To Be Argued By:
Christian Browne
Time Requested: 15 Minutes

Livingston County Clerk's Index No. 000778/2023

New York Supreme Court

APPELLATE DIVISION — FOURTH DEPARTMENT

Docket No.
CA 24-00764

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

Plaintiffs-Respondents,

against

THE SENATE OF THE STATE OF NEW YORK, ANDREA STEWART-COUSINS, as the President Pro Tempore and Majority Leader of the Senate, THE ASSEMBLY OF THE STATE OF NEW YORK, CARL HEASTIE, as Speaker of the Assembly,

Defendants-Appellants,

(Caption Continued on the Reverse)

BRIEF FOR PLAINTIFFS-RESPONDENTS

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and NEW YORK STATE BOARD OF ELECTIONS,

Defendants.

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INTRODUCTION

On this appeal, Defendants-Appellants (hereinafter referred to as "Appellants" or "the Legislature") appeal from the decision and order ("the Order") of the Supreme Court, Livingston County (Doyle, J.) by which the Supreme Court granted summary judgment in favor of Plaintiffs-Respondents ("Respondents") and declared that the Legislature's adoption of a proposed constitutional amendment on July 1, 2022 ("the Proposed Amendment") constitutes an illegal and *ultra vires* act that is of no force and effect.

The Proposed Amendment, known as the "Equal Rights Amendment", sought to amend Article I §11 of the Constitution and was scheduled to appear before the voters of the State for ratification at the general election of November 5, 2024. However, because the Proposed Amendment has been declared null and void, the Supreme Court held that the Proposed Amendment may not appear on the ballot for the consideration of the electors at the 2024 general election.

This case asks the Court to determine a straightforward, yet critical, question concerning the manner by which the Legislature may lawfully adopt proposed amendments to the Constitution. The Supreme Court correctly held that, when the Legislature voted upon the Proposed Amendment prior to receiving an opinion on the measure from the Attorney General ("the AG"), the Legislature violated the plain terms of Article XIX §1 of the Constitution ("the Amendment Article"). As

explained in detail herein, the Amendment Article requires the Legislature, upon the introduction of a proposed constitutional amendment, to refer the proposal to the AG for her opinion thereon. The AG has a "duty" to issue a written opinion to the Legislature within 20 days of the referral of a proposed amendment. Only "upon receiving such opinion" (or upon the expiration of the 20-day period if the AG fails to render an opinion) may the Legislature take a vote upon a proposed amendment. Until the Legislature receives the opinion, or the time for the AG to act has expired, the Legislature has no jurisdiction to hold a vote on a proposed amendment.

COUNTER-STATEMENT OF FACTS

The facts here are not in dispute. On July 1, 2022, the Legislature introduced the Proposed Amendment. R.[1] 29. Upon its introduction, it referred the Proposed Amendment to the AG pursuant to the mandate of the Amendment Article. R. 53. However, instead of awaiting receipt of the opinion or the expiration of the requisite 20 days before taking action on the proposal, the Legislature immediately put the measure to a vote. R. 53. It was approved by both houses on the same day on which it was introduced. R. 53.

[1] Citations to "R. __" refers to the respective pages of the Record on Appeal.

The AG subsequently rendered her opinion, dated July 6, 2022. R. 51. It was received by the Legislature on July 13, 2022, nearly two weeks after both houses had adopted the Proposed Amendment. R. 53.

Thus, because the Legislature voted prior to its receipt of the AG Opinion or the expiration of the requisite 20 day-period, the Supreme Court correctly held that the Legislature acted without jurisdiction and in violation of the requirements of the Amendment Article. R. 12-13, 35-36. For the reasons set forth herein, this Court should affirm the Order in its entirety.

THE SUPREMACY OF THE CONSTITUTION AND ITS INTERPRETATION AND APPLICATION

There is no more foundational principle of law in the jurisprudence of New York than that which upholds the Constitution as the *lex suprema* of the State. It is our "organic law" and, when interpreting and applying its terms, the courts have handed down an unbroken line of cases holding that the plain meaning of document's words, informed by the manifest intent of its drafters, must be carried into full effect.

