



PERILLO HILL

Lisa A. Perillo

lperillo@perillohill.com

Timothy Hill

thill@perillohill.com

July 2, 2024

Via Overnight Mail and by Digital Filing

New York Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: Jurisdictional Response
Byrnes v. Senate of State of New York
APL-2024-00083

Appellate Division, Fourth Department, Dkt. No. CA 24-00764
Livingston County Index No. 000778-2023

Dear Honorable Court:

This office represents appellants Robert Ortt, as Minority Leader of the New York State Senate, and William Barclay, as Minority Leader of the New York State Assembly, (collectively the "Minority Appellants") in the above-referenced appeal. We submit this Jurisdictional Response pursuant to 22 N.Y.C.R.R. Part 500, Rule 500.10(a) in response to this Court's June 27, 2024, Jurisdictional Inquiry letter.¹

I. The Minority Appellants are parties aggrieved pursuant to C.P.L.R. 5511

The Minority Appellants fully participated in the motion practice resulting in the supreme court's Order appealed from to the Appellate Division. Specifically, the Minority Appellants submitted affirmations in support of the Plaintiffs-Appellants' motion for summary judgment (essentially joining in the motion) and in opposition to the Respondents (then Defendants)' motion. In addition, the supreme court's Order expressly states that the Minority Appellants' submissions

¹We understand that a copy of the Record before the Appellate Division, as well as all of the briefs submitted thereto, are being/have been digitally filed (via the Court's Portal) by Marjorie Byrnes, individually and as a member of the New York State Assembly, Tawn Feeney and Susan Lundgren (hereinafter "Plaintiffs-Appellants") as per the Court's direction in its separate Jurisdictional Inquiry letter dated June 26, 2024 addressed to the Plaintiffs-Appellants. These documents include the Brief in opposition filed by the Minority Appellants. The Minority Appellants herein refer to said digitally filed Record and briefs and note that the Court did not direct that the Minority Defendants also file a separate copy of same.

were considered by the supreme court in arriving at its decision and were among the submissions upon which the Order was based. See Order (Record p. 36 at fn.9). The Minority Appellants' papers in support of the summary judgment motion are part of the Record of the Appeal to the Fourth Department (see Record., p. 371 *et seq.* [Affirm. of Lisa A. Perillo in response to Plaintiff's Cross-Motion for Summary Judgment, filed March 5, 2025] and at p. 518 *et seq.*, [Affirm. of Lisa A. Perillo in Further Response to the Supplemental Filings, filed April 12, 2024].)

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

Thus, the Record clearly shows that 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. Thus, the Minority Appellants 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. 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].").

In addition, the Minority Appellants are representatives of a portion of the Defendants-Appellants State Senate and State Assembly and, as such, are unquestionably "connected with the litigation" so as to warrant their participation in this Appeal even if they had not already fully participated before the courts below. 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).").

Given the foregoing, the Minority Appellants are parties aggrieved pursuant to C.P.L.R. 5511 and are property parties to this Appeal.

II. Subject Matter Jurisdiction

It is also respectfully submitted that the Court of Appeals has subject matter jurisdiction over this appeal by the Minority Appellants pursuant to C.P.L.R. 5601(b)(1). This appeal may be taken as of right to the Court of Appeals because it arises “from an order of the appellate division which finally determines *an action* where there is directly involved the construction of the constitution of the state...” *Id.* (Emphasis added). Specifically, the action form which this appeal arises concerns the interpretation of Article XIX, § 1 of the New York State Constitution and the regimen set forth therein required to be followed by the State Legislature in amending the Constitution (that is how the Legislature may change the fundamental law of the State) and thus clearly presents a substantial and important constitutional question. *See Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494, 511 (2022)(“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...”);

Article XIX, §1 sets forth the procedures to be followed in amending the Constitution. The central issue presented in the Action is whether the Legislature acted unconstitutionally in failing to comply with Article XIX, §1 by voting on a proposed amendment prior to: (a) receiving the Attorney General’s opinion on same, or (b) waiting the Constitutionally-mandated 20-day period for said opinion before voting. The Minority Appellants submit that this Section requires that the Legislature refer any proposed amendment to the New York State Attorney General prior to a vote so that the Attorney General can issue an opinion regarding the proposed amendment and its effect upon the other provisions of the Constitution. Appellants assert that this is so that the Legislature may benefit from a legal analysis 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* voting on same. The Legislature may only vote on the proposed amendment after it receives the Attorney General’s opinion or the Constitution’s 20-day waiting period expires. The Minority Appellants respectfully assert that the intent of this provision is to add more deliberation and consideration into the amendment process (which should not be done hastily or lightly). *See Browne v. City of New York*, 241 N.Y. 96, 109 (1925) (“The integrity of the basic law is to be preserved against hasty or ill-conceived changes, the fruit of ignorance or passion.”). The Respondents disagree, arguing that the language of Article XIX, § 1 does not impose a duty of referral on the Legislature, nor a duty to wait for an opinion. As review of the Appellate Division briefs and the Record shows, the substantive legal argument presented to the Appellate Division on the merits of the Action concerns the parsing of the words used in the three sentences comprising Art. XIX, § 1 and analysis of the intention and meaning of same. Among other things, the parties disagree as to whether or not the clause beginning “Upon receiving such opinion...” means that the Legislature must wait for the opinion prior to voting. In addition to the construction of the plain meaning of the words used, the briefing concerns legislative intent and the relevance of custom and practice in interpreting the Constitutional language.

