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July 29, 2024

Hon. Lisa LeCours
Chief Clerk and Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

Re: *Byrnes v. Senate of State of New York*,
APL-2023-00083

Dear Ms. LeCours:

Please find enclosed defendants-respondents' memorandum in opposition to the leave motions filed by plaintiffs-appellants and, separately, defendants-appellants.

Defendants-respondents also write to oppose plaintiffs' request that, if this Court grants leave, it should grant a calendar preference to enable the Court to decide the appeal by the November 2024 election. Given the posture of this case, there is no need for any such calendar preference. Plaintiffs challenge a July 2022 concurrent resolution to amend the Constitution. If, as plaintiffs argue, that resolution is void, then the relief plaintiffs seek could be granted either before or after the November election. The situation was different when this case was before the Fourth Department; at that juncture, the injunction granted by Supreme Court would have prevented the voters from considering the proposed constitutional amendment, and thus the Fourth Department properly expedited the appeal.

Moreover, plaintiffs are responsible for the timing that gives rise to their request for a calendar preference. They waited over 15 months before bringing suit to challenge the July 2022 concurrent resolution. They never sought expedited consideration of their case in Supreme Court. They affirmatively opposed expedition in the Fourth Department. And they did not promptly seek review from this Court, instead waiting almost a month after the Fourth Department entered its July 18, 2024 memorandum and order to file the instant leave motion.

Thus, although leave is not warranted in this case, if this Court grants leave, it should nonetheless deny plaintiffs' request for a calendar preference.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Dustin J. Brockner', is written over a horizontal line.

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State of New York Court of Appeals

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

Plaintiffs-Appellants,

-against-

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,

Defendants-Respondents,

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

Defendants-Appellants,

-and-

NEW YORK STATE BOARD OF ELECTION,

Defendant.

DEFENDANTS-RESPONDENTS' MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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Dated: July 29, 2024

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT.....	1
SUMMARY OF FACTS AND PROCEEDINGS BELOW.....	3
ARGUMENT	9
POINT I	
THE MINORITY DEFENDANTS' MOTION SHOULD BE DISMISSED BECAUSE THEY ARE NOT AGGRIEVED BY THE FOURTH DEPARTMENT'S ORDER	9
POINT II	
THE COURT SHOULD DENY LEAVE.....	10
A. The Fourth Department Properly Applied Settled Precedent to Hold that Plaintiffs' Claim Is Untimely.....	10
B. This Case Presents a Poor Vehicle to Review the Fourth Department's Holding that Plaintiffs' Claim is Untimely.....	17
CONCLUSION	20

PRELIMINARY STATEMENT

Plaintiffs-appellants (“plaintiffs”) and, separately, defendants-appellants seek leave to appeal from a unanimous memorandum and order of the Appellate Division, Fourth Department, that held that plaintiffs’ claim was barred by the statute of limitations. That claim, brought in October 2023, challenged the determination of the New York Senate and Assembly, made on July 1, 2022, to vote on and approve a concurrent resolution that proposed adding an Equal Rights Amendment (“ERA”) to the Constitution. According to plaintiffs, the Senate and Assembly violated the procedure set forth in Article XIX, § 1, of the Constitution, by voting on the resolution before receipt of the Attorney General’s advisory opinion that the ERA would have no effect on the Constitution’s other provisions.

Leave to appeal is not warranted. Defendants-appellants’ motion should be dismissed because, as this Court held when it dismissed their notice of appeal, they are not aggrieved by the Fourth Department’s order. And plaintiffs’ motion should be denied because the Fourth Department’s order entailed a straightforward application of settled precedent. As this Court has repeatedly made clear, a challenge directed

at the procedure followed by a legislative body, as opposed to the substance of legislation adopted, may be raised in a C.P.L.R. article 78 proceeding. Accordingly, a challenge to that procedure—even if asserted in a declaratory judgment action or a hybrid proceeding—is subject to article 78’s four-month statute of limitations. Applying those principles here, the Fourth Department held that because plaintiffs’ claim challenged the procedure followed by the Senate and Assembly in adopting the concurrent resolution, the claim was subject to, and barred by, article 78’s four-month statute of limitations.

