the Legislature's procedures for adopting the proposed amendment, (2) the issue is not "ripe" for review as the amendment has not been voted on by the electorate, and (3) that the plaintiffs do not have standing. Each argument will be addressed *seriatim*.

The Courts have Authority to Review Unconstitutional Acts of the Legislature

The Majority Defendants argue that this Court cannot intrude upon the internal practices and procedures of the Legislature to review its compliance with Article XIX of the Constitution. The Court rejects this argument.

The procedures utilized by the Legislature in proposing amendments to the Constitution are set forth not in internal rules and procedures of the Legislature, but in Article XIX of the Constitution. "Our precedents are firm that the "courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government" (*Saxton v. Carey*, 44 N.Y.2d 545, 551, 406 N.Y.S.2d 732, 378 N.E.2d 95; *New York State Bankers Assn. v. Wetzler*, 81 N.Y.2d 98, 102, 595 N.Y.S.2d 936, 612 N.E.2d 294; *see also, Myers v. United States*, 272 U.S. 52, 116, 47 S.Ct. 21, 25, 71 L.Ed. 160; *Matter of New York State*

Inspection, Sec. & Law Enforcement Empls. v. Cuomo, 64 N.Y.2d 233, 239, 485 N.Y.S.2d 719, 475 N.E.2d 90).” (*King v. Cuomo*, 81 NY2d at 251.)

Courts have the authority to review actions taken by the Legislature to ensure compliance with the Constitution, even if those acts are fairly characterized as “internal rules”- which is not the case herein. “We conclude that the courts do not trespass “into the wholly internal affairs of the Legislature” (*Heimbach v. State of New York*, 59 N.Y.2d 891, 893, 465 N.Y.S.2d 936, 452 N.E.2d 1264, *appeal dismissed* 464 U.S. 956, 104 S.Ct. 386, 78 L.Ed.2d 331) when they review and enforce a clear and unambiguous constitutional regimen of this nature.” (*Id.*)

As the plaintiffs’ cause of action concerns whether the Legislature complied with Article XIX in proposing the amendment to the Constitution, this Court has authority to resolve the issues herein.

The Issue Herein is Ripe for Review

The Majority Defendants also argue that the plaintiffs’ claims are not ripe for review, as the electorate may not approve the amendment at the general election on November 5, 2024.

Important to the resolution of this issue is the fact that the plaintiffs’ claims do not challenge the substance of the proposed amendment. Plaintiffs do not seek to invalidate the proposed amendment arguing that – should it pass - it violates

other constitutional provisions (“facial attack” on its constitutionality) or is unconstitutional as applied to them (an “as applied” challenge), and thus plaintiff will be harmed *if* the voters approve of the amendment. Had the plaintiffs made those claims, those claims would not be ripe for review. (See *e.g.*, *New York Pub. Int. Rsch. Grp., Inc. v. Carey*, 42 NY2d 527 [1977].)

Plaintiffs contend instead that the amendment process employed by the Legislature to propose the amendment was unconstitutional as it violated Article XIX of the Constitution. Plaintiffs’ claim became “ripe” once the Legislature acted in violation of Article XIX and approved the Concurrent Resolution and thereafter placed the proposed amendment on the ballot. (See *New York State Bankers Ass’n, Inc. v. Wetzler*, 81 NY2d 98 [1993].)

As noted by the Court of Appeals in *New York Pub. Int. Rsch. Grp., Inc. v. Carey* (42 NY2d 527 [1977]):

That is not to say that the courts may never consider the validity of proposed legislation. This has been done on several occasions, although with reluctance and then only incidentally to resolve a dispute as to whether the proposition should be placed or remain on the ballot (see, *e.g.*, *Matter of McCabe v Voorhis*, *supra*; *Matter of Tierney v Cohen*, 268 NY 464; *Matter of Osborn v Cohen*, 272 NY 55; *Matter of Mooney v Cohen*, 272 NY 33; *Johnson v Etkin*, 279 NY 1; *Matter of Stroughton v Cohen*, 281 NY 343; *Matter of Atwood v Cohen*, 291 NY 484).

These are not advisory opinions. The effect of the court's determination in those cases does not depend on the outcome of the election. On the

contrary, those orders have the immediate and practical effect of determining whether the proposition should be submitted to the voters, or whether all the expense and human effort involved in the election process would be wasted because of fatal defects in the law.

(*Id.* at 531-532. *See also Fossella v. Dinkins*, 66 NY2d 162 [1985].)

Plaintiffs claim is that the proposed amendment was passed by the Legislature in derogation of Article XIX of the Constitution and should therefore be removed from the ballot. “Where, as here, the relief requested is the preclusion from the ballot of a proposal sought to be placed before the voters, the proceeding is not rendered premature by the fact that unless approved the challenged law would not become effective, for the requested relief is not dependent upon the result of the election and would instead have an immediate effect.” (*Cantrell v. Hayduk*, 45 NY2d 925, 926, [1978].)

Plaintiffs Have Standing to Challenge the Adoption of the Concurrent Resolution

The Majority Defendants argue that citizens do not have standing to challenge unconstitutional acts of the Legislature, and Plaintiff Marjorie Byrnes, as a Member of the Assembly, also lacks standing. The Court disagrees.

Plaintiffs claim the Legislature violated Article XIX of the Constitution in passing the Concurrent Resolution without following the requisite procedures outlined in that Article. The issue of the correct constitutional interpretation of

Article XIX, and whether the Legislature violated same in proposing the amendment herein, are issues of public significance, but there is likely no member of the general public that can allege a specific harm to satisfy common-law standing principles.¹⁴

However, there is an exception to traditional standing principles applicable herein. As the Court of Appeals noted in *Saratoga Cnty. Chamber of Com., Inc. v. Pataki* (100 NY2d 801 [2003]):

It follows that our doctrines governing standing must be sensitive to claims of institutional harm. Actions of this type can serve as a means for citizens to ensure the continued vitality of the constraints on power that lie at the heart of our constitutional scheme (cf. *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 10 [1975]; *Committee for an Effective Judiciary v State*, 209 Mont 105, 112-113, 679 P2d 1223, 1227 [1984]; *State ex rel. Howard v Oklahoma Corp. Commn.*, 614 P2d 45, 52 [Okla 1980]). Thus, where a denial of standing would pose “in effect ... an impenetrable barrier to any judicial scrutiny of legislative action,” our

¹⁴ When questioned during oral argument on their summary judgment motion, able counsel for the Majority Defendants believed that the Attorney General would have standing, but no other person would until the amendment was approved and “as-applied” or “facial challenges” could then be brought. As to the claim that the Attorney General has standing, as noted by the Court of Appeals in *Boryszewski v. Brydges* (37 NY2d 361 [1975]):

Moreover, it may even properly be thought that the responsibility of the Attorney-General and of other State officials is to uphold and effectively to support action taken by the legislative and executive branches of government. As Judge Fuld wrote generally in *St. Clair* (*supra*, 13 N.Y.2d p. 79, 242 N.Y.S.2d p. 47, 192 N.E.2d p. 19) ‘The suggestion * * * that the Attorney-General and other state officials may be relied upon to attack the constitutional validity of state legislation is both unreal in fact and dubious in theory’. His estimate of the situation has been verified in the years since *St. Clair*.

(*Id.* at 364.)

duty is to open rather than close the door to the courthouse (see *Boryszewski*, 37 NY2d at 364; see also *State ex rel. Clark v Johnson*, 120 NM 562, 904 P2d 11 [1995]; *Rios v Symington*, 172 Ariz 3, 833 P2d 20 [1992]; *State ex rel. Sego v Kirkpatrick*, 86 NM 359, 363, 524 P2d 975, 979 [1974]).

