To be argued
By: DUSTIN J. BROCKNER
10 minutes requested

Supreme Court of the State of New York
Appellate Division – Fourth Department

No. CA 24-00764

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

Plaintiffs-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,

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.

BRIEF FOR DEFENDANTS-APPELLANTS

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Dated: May 21, 2024

Supreme Court, Livingston County – No. 000778-2023

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PRELIMINARY STATEMENT

In July 2022, New York's Legislature approved a concurrent resolution to expand the protections of the Constitution's Equal Protection Clause by adding the Equal Rights Amendment ("ERA"). In January 2023, during its next legislative session, the Legislature approved a second concurrent resolution to add the ERA to the Constitution and directed the ERA to appear on the ballot for the November 2024 general election.

Plaintiffs 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. They allege that, under Article XIX, § 1, of the Constitution, the July 2022 concurrent resolution was invalid because, at the time of its approval by the Legislature, the Attorney General had not yet rendered an opinion as to the ERA's effect on the Constitution's other provisions. Supreme Court (Doyle, J.) granted judgment in plaintiffs' favor, declared the July 2022 concurrent resolution void, and ordered the ERA removed from the ballot.

This Court should reverse. Even assuming plaintiffs brought a timely justiciable claim, which they did not, their claim fails on the merits. Article XIX, § 1, provides that when a proposed constitutional amendment is introduced, it must be referred to the Attorney General, who in turn has the duty to render within 20 days an opinion regarding the amendment's effect, if any, on the Constitution's other provisions.

This provision does not, however, impose an affirmative limitation on the Legislature that forbids it from acting on a proposed amendment unless it has received the Attorney General's opinion or the Attorney General interferes with the amendment process by not offering an opinion within 20 days. As constitutional text, history, and settled practice demonstrate, the Attorney General's opinion process is meant to *aid* the Legislature's deliberative process, not constrain it. The absence of an opinion thus does not affect the validity of a concurrent resolution to amend the Constitution—regardless of the reason for that absence. The Legislature may do what it did here and has done numerous times before: take action on the concurrent resolution before the receipt of the Attorney General's opinion or the lapse of the 20-day period that the Attorney General is allotted to render the opinion.

Plaintiffs are not entitled to the relief granted by Supreme Court for two additional reasons. First, plaintiffs did not bring a timely justiciable claim; to the contrary, their action suffers from multiple procedural flaws that warrant its dismissal. Second, even if plaintiffs were entitled to relief, any such relief should apply prospectively only and thereby not deprive the People of the opportunity to express their will in the upcoming election on the immensely important issue of whether to adopt the ERA.

QUESTIONS PRESENTED

1. Whether Supreme Court erred in holding that Article XIX, § 1, of the New York Constitution forbids the Legislature from voting on a concurrent resolution to amend the Constitution unless it has received the Attorney General's opinion or the 20-day period allotted for the Attorney General to render the opinion has lapsed.

2. Alternatively, whether Supreme Court erred in holding that plaintiffs brought a timely justiciable claim.

3. Even assuming for purposes of argument that plaintiffs' legal analysis is correct, whether Supreme Court erred by barring the ERA

from appearing on the ballot rather than ordering prospective relief only for future concurrent resolutions.

STATEMENT OF THE CASE

A. Constitutional Background

Since 1821, the Constitution has authorized the Legislature to propose amendments to the Constitution. *See* 1821 N.Y. Constitution, Art. VIII, § 1. 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.

The legislative process for amending the Constitution is now set forth in Article XIX, § 1. That provision consists of three sentences. The first provides that, once a proposed amendment is introduced, it "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." *Id.* The Attorney General opinion process was added to the Constitution in 1938. (Record on Appeal ["R."] 242.)

Article XIX, § 1's second sentence sets forth the rest of the process. It contemplates an opinion from the Attorney General and a majority vote

in favor of the proposed amendment before referring the amendment to the next regular two-year legislative session. It states:

> 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.

Article XIX, § 1's third and final sentence was added in 1941. (R. 242.) It clarifies that a proposed amendment is not rendered invalid merely because the Legislature chooses to vote on the proposed amendment without the Attorney General's opinion or a timely rendered one. It states:

> 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.

For at least 80 years, this "No Invalidation Clause" has been understood as clarifying that the Legislature may vote on a proposed amendment without waiting for the Attorney General's opinion or the expiration of the 20-day period allotted for the Attorney General to render one. (R. 242-43.) Consistent with that understanding, the Legislature has routinely voted on proposed amendments before receiving an Attorney General's opinion or allowing the 20-day period to lapse. (R. 404-406, 416-459.) This routine practice has been used for at least 18 proposed constitutional amendments that have been submitted to the People. (R. 404-406 [identifying examples].) And at least nine of these amendments were approved and added to the Constitution. These include:

- The amendment, first proposed in 1976, that created the Commission on Judicial Conduct, changed the selection method for Judges on the Court of Appeals, and amended the administration of the Uniform Court System (R. 365, 404, 417, 420);

- The amendment, first proposed in 2012, that created the Independent Redistricting Commission (R. 404, 427);

- The amendment, first proposed in 2012, that authorized casino gambling (R. 404, 429);

- The amendment, first proposed in 2019, that altered the jurisdiction of the New York City's civil courts (R. 405, 439).

(*See also* R. 404-405 [listing remaining examples]).