Review of the complaint (Record at p. 38 *et seq.*) also makes clear that the Action – which consists of a single cause of action for declaratory judgment – concerns construction of the alleged “unambiguous language of the Constitution” as prohibiting “the Legislature from introducing and voting upon a proposed amendment prior to ‘receiving’ the opinion of the Attorney General.” *Id.*, at ¶27. The complaint asserts that the Legislature’s vote and adoption of the resolution at issue “was illegal and *ultra virus* because...the Legislature violated the amendment process set forth at § 1 of Article XIX of the Constitution.” *Id.*, at ¶ 31. The complaint thus alleges that whether or not there was a failure to adhere to the requirements of §1 of Article XIX presents a justiciable controversy.

The Minority-Appellants respectfully submit that the language of Article XIX § 1 presents a non-discretionary “positive provision” – specifically that a proposed amendment shall not become law “except upon compliance with a specified formality,” (i.e. the referral to the attorney general and the waiting of the 20 days for an opinion therefrom) and thus, such provision “is mandatory and may not be disregarded.” Franklin Nat’l Bank v. Clark, 26 Misc. 2d 724, 741-742 (Sup. Ct. N.Y. Co., 1961)(cited by the Court of Appeals in Bd. of Educ. v. New York, 41 N.Y.2d 535, 538 [1977] in support of the well settled proposition that “[w]hile in general the courts will not interfere with the internal procedural aspects of the legislative process, judicial review may be undertaken to determine whether the Legislature has complied with constitutional prescriptions as to legislative procedures”); and see Matter of Hoffmann v. New York State Ind. Redistricting Commn., 217 A.D.3d 53, 70 (3d Dep’t 2023)(“The duty must be positive, not discretionary, and the right to its performance must be so clear as not to admit of reasonable doubt or controversy” – which is precisely the case here). As a result of the Legislature’s unconstitutional failure to comply with the requirements of Article XIX, § 1, the Minority Appellants propose that the Legislature’s adoption of the concurrent resolution in question is *ultra virus* and must be annulled. See Matter of Harkenrider v. Hochul, 38 N.Y.3d 494 (2022) (invalidating as unconstitutional, *ultra vires* legislative action taken before a constitutional predicate was satisfied).

The Supreme Court squarely determined the constitutional question presented to it and focused its well-reasoned and thorough Order on same. That Court correctly found that Article XIX, § 1 imposes upon the Legislature, a positive duty to comply with the delineated requirements therein in amending the Constitution. The constitutional questions was properly determined by the Supreme Court which found that the Legislature’s actions were not in conformance with the Constitution.

However, on appeal, the Appellate Division did not reach the merits. Rather, the Appellate Division avoided the central question of Constitutional construction presented and focused instead on whether the Action should have been brought as an Article 78 proceeding (and on the attendant statute of limitations). It is respectfully submitted that the Appellate Division’s determination that the Action was instead properly brought as an Article 78 proceeding, and was thus untimely, is erroneous. This determination should be overturned and the supreme court’s determination made on the merits of the constitutional question presented, should be upheld. The Appellate Division’s

error concerning whether the claim presented in the Action was properly brought as plenary declaratory judgment or as an Article 78 claim of some kind (and was thus untimely) is intertwined with the question of Constitutional construction presented in the Action, and the scope and breadth of the Legislature's power and authority to (and the ability to be challenged concerning) its amendment of the Constitution. Indeed, the question of the limits and scope of the Legislature's discretion (if any) in the amendment procedures set forth in Article XIX, §1 and whether those procedures are ambiguous, and the ability to compel same are at base a determination which hinges on construction of the constitutional language setting forth the amendment regimen. As such, it is respectfully submitted that the Appellate Division's election not to look at the merits of the action in no way impacts the fact that this Appeal arises from an action directly involving a substantial question in the construction of the New York State Constitution.

Furthermore, given that this appeal concerns the interpretation of the constitutional provisions for amending and changing the Constitution – the fundamental law of the State – accepting this appeal would also be in the public interest.

As such, given that that the underlying action is quintessentially one that concerns Constitutional construction of a vitally important Constitutional provision. Thus, the Appellate Division's Order is appealable as of right pursuant to C.P.L.R. 5601(b)(1).

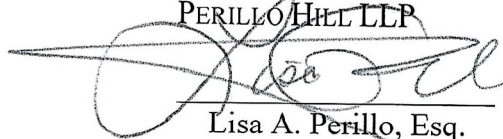
Conclusion

Having demonstrated that the Minority Appellants are parties aggrieved pursuant to C.P.L.R. 5511, and that this appeal arises from an order finally determining an action directly involving the construction of the New York State Constitution, this appeal as taken by the Minority Appellants is proper and squarely falls within the scope of the Court's subject matter jurisdiction pursuant to C.P.L.R. 5601(b)(1). As such, the Minority Appellants respectfully request that this Court accept jurisdiction and set a briefing schedule with oral argument.

We thank the Court for its consideration of this Jurisdictional Response.

Respectfully submitted,

PERILLO/HILL LLP

A handwritten signature in black ink, appearing to read 'Lisa A. Perillo', is written over a horizontal line.

Lisa A. Perillo, Esq.

Lperillo@perillohill.com

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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
bc Cox@coxlawyers.com
Attorneys for Appellants-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 Respondents-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