(*Id.* at 814.)¹⁵

Should this Court not grant plaintiffs standing, it is likely that the actions of the Legislature in proceeding contrary to the requirements of Article XIX would be insulated from judicial review. As noted above, the procedures outlined in Article XIX express the intent of the People that the Legislature receive input from the Attorney General on the impact of the proposed amendment on the Constitution's provisions, thus improving the deliberative process. Accordingly, this Court concludes that plaintiffs, as citizens, have standing to address the claim herein that the Legislature's passing of the Concurrent Resolution was in contravention to the

¹⁵ See also *Boryszewski v. Brydges*, 37 N.Y.2d 361, 364 [1975]:

Where the prospect of challenge to the constitutionality of State legislation is otherwise effectually remote, it would be particularly repellant today, when every encouragement to the individual citizen taxpayer is to take an active, aggressive interest in his State as well as his local and national government, to continue to exclude him from access to the judicial process—since *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 2 L.Ed. 60, the classical means for effective scrutiny of legislative and executive action. The role of the judiciary is integral to the doctrine of separation of powers. It is unacceptable now by any process of continued quarantine to exclude the very persons most likely to invoke its powers.

procedures required by Article XIX. (*Saratoga Cnty. Chamber of Com., Inc. v. Pataki, supra.*)

The Court also concludes that Plaintiff Marjorie Byrnes, as a Member of the Assembly, has standing in her capacity of a member of the New York State Legislature. The harm alleged here - failure of the Legislature to follow the mandates of Article XIX of the Constitution - deprived Assemblymember Byrnes of the opinion of the Attorney General and necessarily impacted her obligations as a member of the Legislature voting on a resolution seeking to amend the constitution. The Court determines this is sufficient to confer standing. (*See gen. Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 NY2d 761 [1991]; *see also Sullivan v. Siebert*, 70 AD2d 975 [3rd Dept. 1979]: "However, the challenge to the standing of petitioner [Assemblymember] Sullivan to pursue the relief sought must fail. Section 164 of the Executive Law provides that annual reports are to be made to the Governor and the Legislature. As a member of the Legislature, Sullivan has a statutory right to receive copies of the reports. This right confers standing upon Sullivan to pursue this action.")

This Action is Properly a Plenary Action and Not a Special Proceeding

The Majority Defendants argue that as the plaintiffs are challenging the procedures used by the Legislature in the adoption of the proposed amendment,

this action is properly maintained as an Article 78 proceeding and thus subject to a four month statute of limitations.

Regardless of how the instant action was initiated, this Court must determine “the true nature of the case” to determine the appropriate statute of limitations period. “In making such a determination, where the nature of an action is at issue, it is necessary to ““examine the substance of [the] action to identify the relationship out of which the claim arises and the relief sought” (citations omitted). If the court determines that the parties’ dispute can be, or could have been, resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs (citations omitted).” (*Dandomar Co., LLC v. Town of Pleasant Valley Town Bd.*, 86 AD3d 83, 90–91 [2nd Dept. 2011]; *see also Foley v. Masiello*, 38 AD3d 1201 [4th Dept. 2007].)

As the parties dispute the operative effect of the language employed in Article XIX of the Constitution, the essence of this case is one of constitutional interpretation- not whether clearly defined procedures were properly followed. (*See e.g., P & N Tiffany Properties, Inc. v. Vill. of Tuckahoe*, 33 AD3d 61 [2nd Dept. 2006].) Challenging the validity of a legislative act is properly a declaratory judgment action. (*See Rochester Police Locust Club, Inc. v. City of Rochester*, 196 AD3d 74, 77 [4th Dept. 2021], *aff’d*, 41 NY3d 156 [2023]): “The gravamen of plaintiffs’ lawsuit is that Local Law

No. 2 is invalid in certain key aspects, and “it is well established that an article 78 proceeding is not the proper vehicle to test the validity of a legislative enactment” (*Kamhi v Town of Yorktown*, 141 AD2d 607, 608 [2d Dept 1988], *affd* 74 NY2d 423 [1989]).” See also *Parker v. Town of Alexandria*, 138 AD3d 1467 [4th Dept. 2016]; *Foley v. Masiello*, *supra*.)

Furthermore, “[] where the substance of the law, “its wisdom and merit” (*Matter of Voelckers v Guelli*, 58 NY2d 170, 177 [1983]), **or its constitutionality**, is challenged, then the proper procedure is to commence an action for a declaratory judgment (see *New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194 [1994]; *P & N Tiffany Props., Inc. v Village of Tuckahoe*, 33 AD3d 61, 64 [2006]).” (*Highland Hall Apartments, LLC v. New York State Div. of Hous. & Cmty. Renewal*, 66 AD3d 678, 681 [2nd Dept. 2009], [emphasis supplied].) Here, the parties are disputing the meaning of the language of Article XIX and what duties it imposes both upon the Attorney General and the Legislature. As the parties are urging different constitutional interpretations of the provisions contained in Article XIX, and thus disputing whether the passage of the Concurrent Resolution was constitutional, a declaratory judgment action is appropriate.

Laches does not Bar this Action

The Majority Defendants argue that the plaintiffs' delay in initiating this action requires the Court to dismiss under the doctrine of laches.¹⁶

"We have defined laches as an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party (*see Matter of Barabash*, 31 NY2d 76, 81 [1972]; *see also Matter of Dreikausen v Zoning Bd. of Appeals*, 98 NY2d 165, 173 n 4 [2002]). The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches (*see Galyn v Schwartz*, 56 NY2d 969, 972 [1982]; *Sorrentino v Mierzwa*, 25 NY2d 59 [1969]; *Skrodelis v Norbergs*, 272 AD2d 316 [2d Dept 2000]). The defense has been applied in equitable actions and declaratory judgment actions (both of which are governed by the six-year catchall provision of CPLR 213 [1]) where the defendant shows prejudicial delay even though the limitations period was met. [FN omitted]." (*Saratoga Cnty. Chamber of Com., Inc. v. Pataki*, 100 NY2d at 816.)

The Majority Defendants fail to allege sufficient prejudice. In alleging prejudice, the Majority Defendants argue that the proposed amendment is scheduled to be voted upon at the general election in November of 2024 and

¹⁶ The Majority Defendants argue that the delay is either sixteen months (from initial passage of the Concurrent Resolution in July of 2022) or nine months (from the second passage of the Concurrent Resolution in January of 2023).

“forc[ing] the entire process to start anew” would be prejudicial. They also argue that a declaration in favor of the plaintiffs would deprive the voters of the ability to vote on the amendment. This does not constitute sufficient prejudice to warrant invocation of laches.

Unlike challenges brought under election law proceedings where the delay in initiating the action may deprive voters of their right to vote (*see e.g., Amedure v. State*, 210 AD3d 1134 [3rd Dept. 2022]) or impose insurmountable burdens on Defendant New York Board of Elections to oversee an efficient election process (*see e.g., League of Women Voters of New York State v. New York State Bd. of Elections*, 206 AD3d 1227 [3rd Dept. 2022], *leave to appeal denied*, 38 NY3d 909 [2022], *reargument denied*, 38 NY3d 1120 [2022]), the delay here did not result in any prejudice to the Legislature. The Legislature may follow the proper procedures mandated by Article XIX and place the proposed amendment on the ballot on a future date.¹⁷ Additionally, the voters have no right to vote on an amendment placed

¹⁷ To the extent the Majority Defendants argue that the plaintiffs’ delay impermissibly prejudiced the Legislature from placing the proposed amendment on the ballot for the 2024 general election, this argument must fail. Had the plaintiffs initiated this action after the Concurrent Resolution first passed, assuming it was “ripe” (in July of 2022), invalidation of that Legislative action would have necessitated the process begin anew and it is not clear that the instant action would have been resolved in time to allow the Legislature to vote again on the Concurrent Resolution prior to the general election in November of 2022. The Majority Defendants have not met their burden in showing that they were prejudiced from placing the proposed amendment on the 2024 general election ballot, or that the failure for it to appear on that ballot constitutes sufficient prejudice to invoke the laches doctrine.

on the ballot in derogation of the procedures required by Constitution. (See e.g., *Town of Cortlandt v. Vill. of Peekskill*, 281 NY 490 [1939].)