B. The State Equal Rights Amendment

On July 1, 2022, Governor Kathy Hochul convened an extraordinary session for the Legislature to address, among other topics, a "concurrent resolution to enshrine equal rights in the State Constitution." (R. 330.) Concurrent resolutions are the form in which proposed constitutional amendments are introduced and adopted.

That same day, the Senate and Assembly each introduced a concurrent resolution to amend the Constitution's Equal Protection Clause, Article I, § 11. (R. 49, 492.) The second sentence of that clause currently refers to the characteristics of race, color, creed, and religion. The amendment, known as the Equal Rights Amendment ("ERA"), would add the following to that list: ethnicity, national origin, age, disability, and sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy. (*See* R. 49.)

The ERA was not a new measure. Throughout the 2021-2022 legislative session, the Legislature introduced, obtained Attorney General opinions, and deliberated numerous iterations of the ERA that

would have added sex and other characteristics to the Equal Protection Clause. (*See, e.g.*, R. 461 [January 2021 concurrent resolution]; R. 471 [January 2021 concurrent resolution]; R. 481 [April 2022 concurrent resolution]; R. 487 [May 2022 concurrent resolution].) Thus, by the July 1 session, the Legislature had received the Attorney General's opinion letters regarding these prior versions of the ERA. (*E.g.*, R. 460 [summary of action on concurrent resolution][1], 470 [same], 480 [same], 486 [same].)

On July 1, after introducing the concurrent resolution to add the ERA, the Senate and Assembly took several steps. Each referred its resolution to the Attorney General for an opinion, debated that resolution, and voted to approve it. (R. 85-86.) Plaintiff Assemblymember Marjorie Byrnes did not speak during the Assembly debate and voted against the concurrent resolution. (R. 61-84, 85.)

Four days later, on July 5, 2022, the Attorney General rendered an opinion for the Assembly as to the effect of the proposed ERA upon the

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[1] The record includes the Legislature's summary of the action taken on each concurrent resolution. The date on which any Attorney General's opinion was received by the Legislature is reflected by the notation "opinion referred to judiciary," which refers to when the relevant judiciary committee received the opinion. (*See, e.g.*, R. 337.)

Constitution's other provisions, stating: "In my opinion, if adopted, the proposed amendment will have no effect upon other provisions of the Constitution." (R. 494.) On July 6, 2022, the Attorney General rendered an identical opinion for the Senate. (R. 496.) The Legislature received the opinion letters on July 13, 2024. (R. 85.)

In November 2022, a general election was held. New Yorkers who voted for members of the Legislature did so on the understanding that the newly constituted Legislature would consider whether to provide the requisite second legislative approval for the ERA and to submit it to the People for a vote thereon.

In January 2023, that new session began, and the Legislature debated and passed the second concurrent resolution to add the ERA to the Constitution. (R. 138-140.) During the Assembly debate, Assemblymember Byrnes spoke against the ERA, stating that it "is unnecessary and in my opinion wrong." (R. 127.) She made no mention of the Attorney General's July 2022 opinion or the fact that the Legislature had voted on the first concurrent resolution before receiving that opinion. (R. 127.)

After passing the second concurrent resolution, the Legislature set the ERA to appear on the ballot for the general election on November 5, 2024. (R. 43.)

C. The Proceedings Below

On October 30, 2023, over nine months after Assemblymember Byrnes cast her second vote against the ERA, she and two New York residents commenced this declaratory judgment action in Supreme Court, Livingston County. (R. 40.) They named as defendants the Senate; Andrea Stewart-Cousins, as the President Pro Tempore and Majority Leader of the Senate; the Assembly; and Carl Heastie, as Speaker of Assembly (collectively, "majority defendants"). (R. 40-41.) Plaintiffs also named as defendants Robert Ortt and William Barclay, as the Minority Leaders of the Senate and Assembly, respectively, and the State Board of Elections. (R. 41.)

Plaintiffs asserted a single claim. They alleged that the Legislature's July 1, 2022, concurrent resolution to add the ERA was invalid under Article XIX, § 1, because the Legislature had voted to adopt the resolution without waiting up to 20 days to receive the Attorney General's opinion. (*See* R. 45-46.)

The majority defendants moved to dismiss on various grounds (R. 247-267), and Supreme Court converted their motion to one for summary judgment (R. 399). Plaintiffs cross-moved for summary judgment. (R. 276-277.) The legislative minority leaders filed briefs 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.)

By decision and judgment dated May 7, 2024, Supreme Court (Doyle, J.) dismissed Senate President Pro Tempore and Majority Leader Stewart-Cousins and Assembly Speaker Heastie based on their legislative immunity but otherwise granted summary judgment in plaintiffs' favor. (R. 7-37.) The court held that the Legislature's July 2022 concurrent resolution was invalid under Article XIX, § 1, because the Legislature adopted it without receiving the Attorney General's opinion or allowing to lapse the 20-day period allotted for the Attorney General to render her opinion. (R. 12-13, 35-36.)

The court additionally rejected the majority defendants' arguments that procedural defects warranted the action's dismissal. The court concluded that the action was justiciable and not barred by the statute of

limitations or laches; it also concluded that Assemblymember Byrnes and the two New York resident plaintiffs had standing. (R. 22-33.)

The court declared the July 2022 concurrent resolution "null and void" and ordered that the proposed ERA be removed from the ballot for the November 2024 general election. (R. 36.)

This appeal ensued. (R. 3.)

