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July 1, 2024

VIA ECF AND FEDERAL EXPRESS

Lisa Lecours
Chief Clerk
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

**Re: Byrnes et al. v. Senate of the State of New York et al.
Fourth Dept. Appellate Case. No. CA 24-00764
APL-2024-00083**

To the Chief Clerk:

This law firm represents Appellants in the above-reference action. Pursuant to the Court's jurisdictional inquiry, Appellants submit this letter to explicate further the basis for their appeal to this Court as a matter of right.

Appellants have invoked the jurisdiction of this Court pursuant to CPLR §5601(b)(1). Such section permits an appeal by right "where there is directly involved the construction of the constitution of the state or of the United States."



An appeal under CPLR §5601(b)(1) “must present to us directly and primarily an issue determinable only by our construction of the Constitution of the state or of the United States. The appellant who relies upon this provision as an authority for his appeal assumes the burden of presenting to us a record which establishes that such construction has been not only directly but necessarily involved in the decision of the case.” *Haydorn v. Carroll*, 225 N.Y. 84, 88 (1918) (internal quotations omitted).

The direct constitutional issue must be preserved for review, meaning that the issue must have been raised before the court of original jurisdiction.

For a constitutional question to be directly involved it must, among other things, be preserved as a question of law. Thus, the constitutional question on the basis of which the appeal as of right is taken must have been properly raised in the courts below. Otherwise, the appeal must be dismissed. This is because NY Constitution article VI, § 3 (a) limits our “jurisdiction to the review of questions of law”...In general, arguments, including constitutional challenges, are preserved only if presented at the trial court level. To demonstrate that a question of law is preserved for this Court's review, a party must show that it raised the specific argument in Supreme Court and aske] the court to conduct that analysis in the first instance. *Henry v. New Jersey Tr. Corp.*, 39 N.Y.3d 361, 366-367 (2023) (internal citations and quotations omitted).

It is beyond dispute that the sole issue in this case “directly” pertains to “the construction of the constitution of the state” and that it is properly preserved for review. Appellants assert a single cause of action by which they seek a declaratory judgment declaring that, when the Legislature adopted a proposed amendment to the



Constitution on July 1, 2022 (“the Proposed Amendment”), it lacked the power to do so because it failed to follow the mandates for the amendment of the Constitution set forth at Article XIX §1 of the Constitution.

On July 1, 2022, the Legislature introduced the Proposed Amendment. Following its introduction, the Legislature referred the Proposed Amendment to the Attorney General for her opinion thereon, as required by Article XIX §1. However, the Legislature also voted to adopt the Proposed Amendment on the same day, immediately after its introduction, and prior to the receipt of the Attorney General’s opinion.

Under Article XIX §1, following the referral of a proposed amendment, the Attorney General has a “duty” to return a written opinion on the proposal to the Legislature within 20 days. The Article says that “[u]pon receiving such opinion”, the Legislature may proceed to vote upon a proposed amendment.

Appellants’ claim that the Legislature’s failure to await the receipt of the Attorney General’s opinion prior to voting on and adopting the Proposed Amendment constitutes a violation of the procedure for the amendment of the Constitution set forth in Article XIX §1. Because the Legislature voted *before* receiving the Attorney’s General’s opinion and not “upon receiving” (i.e. after



receiving) the opinion, it adopted the Proposed Amendment at a time when it had no power to do so, rendering its adoption a nullity.

As such, the only issue that Appellants raise in this matter relates to and is based upon the construction of the meaning of the language in the Constitution. The Supreme Court granted summary judgment to Appellants on this basis, holding that Article XIX §1 prohibits the Legislature from acting upon a proposed amendment until it receives the Attorney General's opinion (or until the 20-day period for her to submit the opinion has expired).

The Appellate Division reversed. While the Appellate Division Order does not concern the merits of Appellants' claim, it raises an important and novel issue of constitutional construction that would have a significant impact on New York civil practice.

The Appellate Division Order dismissed Appellants' cause of action on statute of limitations grounds. The Appellate Division construed Article XIX §1 as a "procedural" provision of the Constitution. According to its reasoning, because Appellants' claim challenges the procedure by which the Legislature adopted the Proposed Amendment, and not the substance of the Proposed Amendment itself, Appellants' claim was cognizable under CPLR Article 78. Since Appellants were



required to bring the claim by a special proceeding, the claim is subject to a four-month statute of limitations and is, therefore, time barred.