Defendants Stewart-Cousins and Heastie are Dismissed from Suit

Andrea Stewart-Cousins and Carl Heastie move to dismiss the action as to them arguing that legislative immunity prevents suit for legislative actions taken by them. The Court agrees.

As observed by the Court of Appeals in *People v. Ohrenstein* (77 NY2d 38 [1990]):

The State Constitution provides: “For any speech or debate in either house of the legislature, the members shall not be questioned in any other place” (N.Y. Const., art. III, § 11). We have not previously considered the scope of the immunity granted by this section, but it appears that it was intended to provide at least as much protection as the immunity granted by the comparable provision of the Federal Constitution (New York State Constitutional Convention Committee, Problems Relating to Legislative Organization and Powers, at 57 [1938]). The Supreme Court has held that the Speech or Debate Clause confers immunity on members of Congress for legislative acts but does not extend to everything a legislator does which is somehow related to his role even though the act is lawful and generally expected of a legislator (*Hutchinson v. Proxmire, supra*).

Legislative acts have been defined as those which are an integral part of the legislative process, and have been held to include votes and speeches on the floor of the House as well as the underlying motivations for these activities (*Hutchinson v. Proxmire, supra*; *United States v. Johnson*, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681; *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507).

(*Id.* at 53-54.)

“The fundamental purpose of the clause is to insure that the legislative function may be performed independently (*Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502, 95 S.Ct. 1813, 1820–21, 44 L.Ed.2d 324; *Gravel v. United States*, 408 U.S. 606, 618, 92 S.Ct. 2614, 2623–24, 33 L.Ed.2d 583). The US Supreme Court has interpreted the Federal Speech or Debate Clause broadly to effectuate its purposes, holding that any acts by members of Congress or their aides within the performance of their legislative functions are beyond judicial scrutiny (*see, Gravel v. United States, supra*, at 616, 624–625, 92 S.Ct. at 2622–2633, 2626–2627). The clause not only shields legislators from the consequences of litigation, but also protects them from the burden of defending themselves in court (*see, Powell v. McCormack*, 395 U.S. 486, 502–503, 89 S.Ct. 1944, 1953–54, 23 L.Ed.2d 491; *Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S.Ct. 1425, 1427–28, 18 L.Ed.2d 577).” (*Straniere v. Silver*, 218 AD2d 80, 83 [3rd Dept. 1996].)

Here, Stewart-Cousins and Heastie – to the extent they are sued as representatives for the Senate and Assembly, respectively, are immune from suit and must be dismissed from this action.¹⁸

¹⁸ Plaintiffs did not oppose this requested relief. “We note at the outset that plaintiff has abandoned the wrongful death cause of action, inasmuch as she failed to oppose that part of defendants’ motion with respect to it and, indeed, has not addressed it on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984 [1994]).” (*Donna Prince L. v. Waters*, 48 AD3d 1137, 1138 [4th Dept. 2008].)

The Appropriate Relief

As the Court finds that the Legislature violated the procedure required by Article XIX, the appropriate remedy is declaring the Concurrent Resolution adopted in derogation of the constitutional procedures void and removing the proposed amendment from the ballot.

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.

Nor does the Court accept the Majority Defendants’ argument that finding in favor of the plaintiffs imperils other amendments passed by the Legislature under the flawed procedures it previously employed. Those amendments are not subject

to challenge here, and the defense of laches would likely invalidate challenges to amendments already adopted by the People.

Based upon the foregoing, the oral argument conducted on April 16, 2024, and the papers submitted herein,¹⁹ it is hereby

ORDERED that the Majority Defendants' motion for summary judgment in GRANTED, in part, and Defendants Andrea Stewart-Cousins and Carl Heastie are dismissed from suit, and the motion is otherwise is DENIED; and it is further

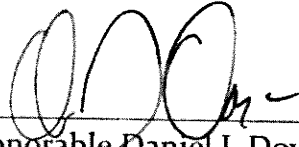
ORDERED that the plaintiffs' motion for summary judgment is GRANTED; and it is further

ORDERED, ADJUDGED and DECREED that that the New York State Legislature violated §1 of Article XIX of the Constitution in adopting the Concurrent Resolution, and the Concurrent Resolution is declared null and void, and the proposed amendment shall be removed from the ballot for the general election of November 5, 2024.

¹⁹ Summons and Complaint, with exhibits (NYSCEF Docket #s 1-4); Notice of Motion (NYSCEF Docket # 10); Affirmation in Support with exhibits (NYSCEF Docket #s 11-15); Memorandum of Law in Support (NYSCEF Docket # 16); Affirmation in Support of Motion with exhibits (NYSCEF Docket #s 42-76); Affirmation in Reply (NYSCEF Docket # 77); Affirmation in Support (NYSCEF Docket # 79); Notice of Cross-Motion (NYSCEF Docket # 26); Affirmation in Support with exhibits (NYSCEF Docket #s 27-31); Affirmation in Opposition to Cross-Motion with exhibits (NYSCEF Docket # 32-37); Memorandum of Law in Opposition to Cross-Motion (NYSCEF Docket # 38); Affirmation in Reply (NYSCEF Docket # 40); Affirmation (NYSCEF Docket # 78).

This constitutes the Decision and Order of the Court.

Dated: May 7, 2024



Honorable Daniel J. Doyle, JSC

EXHIBIT “B”

EXHIBIT “C”

FILED: LIVINGSTON COUNTY CLERK 06/25/2024 12:15 PM

NYSCEF DOC. NO. 93

INDEX# 000778-2023

RECEIVED NYSCEF: 06/25/2024

FILED: LIVINGSTON COUNTY CLERK 06/21/2024 03:43 PM

NYSCEF DOC. NO. 01

INDEX# 000778-2023

FILED: LIVINGSTON COUNTY CLERK 06/21/2024 03:29 PM

NYSCEF DOC. NO. 88

RECEIVED NYSCEF: 06/21/2024

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

537.1

CA 24-00764

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

MARJORIE BYRNES, INDIVIDUALLY AND AS A
MEMBER OF NEW YORK STATE ASSEMBLY, TAWN
FEENEY AND SUSAN LUNDGREN,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

SENATE OF STATE OF NEW YORK, THE ASSEMBLY
OF THE STATE OF NEW YORK, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF
COUNSEL), FOR DEFENDANTS-APPELLANTS AND DEFENDANTS ANDREA STEWART-
COUSINS, AS PRESIDENT PRO TEMPORE AND MAJORITY LEADER OF SENATE AND
CARL HEASTIE, AS SPEAKER OF ASSEMBLY.

MCLAUGHLIN & STERN, LLP, GARDEN CITY (CHRISTIAN BROWNE OF COUNSEL),
AND COX LAWYERS, PLLC, BRONXVILLE, FOR PLAINTIFFS-RESPONDENTS.

PERILLO HILL LLP, SAYVILLE (LISA A. PERILLO OF COUNSEL), FOR
DEFENDANTS ROBERT ORTT, AS MINORITY LEADER OF THE SENATE, AND WILLIAM
BARCLAY, AS MINORITY LEADER OF THE ASSEMBLY.

WINSTON & STRAWN LLP, NEW YORK CITY (SUSANNAH TORPEY OF COUNSEL), FOR
LEAGUE OF WOMEN VOTERS OF NEW YORK STATE, AMICUS CURIAE.