Leave is also not warranted because this case provides a poor vehicle to consider the statute-of-limitations issue. This case suffers from multiple other defects that provide independent grounds for affirmance, including plaintiffs’ lack of standing. The Court would thus not need to address whether plaintiffs’ claim is also time barred.

The Court should decline to hear this case and put an end to plaintiffs’ efforts to disrupt the democratic deliberations of a proposed constitutional amendment that have been ongoing for over two years.

SUMMARY OF FACTS AND PROCEEDINGS BELOW

Article XIX, § 1, of the New York's Constitution sets forth a legislative process to amend the Constitution. An amendment becomes part of the Constitution once it is passed by both houses of two successive separately elected Legislatures and approved by the People. Article XIX, § 1, also provides that, when a proposed amendment is first introduced, it shall be referred to the Attorney General, who has a “duty” to render within 20 days an opinion as to the proposed amendment’s effect on the Constitution’s other provisions. Under the provision’s last sentence, however, “Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment”—regardless of whether the reason for the failure was within the Attorney General’s control—“nor his or her failure to do so timely shall affect the validity of such proposed amendment or legislative action thereon.” The Senate and Assembly may thus vote on a proposed amendment, though the Attorney General has rendered no opinion or an untimely opinion.

Indeed, the Senate and Assembly have for many decades routinely approved proposed amendments without waiting for the Attorney General’s opinion or the lapse of the 20-day period allotted to the

Attorney General to render an opinion. (R.¹ 404-406, 416-459.) By the time of the concurrent resolution at issue here,² the Senate and Assembly had followed this procedure for at least 18 proposed constitutional amendments that were submitted to voters, at least nine of which were approved and are part of the Constitution. (R. 404-406 [identifying examples].)

On July 1, 2022, the Senate and Assembly each introduced a concurrent resolution to expand the protections of the New York Constitution's Equal Protection Clause by adding the ERA. (R. 49, 492.) That same day, the Senate and Assembly took several additional steps: Each chamber referred its resolution to the Attorney General for an opinion; debated its resolution; and decided to vote and approve that resolution. (R. 85-86.) Four days later, the Attorney General opined that the ERA would have no effect on the Constitution's other provisions. (See R. 51.)

¹ References to "R. _" refer to pages in the Record on Appeal before the Appellate Division, Fourth Department.

² A concurrent resolution is the form by which the Senate and Assembly propose constitutional amendments.

In January 2023, with the successive Legislature seated, the Senate and Assembly each approved a second concurrent resolution to add the ERA to the Constitution; the Legislature then directed that the ERA appear on the ballot for the November 2024 election. (R. 43, 138-140.)

In October 2023, plaintiffs-appellants Marjorie Byrnes, an assemblymember opposed to the ERA, and two New York residents filed this declaratory judgment action in Supreme Court, Livingston County, to stop the ERA's appearance on the ballot. (R. 40-47.) Plaintiffs named as defendants to this lawsuit defendants-respondents the Senate; Andrea Stewart-Cousins, as the Senate's President Pro Tempore and Majority Leader; the Assembly; and Carl Heastie, as the Assembly's Speaker (collectively, the "majority defendants"). The lawsuit also named defendants-appellants Robert Ortt and William Barclay, as the Minority Leaders of the Senate and Assembly, respectively (the "minority defendants"), and defendant the State Board of Elections. (R. 40-41.)

Plaintiffs asserted a single claim. They alleged that the Senate and Assembly violated the procedures set forth in Article XIX, § 1, when, on July 1, 2022, each decided to vote on and approve the concurrent resolution before waiting for the Attorney General's opinion or the lapse

of the 20-day period. (R. 45-48.) Plaintiffs alleged that this procedural violation rendered the July 2022 concurrent resolution, and consequently any subsequent action on the ERA, “null and void.” (R. 48.)