> A fundamental rule, in the interpretation of written laws or instruments of any kind, is to construe them according to the sense of the terms and the intention of the framers of the laws or parties to the instruments. That intention is first to be sought from the words employed, and if the language is unambiguous, the words plain and clear, conveying a distinct idea, there is no occasion to resort to other means of interpretation. Effect must be given to the intent as indicated by the language employed. Especially

> should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State.
>
> If to meet exigencies and to prevent mischiefs it is allowable, sometimes, to depart from the strict letter of a law and imply an intent not clearly expressed in the construction of ordinary statutes, which may be framed in haste and with none of the formalities that attend the preparation and adoption of a State Constitution, it would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms.
>
> That would be *pro tanto* to establish a new Constitution and do for the people what they have not done for themselves. The terms of the instrument being clear and free from doubt, and having a well understood meaning and application, the better way is to stand upon the maxim *ita lex scripta est*, and leave any supposed defect or omission to be remedied by the people or by legislation.

Settle v. Van Evrea, 49 N.Y. 280, 281-282 (1872).

The Court of Appeals has found many occasions to reiterate the maxims set down more than 130 years ago in *Settle*. Only six months ago, the Court of Appeals yet again applied these principles to a constitutional question regarding the manner in which the terms set forth in the Constitution should be understood and implemented.

> We have long and repeatedly held that in construing the language of the Constitution as in construing the language of a statute, the courts should look for the intention of the People and give to the language used its ordinary meaning. The starting point for discerning legislative intent is the language of the statute itself, such that the literal language of a statute controls. All parts of the constitutional provision or statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof. Indeed, our well-settled doctrine requires us to give effect to each component of the provision or statute to avoid a construction that treats a word or phrase as superfluous.

Matter of Hoffmann v. New York State Ind. Redistricting Commn., 2023 N.Y. LEXIS 1968, *22-23 (December 12, 2023) (internal citations and quotations omitted).

The rule of construction requires the courts to look to the literal language of the Constitution and to apply it according to its plain meaning, informed by the intent of the drafters, in a manner that harmonizes the various provisions and gives each its due effect. No other considerations—not the self-serving "understanding" of the Legislature, nor the past practices of the political branches, nor the political ramifications of a particular question—enter the analysis. It does not fall to the courts to re-write the Constitution "and do for the people what they have not done for themselves." *Settle*, 49 N.Y. at 281.

ARTICLE XIX, SECTION 1 OF THE CONSTITUTION

A. History and General Construction

The Amendment Article (Article XIX §1) governs the process for the amendment of the Constitution. The parties agree that the Amendment Article dates to 1821 and the process it sets forth for the amendment of the Constitution has remained largely unchanged since its original enactment.

The amendment process is a slow one that unfolds over a period of years. A proposed amendment requires the assent of two separate sessions of the Legislature and ratification by the voters before it may become effective. The Amendment Article has always been construed as a provision that is informed by a desire to require careful deliberation upon any proposed change to the Constitution. Writing for a unanimous Court of Appeals a century ago, Judge Cardozo aptly described the amendment process:

> There is little room for misapprehension as to the ends to be achieved by the safeguards surrounding the process of amendment. The integrity of the basic law is to be preserved against hasty or ill-considered changes, the fruit of ignorance or passion. The amendment must be approved by a majority of the members in each house of the Legislature, and, after being referred to a new Legislature, must be published during a prescribed term for the information of the voters. The members of both houses must have been elected after such publication, for the voters are to have an opportunity to ascertain the views of their representatives as to any change proposed, and to regulate their choice accordingly…For that reason the amendment is to be referred "to the legislature to be

> chosen at the next general election of senators." The members of each house are to know the will of their constituents.

Browne v. New York, 241 N.Y. 96, 109 (1925).