EQUAL PROTECTION PROJECT, LEGAL INSURRECTION FOUNDATION, BARRINGTON,
RHODE ISLAND (WILLIAM A. JACOBSON OF COUNSEL), FOR EQUAL PROTECTION
PROJECT, AMICUS CURIAE.

ANDREW BATH, GENERAL COUNSEL, CHICAGO, ILLINOIS (CHRISTOPHER A.
FERRARA OF COUNSEL), FOR THOMAS MORE SOCIETY, AMICUS CURIAE.

Appeal from a judgment of the Supreme Court, Livingston County
(Daniel J. Doyle, J.), entered May 7, 2024. The judgment, insofar as
appealed from, granted the cross-motion of plaintiffs for summary
judgment, declared that the New York State Legislature violated
article XIX section 1 of the New York State Constitution in adopting
Senate Bill S.51002 and Assembly Bill A.41002, declared those bills
null and void, ordered the proposed constitutional amendment to be
removed from the ballot for the general election of November 5, 2024,
and denied in part the motion for summary judgment of defendants
Senate of the State of New York, Andrea Stewart-Cousins, as the
president pro tempore and majority leader of the Senate, Assembly of
the State of New York and Carl Heastie, as speaker of the Assembly.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the cross-motion is denied, the declaration is vacated, the motion is granted in its entirety, and the complaint is dismissed against defendants Senate of the State of New York and Assembly of the State of New York.

Memorandum: Plaintiffs commenced this action seeking a judgment declaring, inter alia, that the New York State Legislature violated article XIX section 1 of the New York State Constitution in adopting Senate Bill S.51002 and Assembly Bill A.41002 on July 1, 2022 because it advanced a proposed amendment to the Constitution before the Attorney General rendered an opinion in writing as to the effect of the proposed amendment upon other provisions of the Constitution and before the expiration of the 20-day period proscribed for the Attorney General to issue such an opinion. Defendants Senate of the State of New York; Andrea Stewart-Cousins, as the president pro tempore and majority leader of the Senate; Assembly of the State of New York; and Carl Heastie, as speaker of the Assembly (collectively, majority defendants) made a preanswer motion to dismiss the complaint on various grounds, including that the cause of action asserted therein is properly the subject of a CPLR article 78 proceeding and that the four-month statute of limitations applicable to such a proceeding has expired. Plaintiffs cross-moved for summary judgment on the complaint, and Supreme Court converted the majority defendants' motion to dismiss into one seeking summary judgment (see CPLR 3211 [c]). Thereafter, the court granted the majority defendants' motion to the extent it sought summary judgment dismissing the complaint against Stewart-Cousins and Heastie, but otherwise denied the majority defendants' motion. The court also granted plaintiffs' cross-motion and issued a declaration in their favor. Defendants-appellants appeal from the judgment to the extent that it denied the motion and granted the cross-motion, and we now reverse the judgment insofar as appealed from.

When a proceeding or action against a state entity "has been commenced in the form of a declaratory judgment action, for which no specific Statute of Limitations is prescribed, it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought in order to resolve which Statute of Limitations is applicable" (*New York City Health and Hosps. Corp. v McBarnette*, 84 NY2d 194, 200-201 [1994], rearg denied 84 NY2d 865 [1994] [internal quotation marks omitted]). "[I]f the claim could have been made in a form other than an action for a declaratory judgment and the limitations period for an action in that form has already expired, the time for asserting the claim cannot be extended through the simple expedient of denominating the action one for declaratory relief" (*id.* at 201; see *Matter of Foley v Masiello*, 38 AD3d 1201, 1202 [4th Dept 2007]).

It is well settled that "a proceeding under article 78 is not the proper vehicle to test the constitutionality of legislative enactments" (*Matter of Kovarsky v Housing & Dev. Admin. of City of N.Y.*, 31 NY2d 184, 191 [1972]; see *Press v County of Monroe*, 50 NY2d 695, 702 [1980]). When the challenge is directed at the procedures

FILED: LIVINGSTON COUNTY CLERK 06/25/2024 12:15 PM

NYSCEF DOC. NO. 93

INDEX# 000778-2023 2023

RECEIVED NYSCEF: 06/25/2024

FILED: LIVINGSTON COUNTY CLERK 06/21/2024 03:43 PM

NYSCEF DOC. NO. 01

INDEX# 000778-2023 2023

FILED: LIVINGSTON COUNTY CLERK 06/21/2024 03:29 PM

NYSCEF DOC. NO. 88

RECEIVED NYSCEF: 06/21/2024

- 3 -

RECEIVED NYSCEF: 06/21/2024

CA 24-00764

followed by the legislature rather than the substance of the enactment, however, "it is maintainable in an article 78 proceeding" (*Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202 [1987]).

Here, although plaintiffs characterize the complaint "as a challenge to the constitutionality of [defendants'] actions, [it] actually alleges an erroneous application of a constitutional provision relating to the procedure by which" the proposed amendment was advanced, and therefore it would have been proper to "proceed[] by way of a CPLR article 78 proceeding" (*Matter of Straniere v Silver*, 218 AD2d 80, 82 n 2 [3d Dept 1996], *affd* for reasons stated 89 NY2d 825 [1996]; see *Matter of Voelckers v Guelli*, 58 NY2d 170, 176-177 [1983]). Thus, the sole cause of action here is subject to the four-month statute of limitations and is time-barred (see CPLR 217 [1]).

The remaining contentions are academic in light of our determination.

Ann Dillon Flynn

Entered: June 18, 2024

Ann Dillon Flynn
Clerk of the Court

FILED: LIVINGSTON COUNTY CLERK 06/25/2024 12:15 PM

NYSCEF DOC. NO. 93

INDEX# 000778-2023

RECEIVED NYSCEF: 06/25/2024

FILED: LIVINGSTON COUNTY CLERK 06/21/2024 03:43 PM

NYSCEF DOC. NO. 91

INDEX# 000778-2023

RECEIVED NYSCEF: 06/21/2024

FILED: LIVINGSTON COUNTY CLERK 06/21/2024 03:29 PM

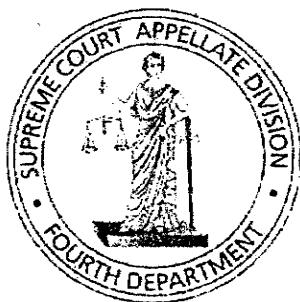
NYSCEF DOC. NO. 88

RECEIVED NYSCEF: 06/21/2024

**Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.**

}

I, Ann Dillon Flynn, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this June 18, 2024

Ann Dillon Flynn

Clerk

EXHIBIT “C”



Andrea K. Bailey, County Clerk
Livingston County Government Center
6 Court Street, Room 201
Geneseo, New York 14454
(585) 243-7010 ~ Fax (585) 243-7928

Livingston County Clerk Recording Page

Received From:

LISA ANGELA PERILLO
285 W MAIN ST STE 203
SAYVILLE, NY 11782

Return To:

LISA ANGELA PERILLO
285 W MAIN ST STE 203
SAYVILLE, NY 11782

Document Type: **NOTICE OF APPEAL**

Document Desc: **NOTICE OF APPEAL -
COURT OF APPEALS**

Plaintiff

Byrnes Marjorie
*individually and as a member of the New
York State Assembly*
Feeney Tawn
Lundgren Susan

Defendant

SEE DOCUMENT

Recorded Information:

Index #: 000778-2023
Notice of Appeal Filing Fee \$65.00

State of New York
County of Livingston

EFiling through NYSCEF

Livingston County Clerk

This sheet constitutes the Clerk's endorsement required by section 319 of the Real Property Law of the State of New York

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

-----X
MARJORIE BYRNES, individually and as a member of
the New York State Assembly, TAWNY FEENY and
SUSAN LUNDGREN, LLC,

Appellate Division
Case No.: CA 24-00764

Plaintiffs-Respondents,

(Originating Court
Supreme Court,
Livingston Co.,
Index No.: 000778-2023)

v.