The Appellate Division Order’s holding is unprecedented. For the first time, it construes a claim that is based upon a so-called “procedural” section of the Constitution as cognizable under CPLR Article 78. The holding has broad implications for constitutional challenges. If upheld, the holding would require parties aggrieved by the Legislature’s failure to follow a procedure set forth in the Constitution (e.g. Article III §14 prohibiting the Legislature from voting upon a bill unless it has “aged” for three days) to commence such a challenge via an Article 78 proceeding within four months.

This Court has never construed constitutional provisions in this manner. For example, twice litigants have challenged the Legislature’s adherence to the mandates of Article XIX, both times by declaratory action. *See Browne v. New York*, 241 N.Y. 96 (1925); *Frank v. State*, 61 A.D.2d 466 (2d. Dept. 1978). As such, the Appellate Division Order plainly poses an important and direct question of constitutional construction that would alter the manner in which the Constitution is understood and the way in which Article 78 proceedings may be employed.

Indeed, the Order has significant implications for the bedrock doctrine of separation of powers. Appellants are not aware of a single case in which an act of



the Legislature has been subject to review by an Article 78 proceeding. As the legislative branch of State government, the acts of the Legislature are, by their nature, legislative. The judiciary is not empowered to review the wisdom or rationality of legislative act, but only whether such act is constitutional. “The maxim that article 78 does not lie to challenge legislative acts is derived from the separation-of-powers doctrine which made the use of the judiciary’s ‘prerogative writ’ unavailable as a vehicle for challenging an act of a legislative body.” *New York City Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 203–04 (1994).

To hold, as the Appellate Division does, that the courts may review the Legislature’s compliance with constitutional procedures via an Article 78 special proceeding would vastly expand the ambit of a legal vehicle designed to allow the courts to review administrative determinations.

Therefore, both Appellants’ cause of action and the Order of the Appellate Division pose direct and substantial constitutional questions that clearly fall within the “as of right” jurisdiction of this Court.

Appellants’ claim posits only a question of constitutional construction—does the “upon receiving” clause of Article XIX §1 prohibit the Legislature from voting on a proposed amendment prior to its receipt of the Attorney General’s opinion?



The Appellate Division Order, too, raises questions of constitutional construction—is a claim based upon Article XIX §1, or another “procedural” provision of the Constitution, cognizable as an Article 78 special proceeding?

Furthermore, regarding separation of powers, the Appellate Division Order raises the question of whether the Legislature may be made a respondent in a CPLR Article 78 proceeding. Do the courts have the power to review compliance with constitutional “procedures” in such a special proceeding?

These questions go to the heart of the plain meaning of the words of the Constitution, the constitutional prerogatives of the Legislature and the ambit accorded to the legislative and judicial branches. This case cannot be adjudicated on any basis other than one that entails the direct construction of the Constitution.

As such, the Court clearly has jurisdiction to hear Appellants’ appeal pursuant to CPLR §5601(b)(1).

Finally, Appellants again respectfully request that the Court render a determination on jurisdiction as soon as possible and set an expedited briefing schedule for this matter. As noted in Appellants’ previously submitted request for a preference, the determination of this matter affects the content of the ballot at the November general election and, therefore, Appellants ask that the Court adjudicate the appeal in the same manner as it would an appeal brought under the Election Law.



We thank the Court for its courtesy and attention to this matter.

Respectfully,

A handwritten signature in black ink, appearing to read 'C. Browne', written in a cursive style.

Christian Browne

CB:cn

cc: Dustin Jacobs Brockner, Esq.
Kevin Gordon Murphy, Esq.
Lisa Angela Perillo, Esq.
Susannah Providence Torpey, Esq.
Ronald David Coleman, Esq.
Christopher Augustine Ferrara, Esq.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK }
 } ss.:
COUNTY OF NASSAU }

CAMI NEGUS, being duly sworn, deposes and says, that deponent is not a party to this action, is over 18 years of age and resides in Mineola, New York 11501.

That on the 1st day of July, 2024, deponent served the within **JURISDICTIONAL RESPONSE LETTER** on the attorneys herein listed at the address designated by said attorneys by depositing a true copy of same enclosed in a post-paid, properly addressed wrapper, in a post-office/official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

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CAMI NEGUS

Sworn to before me this

1st day of July, 2024



Notary Public

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Notary Public, State of New York
No. 01RI0010530
Qualified in Nassau County
Commission Expires 07/03/2027