The majority defendants moved to dismiss the action on multiple grounds. They contended that the action was procedurally defective because, among other reasons, it was time barred and plaintiffs lacked standing. (*See, e.g.*, R. 252-262.) The majority defendants also contended that plaintiffs’ claim failed on the merits. They explained that the Attorney General’s failure to render an opinion by the time of the vote on a concurrent resolution had no bearing on the resolution’s validity, regardless of whether the reason for the failure was within the Attorney General’s control. (*See, e.g.*, R. 262-266.)

Plaintiffs cross-moved for summary judgment. (R. 276-277.) The minority defendants filed papers in support of the merits of plaintiffs’ procedural challenge; the Board of Elections, which is evenly divided between the two major political parties, took no position. (R. 9, 379-380.)

Supreme Court (Doyle, J.) dismissed Senate President Pro Tempore and Majority Leader Stewart-Cousins and Assembly Speaker Heastie based on their undisputed legislative immunity, but otherwise granted

judgment in plaintiff's favor. (R. 7-37.) The court rejected the majority defendants' procedural defenses (R. 22-35); it also held that the Senate and Assembly violated the procedure set forth in Article XIX, § 1, by deciding to adopt the July 2022 concurrent resolution before receipt of the Attorney General's opinion or the lapse of the 20-day period. (R. 36.) The court declared that the resolution was "null and void" and ordered the proposed ERA removed from the November 2024 ballot. (R. 36.)

On the majority defendants' appeal, the Appellate Division, Fourth Department, unanimously reversed. It held that plaintiffs' claim was time barred; the court did not reach the merits of plaintiffs' claim or the majority defendants' alternative procedural defenses. (Memorandum and Order ["Order"] at 2-3.)

The Fourth Department stated the settled rule that where a party brings a declaratory judgment action for which no specific statute of limitations period is prescribed, a court must look to the action's substance "to identify the relationship out of which the claim arises and the relief sought in order to resolve which Statute of Limitations is applicable." (Order at 2 [quoting *New York City Health and Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 200-201 [1994].]) And when a challenge is

“directed at the procedures followed by the legislature rather than the substance of the enactment,” that challenge is “maintainable in an article 78 proceeding.” (Order at 3 [quoting *Matter of Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 202 (1987)].) 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.” (Order at 3 [quoting *Matter of Straniere v. Silver*, 218 A.D.2d 80, 82 n.2 (3d Dept), *aff’d for reasons stated below* 89 N.Y.2d 825 (1996)] [alterations in original].)

Here, as the Fourth Department held, because plaintiffs could have proceeded by way of an article 78 proceeding, their action was subject to article 78’s four-month statute of limitations. (Order at 3 [citing C.P.L.R. 217(1)].) And because plaintiffs waited over 15 months after the Senate and Assembly decided to vote on the July 2022 concurrent resolution before commencing suit, their action was untimely. (Order at 3.)

The Fourth Department concluded that the “remaining contentions are academic in light of our determination.” (Order at 3.)

Plaintiffs and the minority defendants each filed an appeal as of right from the Fourth Department's order, but they did not simultaneously move for leave to appeal. This Court dismissed plaintiffs' appeal for lack of substantial constitutional question and dismissed the minority defendants' appeal for lack of aggrievement. *Byrnes v. Senate of State of New York*, 2024 NY Slip Op. 70811 (July 11, 2024). Only then did these parties file the leave motions, thereby further delaying this case.

The majority defendants' briefs in the Fourth Department explain why plaintiffs' claim was properly dismissed on any of several independent grounds. To those arguments, we add the following comments.

ARGUMENT

POINT I

THE MINORITY DEFENDANTS' MOTION SHOULD BE DISMISSED BECAUSE THEY ARE NOT AGGRIEVED BY THE FOURTH DEPARTMENT'S ORDER

The minority defendants' motion should be dismissed because, as this Court already held, the minority defendants are not aggrieved by the Fourth Department's order. *See* 2024 NY Slip Op. 70811. The Court's holding is law of the case and correct in any event. Alternatively, the

minority defendants' motion should be denied for the same reasons that plaintiffs' motion should be denied, as discussed below.