THE SENATE OF THE STATE OF NEW YORK,
ANDREA STEWART-COUSINS, as the President Pro
Tempore and Majority Leader of the Senate, THE
ASSEMBLY OF THE STATE OF NEW YORK, CARL
HEASTIE, as Speaker of the Assembly,

NOTICE OF APPEAL

Defendants-Appellants,

- and -

NEW YORK STATE BOARD OF ELECTIONS,
ROBERT ORTT, as Minority Leader of the Senate,
WILLIAM BARCLAY, as Minority Leader of the
Assembly,

Defendants.

-----X

PLEASE TAKE NOTICE, that Defendants Robert Ortt, as Minority Leader of
the Senate and William Barclay, as Minority Leader of the Assembly (collectively the
“Minority Defendants”), hereby appeal to the Court of Appeals of the State of New
York from the Memorandum and Order of the Supreme Court of the State of New

York, Appellate Division Fourth Department, entered on June 18, 2024 (the "Order"), whereby the Appellate Division dismissed the above-captioned action, and from each and every part of such Order.

Dated: Sayville, New York
June 25, 2024

Yours, etc.:

PERILLO HILL LLP

By: 
Lisa A. Perillo

285 West Main Street, Suite 203
Sayville, New York 11782
(631) 582-9422

lperillo@perillohill.com

Attorneys for the Minority Defendants

TO: ALL COUNSEL VIA NYSCEF

Christian Browne, Esq.
McLAUGHLIN & STERN, LLP
1122 Franklin Avenue, Suite 300
Garden City, New York 11530
(516) 829-6900
cbrowne@mclaughlinstern.com

-and-

Bobbie Anne Flower Cox, Esq.
COX LAWYERS, PLLC
34 Palmer Ave.
Bronxville, New York 10708
(914) 779-7762
bcox@coxlawyers.com

Attorneys for Plaintiffs-Respondents

Dustin Jacobs Brockner, Esq.
NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
The Capitol
Albany, New York 12224
(518) 776-2017
dustin.brockner@ag.ny.gov

Attorneys for Defendants-Appellants

Kevin Gordon Murphy, Esq.
NYS BOARD OF ELECTIONS
40 N. Pearl Street, Suite 5
Albany, New York 12207
(518) 474-6220
Kevin.murphy@elections.ny.gov

Attorneys for Defendant NYS Board of Elections

And to Amici:

Susannah Providence Torpey, Esq.
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
(212) 294-4690
storpey@winston.com

Attorneys for Non-Party League of Women Voters of New York State

Ronald David Coleman, Esq.
18 Maple Avenue, no. 280
Barrington, RI 02806
rcoleman@dhillonlaw.com

Attorney for Non-Party Equal Protection Project,

Legal Insurrection Foundation

Christopher Augustine Ferrara, Esq.
14829 Cross Island Parkway
Whitestone, New York 11357
(718) 357-1040
cferrara@thomasmoresociety.org

Attorney for Non-Party Thomas More Society



Andrea K. Bailey, County Clerk
Livingston County Government Center
6 Court Street, Room 201
Geneseo, New York 14454
(585) 243-7010 ~ Fax (585) 243-7928

Livingston County Clerk Recording Page

Received From:

CHRISTIAN P. BROWNE

Return To:

CHRISTIAN P. BROWNE

Document Type: **CIVIL ACTION - MISC**

Plaintiff

Byrnes Marjorie
*individually and as a member of the New
York State Assembly*
Feeney Tawn
Lundgren Susan

Document Desc: **NOTICE OF ENTRY**

Defendant

SEE DOCUMENT

Recorded Information:

Index #: 000778-2023

State of New York
County of Livingston

Efiling through NYSCEF

A handwritten signature in cursive script, reading "Andrea K. Bailey".

Livingston County Clerk

This sheet constitutes the Clerk's endorsement required by section 319 of the Real Property Law of the State of New York

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-FOURTH DEPARTMENT**

MARJORIE BYRNES, individually and as a member of
the New York State Assembly, TAWN FEENEY and
SUSAN LUNDREN,

Appellate Case No.: CA 24-00764

Plaintiffs-Respondents,

(Supreme Court, Livingston
County, Index No.: 000778-2023)

-v.-

NOTICE OF ENTRY

THE SENATE OF THE STATE OF NEW YORK,
ANDREA STEWART-COUSINS, as President Pro
Tempore and Majority Leader of the Senate, THE
ASSEMBLY OF THE STATE OF NEW YORK, CARL
HEASTIE, as Speaker of the Assembly,

Defendants-Appellants,

-and-

NEW YORK STATE BOARD OF ELECTIONS,
ROBERT ORTT, as Minority Leader of the Senate, and
WILLIAM BARCLAY, as Minority Leader of the
Assembly,

Defendants.

PLEASE TAKE NOTICE, that the within is a true copy of a Memorandum and Order of
the Supreme Court of the State of New York Appellate Division, Fourth Judicial Department,
entered in the Office of the Clerk of the Court on June 18, 2024 and Certified on June 21, 2024.

Dated: Garden City, New York
June 21, 2024


CHRISTIAN BROWNE, ESQ.
McLAUGHLIN & STERN, LLP
Attorneys for Plaintiffs-Respondents
1122 Franklin Avenue, Suite 300
Garden City, New York 11530
(516) 829-6900

{N0726993.1}

FILED: LIVINGSTON COUNTY CLERK 06/25/2024 12:15 PM

NYSCEF DOC. NO. 93

INDEX# 000778-2023

RECEIVED NYSCEF: 06/25/2024

FILED: LIVINGSTON COUNTY CLERK 06/21/2024 03:43 PM

NYSCEF DOC. NO. 91

INDEX# 000778-2023

RECEIVED NYSCEF: 06/21/2024

BOBBIE ANNE FLOWER COX, ESQ.
COX LAWYERS, PLLC
Attorneys for Plaintiffs-Respondents
34 Palmer Ave.
Bronxville, NY 10708
(914) 779-7762

TO: ALL PARTIES VIA ECF

{N0726993.1}

2

FILED: LIVINGSTON COUNTY CLERK 06/25/2024 12:15 PM

NYSCEF DOC. NO. 93

INDEX NO. 000778-2023

RECEIVED NYSCEF: 06/25/2024

FILED: LIVINGSTON COUNTY CLERK 06/21/2024 03:43 PM

NYSCEF DOC. NO. 91

INDEX NO. 000778-2023

RECEIVED NYSCEF: 06/21/2024
INDEX NO. 000778-2023

FILED: LIVINGSTON COUNTY CLERK 06/21/2024 03:29 PM

NYSCEF DOC. NO. 88

RECEIVED NYSCEF: 06/21/2024



Andrea K. Bailey, County Clerk
Livingston County Government Center
6 Court Street, Room 201
Geneseo, New York 14454
(585) 243-7010 ~ Fax (585) 243-7928

Livingston County Clerk Recording Page

Received From:

ANDREA K. BAILEY
6 COURT STREET
ROOM 201
GENESEO, NY 14454

Return To:

ANDREA K. BAILEY
6 COURT STREET
ROOM 201
GENESEO, NY 14454

Document Type: **CIVIL ACTION - MISC**

Document Desc: **APPELLATE COURT
DECISION/ORDER (CERTIFIED COPY)**

Plaintiff

Byrnes Marjorie
*individually and as a member of the New
York State Assembly*
Feeney Tawn
Lundgren Susan

Defendant

SEE DOCUMENT

Recorded Information:

Index #: 000778-2023

State of New York
County of Livingston

Efiling through NYSCEF

Livingston County Clerk

This sheet constitutes the Clerk's endorsement required by section 319 of the Real Property Law of the State of New York

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

537.1

CA 24-00764

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

MARJORIE BYRNES, INDIVIDUALLY AND AS A
MEMBER OF NEW YORK STATE ASSEMBLY, TAWN
FEENEY AND SUSAN LUNDGREN,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

SENATE OF STATE OF NEW YORK, THE ASSEMBLY
OF THE STATE OF NEW YORK, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF
COUNSEL), FOR DEFENDANTS-APPELLANTS AND DEFENDANTS ANDREA STEWART-
COUSINS, AS PRESIDENT PRO TEMPORE AND MAJORITY LEADER OF SENATE AND
CARL HEASTIE, AS SPEAKER OF ASSEMBLY.