ARGUMENT

POINT I

THE JULY 2022 CONCURRENT RESOLUTION IS VALID UNDER ARTICLE XIX, § 1

Even assuming plaintiffs brought a justiciable timely claim—which they did not, *see infra* Point II—their claim fails on the merits. The July 2022 concurrent resolution, which proposed adding the ERA to the Constitution, is a legislative enactment that enjoys a strong presumption of constitutionality. *See Dalton v. Pataki*, 5 N.Y.3d 243, 255 (2005). The resolution thus may be invalidated "only when conflict with the Constitution is clear and indisputable." *Browne v. City of New York*, 241 N.Y. 96, 112 (1925). Plaintiffs failed to carry their heavy burden to show a constitutional violation in the procedure used to adopt the July 2022

concurrent resolution, let alone one sufficient to invalidate that resolution.

A. The Legislature May Act on a Concurrent Resolution Without Waiting for the Attorney General's Opinion.

Article XIX, § 1, states that, after a constitutional amendment is first proposed and referred to the Attorney General, the Attorney General's "duty" is to render an opinion within 20 days as to the effect of the amendment on the Constitution's other provisions. But neither the text, purpose, nor history of Article XIX, § 1, support Supreme Court's conclusion that a proposed amendment is invalid merely because it was adopted by a Legislature before receipt of the Attorney General's opinion or the lapse of the 20-day period to render such an opinion. The Legislature may thus do precisely what it did here, and what it has done many times before: vote on a proposed amendment before the Attorney General has rendered an opinion.

1. The Constitutional Text Does Not Impose on the Legislature a Duty to Wait for the Attorney General's Opinion.

Turning first to the Constitution's text, that text does not prohibit—let alone clearly and indisputably so—the Legislature from voting on a

proposed amendment until the Legislature has received the Attorney General's opinion or the 20-day period has lapsed.

To start, Article XIX, § 1's No Invalidation Clause addresses the issue directly by clarifying that a legislative enactment proposing to amend the Constitution is not rendered invalid by any divergence from the Attorney General opinion process. The clause states that the "validity" of a proposed amendment and any "legislative action thereon" is unaffected by either (i) the "failure of the attorney-general to render an opinion" or (ii) the "failure of the attorney-general to do so timely."

The clause thus addresses two distinct scenarios. The first is when the Legislature acts without any Attorney General opinion—*i.e.,* at the time of the legislative action, the Attorney General has "fail[ed]" to render an opinion. Because the phrase does not limit the reason for any such failure, that reason need not result from the Attorney General's failure to fulfill the duty to render an opinion within 20 days but can be any "failure" in the opinion process more generally. The provision thus encompasses a case like this one in which there was no Attorney General opinion when the Legislature voted because the Legislature acted before receiving one.

The second scenario is when the Legislature acts with an Attorney General opinion that was untimely rendered—*i.e.,* at the time of the legislative action, the Attorney General had rendered an opinion, but had failed to do so within the requisite 20-day period.

Taken together, these two scenarios cover any possible deviation from the Attorney General opinion process contemplated by the Constitution. The No Invalidation Clause thus serves to ensure that a concurrent resolution cannot be invalidated based any "failure" in that process, regardless of the reason.

The remaining provisions in Article XIX, § 1, do not in any event clearly and expressly impose a duty on the Legislature to wait up to 20 days for an Attorney General's opinion before proceeding to a vote. The Constitution is "framed deliberately and with care," *Matter of King v. Cuomo*, 81 N.Y.2d 247, 253 (1993), and when Article XIX, § 1, imposes a duty on a governmental actor, it does so expressly. The Attorney General has the "duty" to render an opinion within 20 days. N.Y. Const., Art. XIX, § 1. And the Legislature has the "duty" to submit a proposed amendment to the People following the proposed amendment's second passage. *Id.* The Constitution does not, however, expressly impose a duty on the

Legislature to wait for an Attorney General opinion or the lapse of 20 days.

Nor does Article XIX, § 1, clearly impose any such a duty implicitly. To the contrary, the section's description of the sequence of events is ambiguous. To be sure, the section's first sentence is clear: A proposed amendment "shall be referred to the attorney-general whose duty it shall be within twenty days thereafter to render an opinion." The next sentence is less clear, however. It does not say, "upon receiving such opinion, the Legislature may vote." It does not even say that, "upon receiving such opinion, the amendment may *then* be agreed to by a vote and *then* referred to the regular legislative session convened after a general election." It says that "upon receiving such opinion, *if* the amendment … shall be agreed to by a majority of the members elected to each of the two houses," such amendment "shall be entered on their journals … and referred." N.Y. Const., Art. XIX, § 1 (emphasis added). This awkwardly worded sentence does not clearly require the receipt of the Attorney General's opinion before the Legislature may vote.

Even if this second sentence were properly read as Supreme Court read it—to contemplate a vote by the Legislature "upon receiving such

opinion," *i.e., after* receiving the opinion—that reading still would not clearly make such receipt a mandatory condition precedent to legislative action. The sentence does not state that the Legislature may act "*only* upon receiving such opinion." Nor does the sentence state that legislative action may not occur "unless" or "until" the Attorney General has been given 20 days to render an opinion.

