



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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SOLICITOR GENERAL
DIVISION OF APPEALS & OPINIONS

July 3, 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:

The Office of the Attorney General represents defendants-respondents the New York State Senate; Andrea Stewart-Cousins, as the Senate's President Pro Tempore and Majority Leader; the New York State Assembly; and Carl Heastie, as the Assembly's Speaker (collectively, "majority defendants"). I submit this letter in response to the Court's two jurisdictional inquiries, dated June 26, 2024, and June 27, 2024, respectively.

Because the order appealed from does not directly involve any substantial constitutional question, the Court lacks jurisdiction over the putative appeals filed as of right by plaintiffs-appellants and separately by defendants-appellants Robert Ortt and William Barclay, as the Minority Leaders of the Senate and Assembly, respectively (the "minority defendants"). The Court lacks jurisdiction over the minority defendants' appeal for the additional reason that the minority defendants are not aggrieved by the order from which they appeal. The appeals should accordingly be dismissed.

Background

Article XIX, § 1, of New York’s Constitution allows the Legislature to propose amendments to the Constitution. An amendment becomes part of the Constitution once it is passed by two successive separately elected Legislatures and approved by the People at an election. 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. The last sentence of Article XIX, § 1, clarifies that the “validity” of a proposed amendment or any “legislation action thereon” is unaffected if the Legislature votes on an amendment without the Attorney General’s opinion or a timely rendered one.

On July 1, 2022, the New York Senate and Assembly each introduced a concurrent resolution to expand the protections of the New York Constitution’s Equal Protection Clause by adding the Equal Rights Amendment (“ERA”). (R.¹ 49, 492.) (A concurrent resolution is the form by which a proposed amendment is introduced and adopted.) 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 voted to approve it. (R. 85-86.) Four days later, the Attorney General opined that the ERA would have no effect on other provisions of the Constitution. (See R. 51.) In January 2023, with the successive Legislature installed, the Senate and Assembly 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 general 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.) As defendants to their action, plaintiffs named the majority defendants, defendant State Board of Elections, and the two minority defendants. (R. 40-41.) Plaintiffs

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

alleged that the Legislature violated the procedures set forth in Article XIX, § 1, by deciding to vote on the July 2022 concurrent resolution without waiting for the Attorney General to render her purely advisory opinion that the ERA would have no effect on the Constitution's other provisions. (R. 45-48.) And plaintiffs alleged that this alleged procedural violation rendered the July 2022 concurrent resolution, and 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, among other reasons, because even if the action was justiciable, it was time barred and plaintiffs lacked standing. (*See, e.g.*, R. 252-262.) The majority defendants contended further 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 opposed the majority defendants' motion and cross-moved for summary judgment. (R. 276-277.) The minority defendants filed papers in support of plaintiffs; 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 plaintiffs' favor. (R. 7-37.) The court rejected the majority defendants' procedural defenses (R. 22-35) and held on the merits that the Legislature violated Article XIX, § 1, by adopting the July 2022 concurrent resolution before receiving the Attorney General's opinion or awaiting the lapse of the 20-day period afforded to the Attorney General to render one (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, denied plaintiffs' motion for summary judgment, and vacated Supreme Court's declaration.

(Memorandum and Order [“Order”] at 2-3.) The Appellate Division held only that plaintiffs’ single cause of action was untimely. (Order at 2-3.) The court did not reach any of the majority defendants’ alternative procedural defenses or the merits of plaintiffs’ claim.

The Appellate Division stated the well-settled rule that where a declaratory judgment action is brought 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.) 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* 89 N.Y.2d 825 (1996)] [alterations in original].)

Thus, the Appellate Division held, because plaintiffs could have proceeded by way of an article 78 proceeding, this action was subject to the four-month statute of limitations that govern such proceedings. (Order at 3 [citing C.P.L.R. 217(1)].) The action was therefore time-barred (Order at 3), having been commenced over 15 months after the Legislature decided to vote on the July 2022 concurrent resolution. The Appellate Division concluded that the “remaining contentions are academic in light of our determination.” (Order at 3.)