MCLAUGHLIN & STERN, LLP, GARDEN CITY (CHRISTIAN BROWNE OF COUNSEL),
AND COX LAWYERS, PLLC, BRONXVILLE, FOR PLAINTIFFS-RESPONDENTS.

PERILLO HILL LLP, SAYVILLE (LISA A. PERILLO OF COUNSEL), FOR
DEFENDANTS ROBERT ORTT, AS MINORITY LEADER OF THE SENATE, AND WILLIAM
BARCLAY, AS MINORITY LEADER OF THE ASSEMBLY.

WINSTON & STRAWN LLP, NEW YORK CITY (SUSANNAH TORPEY OF COUNSEL), FOR
LEAGUE OF WOMEN VOTERS OF NEW YORK STATE, AMICUS CURIAE.

EQUAL PROTECTION PROJECT, LEGAL INSURRECTION FOUNDATION, BARRINGTON,
RHODE ISLAND (WILLIAM A. JACOBSON OF COUNSEL), FOR EQUAL PROTECTION
PROJECT, AMICUS CURIAE.

ANDREW BATH, GENERAL COUNSEL, CHICAGO, ILLINOIS (CHRISTOPHER A.
FERRARA OF COUNSEL), FOR THOMAS MORE SOCIETY, AMICUS CURIAE.

Appeal from a judgment of the Supreme Court, Livingston County
(Daniel J. Doyle, J.), entered May 7, 2024. The judgment, insofar as
appealed from, granted the cross-motion of plaintiffs for summary
judgment, declared that the New York State Legislature violated
article XIX section 1 of the New York State Constitution in adopting
Senate Bill S.51002 and Assembly Bill A.41002, declared those bills
null and void, ordered the proposed constitutional amendment to be
removed from the ballot for the general election of November 5, 2024,
and denied in part the motion for summary judgment of defendants
Senate of the State of New York, Andrea Stewart-Cousins, as the
president pro tempore and majority leader of the Senate, Assembly of
the State of New York and Carl Heastie, as speaker of the Assembly.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the cross-motion is denied, the declaration is vacated, the motion is granted in its entirety, and the complaint is dismissed against defendants Senate of the State of New York and Assembly of the State of New York.

Memorandum: Plaintiffs commenced this action seeking a judgment declaring, inter alia, that the New York State Legislature violated article XIX section 1 of the New York State Constitution in adopting Senate Bill S.51002 and Assembly Bill A.41002 on July 1, 2022 because it advanced a proposed amendment to the Constitution before the Attorney General rendered an opinion in writing as to the effect of the proposed amendment upon other provisions of the Constitution and before the expiration of the 20-day period proscribed for the Attorney General to issue such an opinion. Defendants Senate of the State of New York; Andrea Stewart-Cousins, as the president pro tempore and majority leader of the Senate; Assembly of the State of New York; and Carl Heastie, as speaker of the Assembly (collectively, majority defendants) made a preanswer motion to dismiss the complaint on various grounds, including that the cause of action asserted therein is properly the subject of a CPLR article 78 proceeding and that the four-month statute of limitations applicable to such a proceeding has expired. Plaintiffs cross-moved for summary judgment on the complaint, and Supreme Court converted the majority defendants' motion to dismiss into one seeking summary judgment (*see* CPLR 3211 [c]). Thereafter, the court granted the majority defendants' motion to the extent it sought summary judgment dismissing the complaint against Stewart-Cousins and Heastie, but otherwise denied the majority defendants' motion. The court also granted plaintiffs' cross-motion and issued a declaration in their favor. Defendants-appellants appeal from the judgment to the extent that it denied the motion and granted the cross-motion, and we now reverse the judgment insofar as appealed from.

When a proceeding or action against a state entity "has been commenced in the form of a declaratory judgment action, for which no specific Statute of Limitations is prescribed, it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought in order to resolve which Statute of Limitations is applicable" (*New York City Health and Hosps. Corp. v McBarnette*, 84 NY2d 194, 200-201 [1994], *rearg denied* 84 NY2d 865 [1994] [internal quotation marks omitted]). "[I]f the claim could have been made in a form other than an action for a declaratory judgment and the limitations period for an action in that form has already expired, the time for asserting the claim cannot be extended through the simple expedient of denominating the action one for declaratory relief" (*id.* at 201; *see Matter of Foley v Masiello*, 38 AD3d 1201, 1202 [4th Dept 2007]).

It is well settled that "a proceeding under article 78 is not the proper vehicle to test the constitutionality of legislative enactments" (*Matter of Kovarsky v Housing & Dev. Admin. of City of N.Y.*, 31 NY2d 184, 191 [1972]; *see Press v County of Monroe*, 50 NY2d 695, 702 [1980]). When the challenge is directed at the procedures

followed by the legislature rather than the substance of the enactment, however, "it is maintainable in an article 78 proceeding" (*Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202 [1987]).

Here, although plaintiffs characterize the complaint "as a challenge to the constitutionality of [defendants'] actions, [it] actually alleges an erroneous application of a constitutional provision relating to the procedure by which" the proposed amendment was advanced, and therefore it would have been proper to "proceed[] by way of a CPLR article 78 proceeding" (*Matter of Straniere v Silver*, 218 AD2d 80, 82 n 2 [3d Dept 1996], *affd for reasons stated* 89 NY2d 825 [1996]; see *Matter of Voelckers v Guelli*, 58 NY2d 170, 176-177 [1983]). Thus, the sole cause of action here is subject to the four-month statute of limitations and is time-barred (see CPLR 217 [1]).

The remaining contentions are academic in light of our determination.

[Handwritten signature]

Entered: June 18, 2024

Ann Dillon Flynn
Clerk of the Court

FILED: LIVINGSTON COUNTY CLERK 06/25/2024 12:15 PM

NYSCEF DOC. NO. 93

INDEX# 000778-2023

RECEIVED NYSCEF: 06/25/2024

FILED: LIVINGSTON COUNTY CLERK 06/21/2024 03:43 PM

NYSCEF DOC. NO. 81

INDEX# 000778-2023

FILED: LIVINGSTON COUNTY CLERK 06/21/2024 03:29 PM

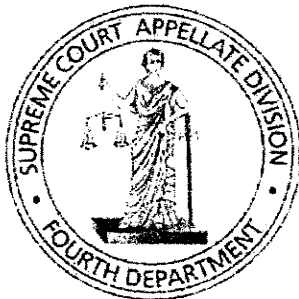
NYSCEF DOC. NO. 88

RECEIVED NYSCEF: 06/21/2024

RECEIVED NYSCEF: 06/21/2024

**Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.** }

I, Ann Dillon Flynn, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this June 18, 2024

Ann Dillon Flynn

Clerk

EXHIBIT “D”

State of New York

Court of Appeals

*Decided and Entered on the
eleventh day of July, 2024*

Present, Hon. Rowan D. Wilson, *Chief Judge, presiding.*

SSDs 23 & 24

Marjorie Byrnes, &c., et al.,
Appellants,

v.