When, in contrast, the Constitution imposes an affirmative constraint on when the Legislature may act, it does so unambiguously. Constitutional provisions of this kind use typical condition-precedent creating language by allowing legislative action "only" if a condition is met or bar action "unless" a condition occurs. *See* N.Y. Const., Art. IX, § 2(b)(2) (the Legislature may pass certain special laws relating to local governments "only" on specified conditions being met); N.Y. Const., Art. III, § 14 (bill must remain on legislators' desks at least three days before final passage "unless" the Governor issues message of necessity).

Contrary to Supreme Court's reasoning (R. 17), the majority defendants' reading does not render meaningless the Attorney General's duty to render an opinion. For one thing, the Legislature can and frequently does choose to vote on a proposed amendment after receiving

the Attorney General's opinion. The Attorney General's opinion can also contribute to the deliberative process even when, as here, it is rendered after the Legislature's first passage of a proposed amendment because the Legislature can look to it in the next legislative session when deciding what action to take.

In fact, it is Supreme Court's reading that would render superfluous a provision of Article XIX, § 1. As noted above, the No Invalidation Clause has two parts: (i) "Neither the failure of the attorney-general to render an opinion concerning such a proposed amendment" (ii) "nor his or her failure to do so timely" shall affect a proposed amendment's validity. Supreme Court held that the Legislature may act without an Attorney General opinion under that clause but only after waiting for the 20-day period to lapse. (R. 12-13.) On that reading, the only "failure" by the Attorney General that would permit legislative action is an Attorney General's "failure" to render an opinion "timely." And that failure is covered entirely by the second part of the clause, the "failure to do so timely" part. Supreme Court's reading thus renders superfluous the first part of the No Invalidation Clause, the "failure of the [AG] to render an

opinion" part. By contrast, the majority defendants' reading gives meaning to both parts.

2. The History and Purpose of Article XIX, § 1 Confirm That It Was Not Intended to Impose a Duty to Wait

The history and purpose of Article XIX, § 1, support the majority defendants' reading. To start, the discussion of the Attorney General opinion process during the 1938 Constitutional Convention made clear that the process was intended to aid legislative action, not constrain it. As one delegate noted, "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." (R. 197.) To be sure, the delegates contemplated that the Attorney General would render the opinion within the 20-day period, and that the Legislature would then act. (R. 197.) But no one at the Convention suggested that the Legislature would have a duty to wait for the Attorney General's opinion or the lapse of the 20-day period before proceeding to a vote. (*See* R. 197.)

The limited nature of the Attorney General opinion supports the view that the Legislature has no such duty to wait. It is undisputed that

the opinion is purely advisory, and, as made clear during the 1938 Constitutional Convention (R. 197), the Legislature remains free to act upon a proposed amendment as it sees fit. *See also* 1961 Ops. Atty. Gen. 52-53 (reproduced at R. 242-243); Peter J. Galie & Christopher Bopst, The New York State Constitution, 350 (2d ed. 2012) (observing that Attorney General's opinion is not "binding and thus not part of the legislative process of amending the constitution") (reproduced at R. 500). Further, the Attorney General is not required to expound on a proposed amendment's merit or meaning; the Attorney General is only required to opine on whether the proposed amendment will have an effect on the Constitution's other provisions. Thus, the opinion—like the one here—regularly consists of a single sentence that the amendment "will have no effect upon other provisions of the Constitution." (R. 494.) And even when an opinion identifies other provisions that may be affected, the opinion need not opine on that effect; the opinion's primary purpose is to identify any such other provisions. What is more, although Supreme Court read Article XIX, § 1, as "requiring the Legislature to consider information provided" by the AG, the text unequivocally imposes no such

requirement. (R. 17.) All that the provision requires is an opinion's receipt, not its review.

Equally unavailing is Supreme Court's speculation about the purpose underlying the No Invalidation Clause. (*See* R. 15-16.) The court speculated that the clause was meant to prevent the Attorney General from being able to "pocket veto" a proposed amendment "by refusing to follow his or her duty in providing the opinion" (R. 15), *i.e.,* deliberate refusals by the Attorney General to provide a timely opinion, and not cases in which the Attorney General has merely not yet provided an opinion when the Legislature chooses to vote. The court cites nothing to support its speculation that any such concern was on the drafters' minds, and we have found none.

The speculation that the No Invalidation Clause was aimed at hostility between the Attorney General and the Legislature is inconsistent with the enduring presumption that public officials like the Attorney General and legislators act in good faith. *See Matter of Ryan v. Lefkowitz*, 26 A.D.2d 604, 604 (3d Dep't), *aff'd*, 18 N.Y.2d 977 (1966).

Moreover, two historical events suggest that the No Invalidation Clause was intended to serve the broader purpose of clarifying that while

the Attorney General's opinion could aid the Legislature, the opinion was not a prerequisite to valid legislative action and thus was not intended to constrain such action.

First, in 1939, after the No Invalidation Clause was first proposed, the Attorney General issued an opinion explaining that the clause would serve to clarify that the timing of the Attorney General opinion has no effect on a proposed amendment's validity. 1939 Ops. Atty. Gen. 358 (quoted at R. 242). As the opinion observed, "Since, without such a provision the question of the effect of any such failure *might be doubtful,* the proposed amendment *removes any such doubts*." *Id.* (emphasis added).