The Second Department followed Cardozo's opinion a half-century later when it construed the Amendment Article, describing its importance in the constitutional law of the State in a significant footnote to its holding in *Frank v. State.*

> Purely as a matter of historical information, it should be noted that section 1 of article XIX first appeared in the 1821 Constitution and thereby remedied the omission of the Constitution of 1777 to provide for its own amendment (amendment by a constitutional convention was not authorized until the Constitution of 1846). It has remained essentially unchanged for more that (sic) 150 years. Since it prevents alteration of the fundamental law of the State, except by the most deliberative and time-consuming of processes, section 1 of article XIX must be deemed one of the most important provisions of our State Constitution.

Frank v. State, 61 A.D.2d 466, 469 (2d Dept 1978); *affirmed* 44 N.Y. 2d 687 (1978).

B. The Language of the Amendment Article

The Amendment Article reads, in pertinent part, as follows:

> Any amendment or amendments to this constitution may be proposed in the senate and assembly *whereupon such amendment or amendments 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. 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…

Article XIX § 1.

The language set forth above in boldface was added to the Amendment Article by the Constitutional Convention of 1938 ("the 1938 Convention"). R. 197. The 1938 Convention created, for the first time, a role for the AG in the amendment process. R. 197. The unambiguous language erects a sequential, multi-step process by which a proposed amendment moves from its introduction to its submission to the electorate for ratification. Article XIX § 1.

A proposed amendment may originate in either house of the Legislature. After introduction, the proposal "shall be referred to the attorney-general." It is the "duty" of the AG, following referral, "to render an opinion" on the proposed amendment within 20 days. Then, "upon receiving such opinion," the Legislature may put the amendment to a vote. Article XIX § 1.

The language that has governed the amendment process since 1938 has a plain meaning and sets up a logical process—introduction, referral for opinion,

issuance and receipt of opinion or expiration of the requisite 20 days, and then a vote.

POINT I

THE AMENDMENT ARTICLE REQUIRES THE LEGISLATURE TO RECEIVE THE AG OPINION BEFORE IT MAY VOTE ON A PROPOSED AMENDMENT

The issue in this case turns upon the meaning and application of the phrase *"upon receiving such opinion."* As the Order correctly held, this language, construed according to its plain meaning and the manifest intent of its drafters, imposes a jurisdictional limit on the power of the Legislature. R. 12-14, 16-17.

The first sentence of the Amendment Article requires the Legislature, following the introduction of a proposed amendment, to refer the proposal to the AG for her opinion "as to the effect of such amendment or amendments upon other provisions of the constitution." Article XIX § 1. Appellants concede that the referral is a mandatory component of the amendment process.

The second sentence of the Amendment Article picks up the process after the referral to the AG and begins with the key phrase *"[u]pon receiving such opinion."* Article XIX § 1. It goes on to describe the stage of the process that follows the receipt of the opinion.

> *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;

Id.

The commonly understood and obvious meaning of the preposition "upon" is synonymous with the term "after." "You use ***upon*** when mentioning an event that is followed immediately by another event." *See* Collins Dictionary (https://www.collinsdictionary.com/us/dictionary/english/upon). Dictionary.com lists "consequent to" and "simultaneous" as words related to "upon." *See* https://www.dictionary.com/browse/upon. "Upon" assuredly does not mean "before" or "prior to", and such terms are considered its opposites. *See* https://www.wordhippo.com/what-is/the-opposite-of/upon.html#:~:text=beneath,on%20the%20nether%20side%20of.

According to the common and plain meaning of the phrase, the Legislature is permitted to vote on a proposed amendment *after* it receives the AG Opinion or following the expiration of 20 days. "Upon receiving" does not mean, and cannot mean, "prior to" or "at any time." It is a temporal, sequential term that restricts the Legislature's power to act on a proposed amendment until it receives the AG Opinion or 20 days have passed from the time of referral. This unambiguous language establishes a component of a logical, step-by-step order of operations that

requires the Legislature to request and receive the AG Opinion or wait the 20 days, before it puts a proposed amendment to a vote.

"When language of a constitutional provision is plain and unambiguous, full effect should be given to the intention of the framers as indicated by the language employed and approved by the People. In a related governance contest, this Court found no justification for departing from the literal language of the constitutional provision." *King v. Cuomo*, 81 N.Y.2d 247, 253 (1993) (internal citations and quotations omitted).