**THE APPEALS FROM THE APPELLATE DIVISION’S DECISION
DOES NOT DIRECTLY INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

Plaintiffs’ appeal and the minority defendants’ appeal should both be dismissed because no constitutional question, substantial or otherwise, is “directly involved” within the meaning of CPLR 5601(b)(1). A constitutional question is directly involved only if that question was

“necessarily involved in the decision of the case.” Arthur Karger, Powers of the New York Court of Appeals § 7:8 (Sept. 2023 update) (quoting *Haydorn v. Carroll*, 225 N.Y. 84, 87-88 [1918]). Even if the underlying action alleges constitutional claims, “an appeal as of right does not lie if the decision appealed from was or could have been based upon some ground other than construction of the Constitution.” *Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174, 182-83 (1988). Accordingly, an appeal will be dismissed when the Appellate Division’s decision rests on an independent nonconstitutional ground, such as the statute of limitations or lack of standing. *See, e.g.*, Karger, *supra*, § 7:9 at n.19 (collecting cases); *Morey v. Johnston*, 4 N.Y.2d 804 (1958) (statute of limitations); *Town of Hardenburgh, Ulster Cnty., N.Y. v. State of New York*, 52 N.Y.2d 536, 540 (1981) (standing).

No constitutional question is directly involved here. Although plaintiffs alleged a constitutional claim—that the adoption of the July 2022 concurrent resolution violated the procedure set forth in Article XIX, § 1—and Supreme Court resolved that claim in plaintiffs’ favor, the Appellate Division did not resolve that claim at all, let alone directly. The Appellate Division relied instead on an independent nonconstitutional ground: It held that this action was time barred by article 78’s four-month statute of limitations. (Mem. at 3 [citing C.P.L.R. 217(1)].) Thus, “it cannot be said that the asserted constitutional issue was a basis of the decision below,” and an appeal as of right based on that issue does not lie. *Town of Hardenburgh*, 52 N.Y.2d at 540.

Indeed, this Court recently dismissed an appeal as of right in materially analogous circumstances. In *Matter of Borrello v. Hochul*, the trial court granted judgment in favor of plaintiffs on their constitutional claim, but the Appellate Division reversed based solely on a non-constitutional, procedural ground—namely, plaintiffs’ lack of standing. 221 A.D.3d 1484 (4th Dep’t 2023), *appeal dismissed*, 2024 WL 2969662 (2024). This Court dismissed plaintiffs’ appeal as of right from the Appellate Division’s decision because no substantial constitutional question was “directly involved.” 2024 WL 2969662, at *1. That same conclusion is warranted for the appeals in this case.

**THE MINORITY DEFENDANTS ARE NOT AGGRIEVED BY THE
APPELLATE DIVISION'S DECISION**

The Court lacks jurisdiction over the minority defendants' appeal for the additional reason that they are not aggrieved by the Fourth Department's decision. *See* C.P.L.R. 5511. In Supreme Court, the minority defendants never alleged a cause of action, such as a cross-claim against the majority defendants. Nor did they file a motion seeking affirmative relief on their own behalf. Rather, they filed papers that ostensibly supported plaintiffs' reading of Article XIX, § 1. (*See* R. 371-381.) The minority defendants are thus not aggrieved by the Fourth Department's decision, which, among other things, denied plaintiffs' summary judgment motion and held that plaintiffs' sole cause of action was time-barred. *See Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 N.Y.3d 658, 664 n.4 (2014) (a defendant was not aggrieved where it "did not move for summary judgment and the Appellate Division denied plaintiffs motion for summary judgment").

Respectfully submitted,

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AFFIRMATION OF SERVICE
BYRNES v. SENATE of STATE OF NEW YORK
Court # - APL-2023-00083

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

Cristal R. Gazelone affirms:

I am over eighteen years of age and an employee in the office of LETITIA JAMES, Attorney General of the State of New York, attorney for Respondent herein.

On, the 3rd day of July, 2024, I served a copy of the annexed **Letter recommending dismissal** upon the parties named below by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a letter box of the Capitol Station Post Office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said parties at the address within the State and respectively designated by said parties for that purpose as follows:

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Dated: Albany, New York
July 3rd, 2024

I affirm under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Cristal R. Gazelone