POINT II

THE COURT SHOULD DENY LEAVE

A. **The Fourth Department Properly Applied Settled Precedent to Hold that Plaintiffs' Claim Is Untimely.**

Plaintiffs' motion should be denied because it fails to identify a leaveworthy issue. The governing legal principles are well-established. If the issue that the plaintiffs seek to raise in a declaratory judgment action could have been raised in an article 78 proceeding, then the action is governed by the four-month statute of limitations that applies to such proceedings. *See, e.g., Press v. County of Monroe*, 50 N.Y.2d 695, 703-04 (1980). While an article 78 proceeding generally cannot be used to challenge "the validity of legislation," *Walton v. New York State Dept. of Correctional Servs.*, 8 N.Y.3d 186, 194 (2007), such a proceeding may be brought if the challenge is not directed at the legislative act's substance "but at the procedures followed in its enactment." *Matter of Save the Pine Bush*, 70 N.Y.2d at 202 (citing *Matter of Voelckers v. Guelli*, 58 N.Y.2d 170, 177 [1983]). The practice commentaries confirm that these principles are well settled, stating that "defects in the procedure by which

legislation was enacted, in contrast to the substance or content of the legislation, are subject to Article 78 review.” Vincent Alexander, Practice Commentaries, McKinney’s Cons. Laws of NY, C.P.L.R. C7801:5.

These settled principles resolve this case. Plaintiffs do not challenge the July 2022 concurrent resolution’s substance, but rather the procedure followed in its adoption. According to plaintiffs, the determination of the Senate and the Assembly, made on July 1, 2022, to vote on and approve the concurrent resolution without waiting for the Attorney General’s opinion or the lapse of the 20-day period violated the procedures set forth in Article XIX, § 1. As the Fourth Department correctly held, plaintiffs thus allege “an erroneous application of a constitutional provision relating to the procedure by which’ the proposed amendment was advanced,” a claim that could have been raised in an article 78 proceeding. (Order at 2 [*Matter of Straniere*, 218 A.D.2d at 82].) That claim was therefore time barred, having been brought in October 2023, over 15 months after the Senate and Assembly took the challenged July 1, 2022 action.

There is nothing leaveworthy, much less erroneous, about the Fourth Department’s order in this case. It is undisputed that this order

does not conflict with an order from another department of the Appellate Division. As plaintiffs concede (*see* Pl. Lv. Mot. at 7-9), the departments are aligned. Each recognizes that a party's challenge can be brought in an article 78 proceeding if it is directed at the procedure followed by the legislative body rather than the substance of any legislation. *See, e.g., Matter of Cobbs Hill Vil. Tenants' Assn. v. City of Rochester*, 194 A.D.3d 1437, 1438 (4th Dep't 2021); *P & N Tiffany Props., Inc. v. Village of Tuckahoe*, 33 A.D.3d 61, 66 (2d Dep't 2006); *Matter of Straniere*, 218 A.D.2d at 82 n.2; *459 W. 43rd St. Corp. v. New York State Div. of Hous. & Community Renewal*, 152 A.D.2d 511, 512-13 (1st Dep't 1989). Nor do plaintiffs contend that a split exists among the departments about how to apply this principle, let alone a split that this case implicates.

Further, and contrary to plaintiffs' argument (Pl. Lv. Mot. at 9), the Fourth Department in this case and the Appellate Division in general have not misapplied this Court's precedent, which recognizes that procedural challenges that implicate the validity of legislation may be raised in an article 78 proceeding. Citing only to *Matter of Save the Pine Bush*, plaintiffs argue that article 78 review of such challenges is available *only if* the challenge contests a "separate administrative

determination” that is “a pre-requisite to the legislative process, but it is not part of the legislative process.” (Pl. Lv. Mot. at 9.) That is not, and has never been, the law.

For instance, in *Matter of Voelckers*, the main case cited by *Matter of Save the Pine Bush*, the Court held that a simple majority vote, rather than supermajority vote, was needed to enact an ordinance and that the ordinance at issue was therefore effective. 58 N.Y.2d at 176-77. As the Court explained, this issue, which concerned the “numerical sufficiency of a ballot,” was properly addressed in article 78 proceeding because it entailed “a question of procedure only, eschewing any intrusion into the substance of the matter being voted on.” *Id.* at 177. Plaintiffs’ claim too raises a question of procedure only.