Second, when the Attorney General opinion process was proposed to be added to the Constitution at the 1938 Constitutional Convention, an unrelated proposal to amend the Constitution by way of consecutive concurrent resolutions was already underway. More specifically, a first concurrent resolution to add an exception to the constitutional prohibition on gambling had already passed the Legislature. *See Matter of Stoughton v. Cohen,* 281 N.Y. 343, 344-45 (1939). Because that concurrent resolution occurred in early 1938, before the Attorney General

opinion process was added to the Constitution, it occurred with no Attorney General opinion. *See id.* at 344-45. The Court of Appeals subsequently rejected a challenge to the validity of that first concurrent resolution, reasoning that the 1938 Constitutional Convention never intended to invalidate legislative acts performed under the old Constitution. *See id.* at 348. Nonetheless, the Legislatures that, first in 1939 and then in 1941, adopted the concurrent resolutions to add the No Invalidation Clause to Article XIX, § 1, were presumably aware of the fact that a concurrent resolution on the gambling exception had been passed with no Attorney General opinion in place, through no fault of the Attorney General. It is thus far more likely that those Legislatures sought to address the absence of an Attorney General opinion for any reason at all, rather than only the absence of an opinion for the purpose of exercising a "pocket veto."

The history and purpose of the No Invalidation Clause thus confirm that the clause was intended merely to clarify that the absence of an Attorney General opinion at the time of legislative action does not affect the validity of that action, no matter the reason for the opinion's absence. The No Invalidation Clause thereby ensures that parties cannot do what

plaintiffs and the court below have done here—use alleged non-compliance with the Attorney General opinion process to disrupt the amendment process and deprive the People of the chance to express their will.

3. Longstanding Practice and Custom Show that the Legislature Has No Duty to Wait

Longstanding practice and custom strongly supports the majority defendants' reading. As a threshold matter, Supreme Court is mistaken that longstanding legislative practice is "irrelevant." (R. 18.) When interpreting a constitutional provision, New York courts have long given weight to "the conduct of the Legislature as it exercised its authority" under that provision. *New York Pub. Interest Research Group v. Steingut*, 40 N.Y.2d 250, 258 (1976); *see also Matter of Cappelli v. Sweeney*, 167 Misc. 2d 220, 231-32 (Sup. Ct. 1995) (relying on decades of historical practice to construe constitutional provision), *aff'd for reasons stated below*, 230 A.D.2d 733 (2d Dep't 1996). To be sure, legislative practice cannot countermand the Constitution's plain and unambiguous language. *See King*, 81 N.Y.2d at 253. As explained above, however, it is

far from plain that the language of Article XIX, § 1, supports the interpretation proposed by plaintiffs and adopted by Supreme Court.

Settled practice is therefore relevant and, in this case, unequivocal. For at least 80 years, Article XIX, § 1, has been read to impose no duty on the Legislature to wait for an Attorney General opinion or the lapse of the 20-day period allotted to the Attorney General to render one before voting on a proposed amendment.

In 1961, the Attorney General examined the history of Article XIX, § 1, and opined that the absence of an Attorney General opinion at the time of an amendment's first passage has no bearing on the amendment's validity. 1961 Ops. Atty. Gen. 52-53 (reproduced at R. 242-243). The Attorney General explained that the opinion mentioned in the Constitution is "purely advisory," not part of the legislative process, and the Legislature's receipt of the opinion "is not a *sine qua non*." *Id.*

Consistent with that understanding, when an amendment is first proposed, the Legislature has often voted on that amendment before receipt of the Attorney General opinion or the lapse of the 20-day period. (R. 404-406.) This routine procedure has been used for at least 18 proposed constitutional amendments that were submitted to the People

for approval. (R. 404-406.) At least nine of those amendments were approved and are now part of the Constitution. *See supra* at 6-7. One of those amendments, first proposed in 1976, created the Commission on Judicial Conduct; in that case, as here, the amendment was first proposed during an extraordinary legislative session and adopted that same day, before receipt of the Attorney General's opinion. (*Compare* R. 365, 404, *with* R. 417-418.) Indeed, a well-respected commentary on the Constitution has observed that the receipt of the Attorney General's opinion has no bearing on the validity of proposed constitutional amendments. *See* Galie & Bopst, *supra*, at 350 (reproduced at R. 500).

B. Even if the Legislature Had a Duty to Wait for the Attorney General's Opinion, It Substantially Complied With That Duty.

Even if Supreme Court were correct in interpreting Article XIX, § 1, as imposing a duty on the Legislature to wait for an Attorney General opinion or the lapse of the 20-day period to render one, plaintiffs' claim would still fail. The Court of Appeals has held that legislative action should not be invalidated where there has been "substantial compliance with the letter and spirit of the constitutional requirement." *Matter of Schneider v. Rockefeller*, 31 N.Y.2d 420, 434 (1972). There was

substantial compliance here. During the 2021-2022 legislative session, the Legislature introduced numerous prior iterations of the ERA, on which the Attorney General rendered timely opinions. *See supra* at 7-8. Thus, by the time the Legislature acted, it had received, in substantial part, the Attorney General's opinion regarding the ERA.

The text of the ERA and the prior iterations from that legislative session overlapped considerably. As noted, the ERA would amend the list of protected characteristics of New York's Equal Protection Clause to add ethnicity, national origin, age, disability, sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, as well as reproductive healthcare and autonomy. (*See* R. 49.) By the time the Legislature voted in July 2022, the Attorney General had provided multiple opinions with respect to adding all but the last of these characteristics to the Equal Protection Clause. (R. 487-490; *see also* R. 460-461, 464-465, 471-472 [proposals that included some of the 10 characteristics].) And as to the last characteristic, the Attorney General had, by the time of the Legislature's vote in July 2022, provided an opinion regarding an amendment that would add "reproductive

autonomy" to the Bill of Rights, covering essentially the same subject matter as "reproductive healthcare." (R. 477-478.)