Senate of the State of New York et al.,
Respondents,
Robert Ortt, &c., et al.,
Appellants,
et al.,
Defendant.

Appellants Marjorie Byrnes, &c., et al. and appellants Robert Ortt, &c., et al.
having separately appealed to the Court of Appeals in the above title;

Upon the papers filed and due deliberation, it is

ORDERED, that the appeal taken by Marjorie Byrnes, &c., et al. is dismissed
without costs, by the Court sua sponte, upon the ground that no substantial constitutional
question is directly involved; and it is further

ORDERED, that the appeal taken by Robert Ortt, &c., et al. is dismissed without
costs, by the Court sua sponte, upon the ground that they are not parties aggrieved (*see*
CPLR 5511).



Lisa LeCours
Clerk of the Court

EXHIBIT “E”



Andrea K. Bailey, County Clerk
Livingston County Government Center
6 Court Street, Room 201
Geneseo, New York 14454
(585) 243-7010 ~ Fax (585) 243-7928

Livingston County Clerk Recording Page

Received From:

CHRISTIAN P. BROWNE

Return To:

CHRISTIAN P. BROWNE

Document Type: **CIVIL ACTION - MISC****Plaintiff**

Byrnes Marjorie
*individually and as a member of the New
York State Assembly*
Feeney Tawn
Lundgren Susan

Document Desc: **NOTICE OF ENTRY****Defendant**

SEE DOCUMENT

Recorded Information:

Index #: 000778-2023

State of New York
County of Livingston

EFiling through NYSCEF

A handwritten signature in cursive script, reading "Andrea K. Bailey".

Livingston County Clerk

This sheet constitutes the Clerk's endorsement required by section 319 of the Real Property Law of the State of New York

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-FOURTH DEPARTMENT**

MARJORIE BYRNES, individually and as a member of
the New York State Assembly, TAWN FEENEY and
SUSAN LUNDREN,

Appellate Case No.: CA 24-00764

Plaintiffs-Respondents,

(Supreme Court, Livingston
County, Index No.: 000778-2023)

-v.-

NOTICE OF ENTRY

THE SENATE OF THE STATE OF NEW YORK,
ANDREA STEWART-COUSINS, as President Pro
Tempore and Majority Leader of the Senate, THE
ASSEMBLY OF THE STATE OF NEW YORK, CARL
HEASTIE, as Speaker of the Assembly,

Defendants-Appellants,

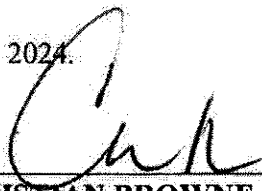
-and-

NEW YORK STATE BOARD OF ELECTIONS,
ROBERT ORTT, as Minority Leader of the Senate, and
WILLIAM BARCLAY, as Minority Leader of the
Assembly,

Defendants.

PLEASE TAKE NOTICE, that the within is a true copy of a Memorandum and Order of
the Supreme Court of the State of New York Appellate Division, Fourth Judicial Department,
entered in the Office of the Clerk of the Court on June 18, 2024.

Dated: Garden City, New York
June 20, 2024


CHRISTIAN BROWNE, ESQ.
McLAUGHLIN & STERN, LLP
Attorneys for Plaintiffs-Respondents
1122 Franklin Avenue, Suite 300
Garden City, New York 11530
(516) 829-6900

BOBBIE ANNE FLOWER COX, ESQ.
COX LAWYERS, PLLC
Attorneys for Plaintiffs-Respondents
34 Palmer Ave.
Bronxville, NY 10708
(914) 779-7762

TO: ALL PARTIES VIA ECF

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

537.1

CA 24-00764

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

MARJORIE BYRNES, INDIVIDUALLY AND AS A
MEMBER OF NEW YORK STATE ASSEMBLY, TAWN
FEENEY AND SUSAN LUNDGREN,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

SENATE OF STATE OF NEW YORK, THE ASSEMBLY
OF THE STATE OF NEW YORK, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF
COUNSEL), FOR DEFENDANTS-APPELLANTS AND DEFENDANTS ANDREA STEWART-
COUSINS, AS PRESIDENT PRO TEMPORE AND MAJORITY LEADER OF SENATE AND
CARL HEASTIE, AS SPEAKER OF ASSEMBLY.

MCLAUGHLIN & STERN, LLP, GARDEN CITY (CHRISTIAN BROWNE OF COUNSEL),
AND COX LAWYERS, PLLC, BRONXVILLE, FOR PLAINTIFFS-RESPONDENTS.

PERILLO HILL LLP, SAYVILLE (LISA A. PERILLO OF COUNSEL), FOR
DEFENDANTS ROBERT ORTT, AS MINORITY LEADER OF THE SENATE, AND WILLIAM
BARCLAY, AS MINORITY LEADER OF THE ASSEMBLY.

WINSTON & STRAWN LLP, NEW YORK CITY (SUSANNAH TORPEY OF COUNSEL), FOR
LEAGUE OF WOMEN VOTERS OF NEW YORK STATE, AMICUS CURIAE.

EQUAL PROTECTION PROJECT, LEGAL INSURRECTION FOUNDATION, BARRINGTON,
RHODE ISLAND (WILLIAM A. JACOBSON OF COUNSEL), FOR EQUAL PROTECTION
PROJECT, AMICUS CURIAE.

ANDREW BATH, GENERAL COUNSEL, CHICAGO, ILLINOIS (CHRISTOPHER A.
FERRARA OF COUNSEL), FOR THOMAS MORE SOCIETY, AMICUS CURIAE.

Appeal from a judgment of the Supreme Court, Livingston County
(Daniel J. Doyle, J.), entered May 7, 2024. The judgment, insofar as
appealed from, granted the cross-motion of plaintiffs for summary
judgment, declared that the New York State Legislature violated
article XIX section 1 of the New York State Constitution in adopting
Senate Bill S.51002 and Assembly Bill A.41002, declared those bills
null and void, ordered the proposed constitutional amendment to be
removed from the ballot for the general election of November 5, 2024,
and denied in part the motion for summary judgment of defendants
Senate of the State of New York, Andrea Stewart-Cousins, as the
president pro tempore and majority leader of the Senate, Assembly of

-2-

537.1

CA 24-00764

the State of New York and Carl Heastie, as speaker of the Assembly.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the cross-motion is denied, the declaration is vacated, the motion is granted in its entirety, and the complaint is dismissed against defendants Senate of the State of New York and Assembly of the State of New York.

Memorandum: Plaintiffs commenced this action seeking a judgment declaring, inter alia, that the New York State Legislature violated article XIX section 1 of the New York State Constitution in adopting Senate Bill S.51002 and Assembly Bill A.41002 on July 1, 2022 because it advanced a proposed amendment to the Constitution before the Attorney General rendered an opinion in writing as to the effect of the proposed amendment upon other provisions of the Constitution and before the expiration of the 20-day period proscribed for the Attorney General to issue such an opinion. Defendants Senate of the State of New York; Andrea Stewart-Cousins, as the president pro tempore and majority leader of the Senate; Assembly of the State of New York; and Carl Heastie, as speaker of the Assembly (collectively, majority defendants) made a preanswer motion to dismiss the complaint on various grounds, including that the cause of action asserted therein is properly the subject of a CPLR article 78 proceeding and that the four-month statute of limitations applicable to such a proceeding has expired. Plaintiffs cross-moved for summary judgment on the complaint, and Supreme Court converted the majority defendants' motion to dismiss into one seeking summary judgment (see CPLR 3211 [c]). Thereafter, the court granted the majority defendants' motion to the extent it sought summary judgment dismissing the complaint against Stewart-Cousins and Heastie, but otherwise denied the majority defendants' motion. The court also granted plaintiffs' cross-motion and issued a declaration in their favor. Defendants-appellants appeal from the judgment to the extent that it denied the motion and granted the cross-motion, and we now reverse the judgment insofar as appealed from.