This Court’s decision in *Matter of Straniere* is equally instructive, and it refutes plaintiffs’ claim (Pl. Lv. Mot. at 6) that an article 78 proceeding cannot be used to challenge the procedural determinations of a house of the Legislature. See 218 A.D.2d 80, *aff’d for reasons stated below* 89 N.Y.2d 828. In that case, individual legislators challenged the determination of the Assembly’s Speaker, made on behalf of the entire Assembly, regarding an issue of procedure—in particular whether, before

acting on a proposed bill, the Constitution required the Legislature to receive a home rule message from the municipality affected by the bill. *See id.* at 81-82; *see also* N.Y. Const., art. IX, § 2(b). Citing the practice commentaries and *Matter of Voelckers*, this Court held that, because the legislators' challenge "alleges an erroneous application of a constitutional provision relating to the procedure by which legislation is enacted," the challenge was properly raised in an article 78 proceeding. 218 A.D.2d at 82 n.2. As the Fourth Department correctly held here, plaintiffs similarly allege an erroneous application of a constitutional provision relating to the legislative procedure, which thus could have been raised in an article 78 proceeding. (Order at 2-3.)

Equally unavailing is plaintiffs' reliance on two of this Court's decisions, neither of which address when procedural challenges can be raised in an article 78 proceeding. (Pl. Lv. Mot. at 9-10.) Plaintiffs rely on *Matter of Foy v. Schechter*, 1 N.Y.2d 604 (1956), for their contention that a lawsuit is not subject to a four-month statute of limitations if it alleges that a "legislative body acts in an *ultra vires* manner in enacting legislation." (Pl. Lv. Mot. at 10.) *Matter of Foy* held no such thing. It concerned a different issue altogether, namely, when a party may

collaterally attack the determination of an administrative agency, which in that case reclassified the salary grades of transit workers. *See* 1 N.Y.2d at 609, 612.

Plaintiffs similarly mischaracterize *Hoehmann v. Town of Clarkstown*, 40 N.Y.3d 1 (2023), as holding that a challenge to a law as improperly adopted can never be untimely. (Pl. Lv. Mot. at 10.) *Hoehmann* involved what this Court emphasized were “unique circumstances.” 40 N.Y.3d at 6. The challenged law, which purported to set term limits for all elected town officials and required a supermajority vote by the town board to repeal, was never adopted in the first place: The law indisputably had to be approved by referendum before it took effect, yet no such referendum had occurred. *Id.* at 5-6. Emphasizing that the referendum requirement ensured the right to vote, which is of “fundamental significance,” this Court held that the law “lacks operative effect until presented to and approved by the voters.” *Id.* (internal quotation marks omitted). Thus, the challenges to the law were not untimely, regardless of whether a four-month or six-year statute of limitations applied. *Id.*

None of the unique circumstances in *Hoehmann* are present here. Plaintiffs do not contend that the Attorney General's opinion, which no legislator has to consider, ensures the right to vote, either by lawmakers or the People. Nor do plaintiffs contend that the July 2022 concurrent resolution lacks operative effect until the occurrence of a future action, such as a vote by each house of the Legislature or the People. Plaintiffs argue instead that each chamber's vote was itself void *ab initio* because each chamber did not follow a procedural requirement beforehand.

Lastly, while plaintiffs are correct that two prior cases concerning the application of Article XIX, § 1, were litigated as "plenary actions," this fact does not make this case leaveworthy. (Pl. Lv. Mot. at 7 [citing *Browne v. City of New York*, 241 N.Y. 96 (1925); *Frank v. State*, 61 A.D.2d 466 (2d Dep't 1977), *aff'd for reasons stated below*, 44 N.Y.2d 687 (1978)].) Neither of the prior cases addressed a statute-of-limitations issue. And, as this Court has since made clear, article 78's four-month statute of limitations cannot be evaded merely by bringing a challenge as a declaratory judgment action. *See, e.g., Press*, 50 N.Y.2d at 701; *Solnick v. Whalen*, 49 N.Y.2d 224, 229-230 (1980). The Fourth Department thus correctly

resolved this case based on this Court's more recent precedent, including *Matter of Save the Pine Bush*, that actually address the issue presented.