There was also substantial compliance with respect to the ERA's other section, subsection (b), which consists of two clauses.[2] As to the first clause, the Attorney General had provided opinions on several prior iterations of the ERA that contained an identically worded clause. (*See* R. 460-462, 480-481, 486-487.) And as to the second clause, the Attorney General had similarly provided an opinion on a prior iteration of the ERA that contained a similarly worded clause. (R. 460-462.)

Indeed, plaintiffs do not dispute that the Legislature had the Attorney General's opinions on the ERA's prior iterations when it acted on the July 2022 concurrent resolution. (R. 510-511.) Nor did Supreme Court find these prior Attorney General opinions insufficient to establish substantial compliance with Article XIX, § 1. The court ruled instead that

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[2] Subsection (b) states that: "Nothing in this section shall invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of a characteristic listed in this section, nor shall any characteristic listed in this section be interpreted to interfere with, limit, or deny the civil rights of any person based upon any other characteristic identified in this section." (R. 49.)

substantial compliance cannot satisfy what the court held was a constitutionally mandated procedure. (R. 35.)

That ruling contravenes Court of Appeals precedent. In *Schneider*, the Court of Appeals held that substantial compliance sufficed to validate legislative action on a bill that had not remained on the members' desks for at least three full calendar days as required, but instead had been voted on before the third calendar day was over. *See* 31 N.Y.2d at 434-35 & n.7. Substantial compliance should similarly validate the Legislature's first concurrent resolution to enact the ERA, given that the Legislature had in effect received the Attorney General's opinion on the ERA when the Legislature approved that resolution.

POINT II

ALTERNATIVELY, THIS COURT SHOULD DISMISS THIS ACTION BECAUSE IT IS PROCEDURALLY IMPROPER

Plaintiffs' action is procedurally improper in any event. Indeed, it suffers from several defects, any one of which warrants dismissal.

A. This Action Is Either Non-Justiciable or Untimely.

This action is either non-justiciable or barred by the statute of limitations or laches. The action is non-justiciable because it seeks to

impermissibly intrude on the Legislature's internal affairs. It is "not the province of the courts to direct the legislature how to do its work." *Steingut*, 40 N.Y.2d at 257 (internal quotation marks omitted). The Legislature's determination as to whether or when to hold a vote on a proposed measure is a discretionary decision that is reserved to that body. That determination is thus "too intertwined with internal legislative affairs to be susceptible of judicial review." *Urban Justice Ctr. v. Pataki*, 38 A.D.3d 20, 29 (1st Dep't 2006).

In holding that this action was justiciable, Supreme Court relied on the Court of Appeals' decision in *King* (R. 23), but that case is distinguishable. *King* involved a challenge to the Legislature's practice of recalling a passed bill after it had been presented to the Governor. *See* 81 N.Y.2d at 250-51. The Court of Appeals held that that case did not interfere with the Legislature's internal proceedings, and thus was justiciable in light of two factors: (i) the challenged recall practice violated a "clear and unambiguous" constitutional command; and (ii) the practice significantly altered the balance of power between the Legislature and Executive in the lawmaking process, by intruding upon the Governor's

nondelegable power to decide whether to veto or approve a passed bill. *Id.* at 251-52.

Neither factor is present here. The challenged legislative practice does not violate a clear and unambiguous constitutional command. As explained *supra* at 13-19, the text of Article XIX, § 1, imposes no clear duty on the Legislature to wait until it has received the Attorney General opinion or the 20-day period for rendering that opinion has lapsed. Nor does the challenged legislative practice alter the balance of powers between the Legislature and the Executive. Unlike the Governor's power to veto or approve bills, the Attorney General's duty to issue an opinion is a purely advisory aid to the Legislature's internal decisionmaking rather than an additional, external constraint thereon.

Regardless, even if this action were justiciable, it would fail because it is barred by the statute of limitations. Where, as here, a declaratory judgment action is brought, a court must examine that action's substance to assess if its claim "could be resolved in another proceeding for which a specific limitation period is provided by law." *Whitmer v. New York State Dept. of Taxation & Fin.*, 120 A.D.3d 1590, 1591 (4th Dep't 2014). If the claim could have been brought in an article 78 proceeding, then it is

subject to the four-month statute of limitations that apply to such proceedings. *See, e.g.*, *Matter of Allens Cr./Corbetts Glen Preserv. Group v. Town of Penfield Planning Bd.*, 224 A.D.2d 979, 980 (4th Dep't 1996).

Although an article 78 proceeding is generally unavailable to challenge the validity of a legislative act, when the challenge is directed "not at the substance of the [act] but at the procedures followed in its enactment, it may be maintainable in an article 78 proceeding." *Schiener v. Town of Sardinia*, 48 A.D.3d 1253, 1254 (4th Dep't 2008) (quoting *Matter of Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 202 [1987]). A challenge is procedural if it implicates only the procedures by which the legislative body acted, "eschewing any intrusion into the substance of the matter being voted on." *Matter of Voelckers v. Guelli*, 58 N.Y.2d 170, 177 (1983).