When a proceeding or action against a state entity "has been commenced in the form of a declaratory judgment action, for which no specific Statute of Limitations is prescribed, it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought in order to resolve which Statute of Limitations is applicable" (*New York City Health and Hosps. Corp. v McBarnette*, 84 NY2d 194, 200-201 [1994], rearg denied 84 NY2d 865 [1994] [internal quotation marks omitted]). "[I]f the claim could have been made in a form other than an action for a declaratory judgment and the limitations period for an action in that form has already expired, the time for asserting the claim cannot be extended through the simple expedient of denominating the action one for declaratory relief" (*id.* at 201; see *Matter of Foley v Masiello*, 38 AD3d 1201, 1202 [4th Dept 2007]).

It is well settled that "a proceeding under article 78 is not the proper vehicle to test the constitutionality of legislative enactments" (*Matter of Kovarsky v Housing & Dev. Admin. of City of*

-3-

537.1

CA 24-00764

N.Y., 31 NY2d 184, 191 [1972]; see *Press v County of Monroe*, 50 NY2d 695, 702 [1980]). When the challenge is directed at the procedures followed by the legislature rather than the substance of the enactment, however, "it is maintainable in an article 78 proceeding" (*Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202 [1987]).

Here, although plaintiffs characterize the complaint "as a challenge to the constitutionality of [defendants'] actions, [it] actually alleges an erroneous application of a constitutional provision relating to the procedure by which" the proposed amendment was advanced, and therefore it would have been proper to "proceed[] by way of a CPLR article 78 proceeding" (*Matter of Straniere v Silver*, 218 AD2d 80, 82 n 2 [3d Dept 1996], *affd for reasons stated* 89 NY2d 825 [1996]; see *Matter of Voelckers v Guelli*, 58 NY2d 170, 176-177 [1983]). Thus, the sole cause of action here is subject to the four-month statute of limitations and is time-barred (see CPLR 217 [1]).

The remaining contentions are academic in light of our determination.

Entered: June 18, 2024

Ann Dillon Flynn
Clerk of the Court



NYSCEF Confirmation Notice

Livingston County Supreme Court



The NYSCEF website has received an electronic filing on 06/20/2024 02:48 PM. Please keep this notice as a confirmation of this filing.

000778-2023

Marjorie Byrnes et al v. The Senate of the State of New York et al

Assigned Judge: Daniel J. Doyle

Documents Received on 06/20/2024 02:48 PM

Doc #	Document Type
86	NOTICE OF ENTRY

Filing User

CHRISTIAN P BROWNE | cbrowne@mclaughlinstern.com
1122 Franklin Ave Ste 300, Garden City, NY 11530

E-mail Service Notifications

An email regarding this filing has been sent to the following on 06/20/2024 02:48 PM:

CHRISTIAN P. BROWNE - cbrowne@mclaughlinstern.com

ROBERTA A. FLOWER COX - bcox@coxlawyers.com

ADAM M. FUSCO - afusco@mertzlegal.com

EMILY FUSCO - Emily.Fusco@ag.ny.gov

TIMOTHY F. HILL - thill@mphlawgroup.com

HEATHER L. MCKAY - heather.mckay@ag.ny.gov

KEVIN G. MURPHY - kevin.murphy@elections.ny.gov

LISA A. PERILLO - lperillo@perillohill.com

BRIAN L. QUAIL - brian.quail@elections.ny.gov

Andrea K. Bailey, County Clerk - countyclerk@co.livingston.ny.us

Website: <http://www.livingstoncounty.us>

NYSCEF Resource Center, nyscef@nycourts.gov

Phone: (646) 386-3033 | Fax: (212) 401-9146 | Website: www.nycourts.gov/efile

COURT OF APPEALS
STATE OF NEW YORK

-----X

MARJORIE BYRNES, individually and as a member of
the New York State Assembly, TAWN FEENEY and
SUSAN LUNDGREN, LLC,

APL-2024-00083

Appellate Division
Case No.: CA 24-00764

Appellants-Respondents,

- against –

AFFIDAVIT OF SERVICE

THE SENATE OF THE STATE OF NEW YORK,
ANDREA STEWART-COUSINS, as the President Pro
Tempore and Majority Leader of the Senate,
THE ASSEMBLY OF THE STATE OF NEW YORK,
CARLE HEASTIE, as Speaker of the Assembly,

Respondents-Appellants,

- and –

NEW YORK STATE BOARD OF ELECTIONS,

Defendants,

ROBERT ORTT, as Minority Leader of the Senate,
WILLIAM BARCLAY, as Minority Leader of the
Assembly,

Appellants-Respondents.

-----X

STATE OF NEW YORK)
)ss.:
COUNTY OF SUFFOLK)

INES CRUZ., being duly sworn, says; I am not a party to the action, am over 18 years of
age and reside in Brentwood, New York.

On **JULY 19, 2024**, I served the **NOTICE OF MOTION FOR LEAVE TO
APPEAL** upon the following person(s) by depositing a true copy thereof enclosed in a
Overnight Delivery post-paid wrapper, in an official depository under the exclusive care and

custody of the United Parcel Service (“UPS”) within New York State, addressed to each of the following persons at the last known address set forth after their name:

CHRISTIAN BROWNE, ESQ.
MCLAUGHLIN & STERN, LP
1122 Franklin Avenue, Suite 300
Garden City, NY 11530
(516) 829-6900

-and-

BOBBIE ANNE FLOWER COX, ESQ.
COX LAWYERS, PLLC
34 Palmer Avenue
Bronxville, NY 10708
(914) 779-7762
Attorneys for Appellants-Respondents

DUSTIN JACOBS BROCKNER, ESQ.
NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
The Capitol
Albany, New York 12224
(518) 776-2017
Attorneys for Respondents--Appellants

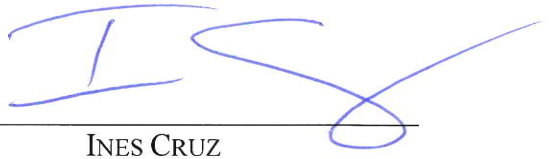
KEVIN GORDON MURPHY, ESQ.
NYS BOARD OF ELECTIONS
40 N. Pearl Street, Suite 5
Albany, New York 12207
(518) 474-6220
Attorneys for the NYS Board of Elections

And to Amici:

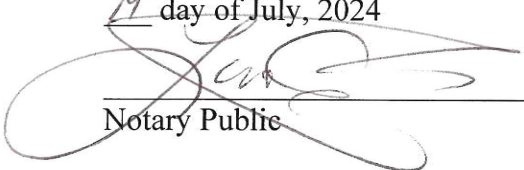
SUSANNAH PROVIDENCE TORPEY, ESQ.
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
(212) 294-4690
Attorneys for Non-Party League of Woman Voters of New York State

RONALD DAVID COLEMAN, ESQ.
18 Maple Avenue, No. 280
Barrington, Rhode Island 02806
*Attorneys for Non-Party Equal Protection Project,
Legal Insurrection Foundation*

CHRISTOPHER AUGUSTINE FERRARA, ESQ.
14829 Cross Island Parkway
Whitestone, New York 11357
(718) 357-1040
Attorneys for Non-Party Thomas More Society


INES CRUZ

Sworn to before me this
19 day of July, 2024


Notary Public

LISA A. PERILLO
Notary Public, State of New York
No. 02PE6373586
Qualified in Suffolk County
Commission Expires 04/16/2026