B. This Case Presents a Poor Vehicle to Review the Fourth Department's Holding that Plaintiffs' Claim is Untimely.

This Court should deny leave for the independent reason that this case presents a poor vehicle to review the Fourth Department's holding that plaintiffs' claim is untimely. Because there are multiple alternative grounds for affirming the Fourth Department's decision—all fully briefed by the majority defendants in the courts below—the Court would not need to decide the statute-of-limitations issue.

One alternative ground for affirmance is that plaintiffs lack standing. (Maj. Def. Opening Br. at 36-39; Maj. Def. Reply Br. at 24-25.)³ Plaintiffs' sole theory of standing below was that they have citizen-taxpayer standing to assert the claim at issue because to hold otherwise would create "an impenetrable barrier" to judicial review. (R. 289 [quoting *Boryszewski v. Brydges*, 37 N.Y.2d 361, 334 N.E.2d 579 (1975)].)

³ References to the opening and reply briefs refer to the majority defendants' opening and reply briefs before the Fourth Department.

Plaintiffs, however, have failed to show that an such “impenetrable barrier” to review exists here. Either the Attorney General, as the opinion’s author, or legislators, as the opinion’s intended audience, could in theory allege that they suffered a personal injury in fact when the Senate and/or Assembly votes on a proposed amendment without awaiting the Attorney General’s opinion. Yet, while Assemblymember Byrnes is a legislator, she affirmatively waived reliance on legislator standing in the courts below and chose instead to rely solely on the same alleged generalized injury that the other plaintiffs asserted. Indeed, plaintiffs’ counsel conceded during oral argument in the Fourth Department that legislator standing is “not applicable.”⁴ (*See also* R. 361 [majority defendants noting plaintiffs’ waiver of legislator standing], R. 389-390 [not contesting waiver].)

Plaintiffs’ action is also barred by laches. (Maj. Def. Opening Br. at 34-35; Maj. Def. Reply Br. at 22-24). Although plaintiffs challenge the Assembly’s and Senate’s decision to vote on the concurrent resolution on

⁴ Oral Argument at 36:13-36:23, *Byrnes v. Senate*, App. Div., Fourth Dept., No. CA 24-00764 (June 17, 2024), <https://ad4.nycourts.gov/njs/term/argument/calendar?date=2024-06-17T00:00:00.000Z&venue=1>.

July 1, 2022, they inexplicably waited over 15 months to bring suit. And plaintiffs have taken steps since to prolong this suit's resolution: They failed to seek expedited consideration in Supreme Court; opposed expedited treatment in the Fourth Department; and did not promptly seek this Court's leave. Under these circumstances, this Court should deny plaintiffs request to have the Court review a concurrent resolution that was approved over two years ago.

In all events, plaintiffs' claim suffers not only numerous procedural flaws, but is meritless. (Maj. Def. Opening Br. at 12-29; Maj. Def. Reply Br. at 4-18.) Plaintiffs failed to carry their formidable burden of showing that the legislative procedure utilized here was unconstitutional beyond a reasonable doubt. *See Frank*, 61 A.D.2d at 469-71. That procedure is indisputably consistent with longstanding legislative practice and understanding. *See Browne*, 241 N.Y. at 113 (legislative practice under Article XIX, § 1, can be decisive unless "clearly unreasonable"). And nothing in the text of Article XIX, § 1, unambiguously provides that a vote on a proposed amendment is invalid if that vote occurs before receipt of the Attorney General's opinion or the expiration of the 20-day period. Indeed, the last sentence of Article XIX, § 1, is reasonably read to confirm

that legislative action is valid if, at the time of the action, the Attorney General has failed to issue an opinion, regardless of whether the reason for that failure was within the Attorney General's control, or issued an untimely opinion, i.e., not within 20 days.

CONCLUSION

The majority defendants' motion should be dismissed or denied, and plaintiffs' motion should be denied.

Dated: Albany, New York
July 29, 2024

Respectfully submitted,

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