Applying these principles, and assuming plaintiffs' action is justiciable, the action could have been brought as an article 78 proceeding and is thus time-barred by the four-month statute of limitations. *See* C.P.L.R. 217(1). Plaintiffs' challenge is "patently directed not at any aspect of the content or facial substance of the [concurrent] resolution but at the procedures followed in its enactment." *Atkins v. Town of*

Rotterdam, 266 A.D.2d 631, 633 (3d Dep't 1999). Supreme Court acknowledged that plaintiffs "do not challenge the substance of the proposed amendment." (R. 23.) Plaintiffs instead allege that the Legislature failed to follow the procedures set forth in Article XIX, § 1, when it approved the first concurrent resolution on July 1, 2022. (*See* R. 45.) This challenge, if justiciable, thus could have been brought as an article 78 proceeding within four months of July 1, 2022. Because plaintiffs did not file this action until October 2023, it is untimely.

Supreme Court's contrary reasoning is unsound. The court held that an article 78 proceeding would have been unavailable because the parties dispute "whether the passage of the Concurrent Resolution was constitutional." (R. 30.) In support, the court cited cases that have observed that article 78 does not lie when the constitutionality of a legislative enactment is challenged. (R. 30 [citing, e.g., *Matter of Highland Hall Apts., LLC v. New York State Div. of Hous. & Community Renewal*, 66 A.D.3d 678 (2d Dep't 2009)].)

That general principle does not apply here. Plaintiffs do not allege that any provision of the concurrent resolution violates the Constitution. Rather, they claim that the procedure that resulted in the concurrent

resolution's passage violated the Constitution and that, due to this procedural violation, the concurrent resolution invalid. (R. 45.) It is immaterial that the Constitution, rather than a statute or regulation, provides the applicable procedure. Thus, this case, unlike the cases cited by Supreme Court, raises a "question of procedure only." *Matter of Voelckers*, 58 N.Y.2d at 177; *see Matter of Straniere v. Silver*, 218 A.D.2d 80, 82 n.2 (3d Dep't) (noting that petitioners had properly proceeded under article 78 because dispute turned on a "constitutional provision relating to the procedure by which legislation is enacted"), *aff'd for reasons state below,* 89 N.Y.2d 825 (1996).

Even if plaintiffs' action were not barred by the statute of limitations, it would be barred by the equitable doctrine of laches. To assess whether laches applies, a court considers "the nature and subject matter of the particular controversy, its context and the reliance and prejudicial impact on defendants and others materially affected." *Schulz v. State*, 81 N.Y.2d 336, 347 (1993). "Broadly stated, the profound destabilizing and prejudicial effects from delay may be decisive factors." *Id.* The destabilizing and prejudicial effects of plaintiffs' delay are decisive here. Plaintiffs challenge the concurrent resolution adopted by

the Legislature on July 1, 2022, but they waited until October 2023 to bring this action. In the interim, the voters went to the polls in November 2022 to cast votes for members of the Legislature on the understanding that the newly constituted Legislature would consider the ERA in its next legislative session. In January 2023, a newly seated Legislature adopted a second concurrent resolution to add the ERA and set the ERA to be on the ballot for the November 2024 general election. And campaigning on the ERA has been underway since mid-2023.[3] Yet, due in large part to plaintiffs' inexplicable delay in raising their claim, this action now threatens to create considerable uncertainty over what is at stake in the forthcoming general election, causing substantial prejudice to the State and its voters. Laches should prevent such disruption.

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[3] Nick Reisman, *How Democrats, advocates are mobilizing for Equal Rights Amendment in New York*, Spectrum News 1, June 29, 2023, https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2023/06/29/how-democrats--advocates-are-mobilizing-for-equal-rights-amendment.

B. Plaintiffs Lack Standing.

This action also fails for lack of standing. Even accepting for the sake of argument that a legislator could have standing to bring the instant challenge, none of plaintiffs here has standing.

The two New York resident plaintiffs indisputably failed to allege any "special damage, different in kind and degree from the community generally." *Matter of Niagara County v. Power Auth. of State of N.Y.*, 82 A.D.3d 1597, 1598 (4th Dep't 2011). Supreme Court nonetheless held that both had standing here because, absent such standing, it is "likely" that the Legislature's passage of the July 2022 concurrent resolution would be "insulated from judicial review." (R. 27.)

That reasoning was mistaken. Supreme Court relied on caselaw providing that a citizen-taxpayer may be found to have standing if denying standing would create "an impenetrable barrier to any judicial scrutiny of legislative action." (R. 26 [quoting *Saratoga County Chamber of Commerce v Pataki*, 100 N.Y.2d 801, 814 (2003)].) But the "impenetrable barrier" theory does not apply here, for either of two reasons. First, Supreme Court cites no authority, and we are aware of none, that the "impenetrable barrier" theory for citizen-taxpayers

extends beyond challenges to the expenditure of state funds. *See Saratoga*, 100 N.Y.2d at 814; *Boryszewski v. Brydges*, 37 N.Y.2d 361, 364 (1975). Plaintiffs' claim does not raise any such challenge. Second, assuming for purposes of argument that the claim is justiciable, there is no "impenetrable barrier" here. Under Supreme Court's reasoning, not only could an Attorney General bring this challenge, but in principle so too could individual legislators seeking to assert the alleged harm of having to vote on a proposed amendment before receiving the Attorney General's opinion. The possibility of such a challenger defeats the reliance by plaintiffs on citizen-taxpayer standing.

Assemblymember Byrnes failed to assert legislator standing, however, and thus lacks standing for that different reason. None of plaintiffs' submissions in the court below suggested that Assemblymember Byrnes had legislator standing. (*See* R. 45, 289-291, 388-390.) To the contrary, plaintiffs waived reliance on legislator standing by failing to respond to the majority defendants' argument below that she lacked such standing. (*Compare* R. 361 [majority defendants noting plaintiff's waiver of legislative standing], R. 389-390 [plaintiffs not contesting her waiver].) Assemblymember Byrnes instead

sought to rely on the same generalized harm that the two New York resident plaintiffs asserted. Accordingly, she lacks legislator standing because she failed to allege that she suffered a "direct, personal injury beyond an abstract institutional harm." *Matter of Borrello v. Hochul*, 221 A.D.3d 1484, 1486 (4th Dep't 2023) (internal quotation marks omitted); *Silver v. Pataki*, 96 N.Y.2d 532, 539 (2001) (legislator standing requires more than relying solely on injuries "suffered by the legislature as a whole").

Nor does the complaint allege facts from which legislator standing could be inferred. Assemblymember Byrnes does not allege that she would have read the Attorney General's opinion or been advised of its contents had the Assembly received it before voting. Nor could she plausibly have alleged that reading or knowing the contents of the Attorney General's opinion could have assisted her in any way, given the multiple Attorney General opinions that had been rendered on earlier iterations of the proposed ERA. And she also does not allege any other way in which she would have benefited from having the Assembly wait for an Attorney General opinion. Thus, the only factual allegation relevant to her standing is that she is a legislator. That fact alone,

without a single additional allegation, fails to show "a direct and *personal* injury" that represents a particularized harm, as would be required to show legislator standing in this case. *Matter of Borrello*, 221 A.D.3d at 1486 (internal quotation marks omitted) (emphasis in original).

POINT III

ANY RELIEF SHOULD BE PROSPECTIVE ONLY AND NOT AFFECT THE CURRENT ELECTION

If this Court were to find that plaintiffs were entitled to some relief, that relief should not bar the ERA's appearance on the ballot this November and thereby deprive the People of the opportunity to vote on this fundamental issue. Rather, given that plaintiffs challenge a settled legislative procedure that has engendered profound reliance interests, any relief should be limited to a declaration that applies prospectively only—*i.e.*, to future legislative action on proposed constitutional amendments.

Even when a court finds that a legislative procedure is not constitutionally authorized, the question of the appropriate relief is "a critically distinct issue." *King*, 81 N.Y.2d at 255. In *King*, the Court of Appeals held that the Constitution did not permit a longstanding

legislative practice of recalling passed bills after they had been presented to the Governor. *Id.* at 253-54. The Court of Appeals nonetheless held that relief would be limited to a declaration that the recall practice is "unconstitutional prospectively from this date forward." *Id.* at 257. The Court of Appeals explained that "courts should not act so as to cause disorder and confusion in public affairs even though there may be a strict legal right." *Id.* (internal quotation marks omitted). And, in that case, the recall practice had been in operation for decades and repeatedly used. *Id.* at 256-57. Thus, the Court of Appeals concluded, "despite the mitigation from the short four-month Statute of Limitations (CPLR 217), a retroactive ruling, or even a ruling with resuscitative effect, in the instant case would cause profoundly uncertain effects in particular and unwarranted disorder and confusion." *Id.*; *see also Matter of Campaign for Fiscal Equity v. Marino*, 87 N.Y.2d 235, 240 (1995) (citing *King* and limiting relief to a declaration that challenged legislative practice is "unconstitutional prospectively from this date").

Any relief in this case should be similarly limited to a declaration that the challenged legislative procedure is not permitted from the date of this Court's order forward. As in *King*, the challenged legislative

procedure has been repeatedly used for many decades. As noted, the Legislature has approved and sent to the voters without waiting for an Attorney General opinion or the lapse of the 20-day period at least 18 proposed constitutional amendments, at least 9 of which were approved and added to the Constitution. (*See* R. 404-406.) These include the amendments that created the Independent Redistricting Commission and authorized casino gambling. (R. 404-405.) Yet, under Supreme Court's holding, these amendments were not adopted in accordance with Article XIX, § 1. Even with the protection afforded by the statute of limitations and laches defenses, a declaration with any retroactive effect—like the declaration ordered by Supreme Court—can have "profoundly uncertain effects." *See King*, 81 N.Y.2d at 256.

An injunction that requires the majority defendants to remove the ERA from the November ballot would also "be a disproportionate remedy." *Id.* That injunction would invalidate the votes of two separately elected legislatures that approved the proposed ERA, including at least one that had the Attorney General's opinion when it acted. That injunction would also be profoundly disruptive for voters because it would deprive them of the opportunity they expect to have in the upcoming

election to vote on a fundamental question regarding the scope of the Constitution's Equal Protection Clause. Given that an injunction would have such broad, unsettling effects, it should not be granted, and any declaratory relief should be limited to future legislative actions.

CONCLUSION

This Court should reverse Supreme Court's judgment and either (i) enter a declaration that the July 2022 concurrent resolution is valid, (ii) dismiss the action in its entirety, or (iii) declare that the challenged legislative procedure is not permitted from the date of this Court's order forward.

Dated: Albany, New York
May 21, 2024

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 8,159.