The literal language of the Amendment Article authorizes a vote on a proposed amendment "upon receiving" the AG Opinion—not before receiving it. While the AG Opinion itself offers only guidance to the Legislature, the Legislature is mandated to seek such opinion, just as the AG is mandated to provide the opinion within 20 days. Only after receiving the opinion may the Legislature vote. No other construction of the language is sensible. "In the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect and we are not concerned with the wisdom of their insertion. As adopted by the People the intent is to be ascertained, not from speculating upon the subject; but from the words in which the will of the People has been expressed. To hold otherwise would be dangerous to our political institutions." *People v. Rathbone*, 145 N.Y. 434, 438 (1895).

Furthermore, both common sense and the legislative history of the 1938 Convention support the Order's application of the "upon receiving" clause. The purpose of an opinion is to inform and guide a party before it takes an action. It makes no sense to read the Amendment Article as contemplating that the Legislature could vote on a proposed amendment prior to its receipt of the AG Opinion. Obviously, an opinion has no purpose if it is received after the Legislature puts a proposal to a vote.

At the 1938 Convention, in harmony with common sense and the plain language that they chose, the drafters of the provision that created the AG Opinion requirement explained the sequence of the amendment process.

> The only substantial change is that the provision on lines 6 to 11 of the proposal, whereby it is provided that when a proposed amendment is submitted to the Legislature, it will immediately be forwarded to the Attorney-General for his report as to its effect upon other provisions of the Constitution; *and upon this report coming back within 20 days, then the Legislature will proceed to act upon it as it sees fit.* In other words, it was thought 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. (emphasis added).

R. 197.

As indicated by the 1938 Convention, and by common sense, an opinion cannot serve its purpose—it cannot be "very helpful to the Legislature"—if the Legislature holds a vote before it receives the opinion, operating in a manner akin

to the "sentence first, verdict afterwards" process of the trial in *Alice in Wonderland*. The drafters intended that, upon introduction, the Legislature would "immediately" refer a proposed amendment to the AG. R. 197. *Then*, "upon this report coming back within 20 days", the Legislature would proceed to vote. R. 197. Like its counterpart adverb "upon", the adverb "then" is also a sequential word that means "soon after that; next in order of time." *See* Then Definition & Meaning - Merriam-Webster.

The creation of the role for the AG in the amendment process is clearly intended to augment the fundamental purpose of the Amendment Article. The Amendment Article establishes a process that is intended to ensure that the Constitution is altered only after careful deliberation. In *Browne*, the Court of Appeals expounded upon the Amendment Article's "safeguards" that exist to protect "[t]he integrity of the basic law…against hasty or ill-considered changes, the fruit of ignorance or passion." 241 N.Y. at 109. The Second Department described the Amendment Article as permitting the "alteration of the fundamental law" only "by the most deliberative and time-consuming of processes" and called it "one of the most important provisions of our State Constitution." *Frank*, 61 A.D.2d at 469.

Applying the "upon receiving" clause as a substantive limit on the ability of the Legislature to act with utter haste, as it did when it approved the Proposed

Amendment immediately following its introduction with nearly zero debate, gives legal force to the essential purpose of the Amendment Article. Such an application of the clause, requiring the Legislature at a minimum to await the AG Opinion before racing to alter our fundamental law, is an enforceable legal safeguard that fosters the deliberative process that the Constitution envisions for amendment, and that the 1938 Convention intended to strengthen by introducing the AG Opinion into the amendment process.

Yet, despite the plain language of the Amendment Article, its history, purpose and the intent of the 1938 Convention, Appellants seek to free the Legislature from the Constitution's minimal constrain on its power to act according to its whims. They argue that the "upon receiving" clause is part of an "awkwardly worded sentence" that is missing certain buzz words that Appellants insist are necessary in order to restrict the power of the Legislature to act prior to the receipt of the AG Opinion. *See* App. Br. at p. 16.

But Appellants never proffer an alternative meaning for the clause, let alone a plausible one. They suggest that the "upon receiving" clause is ambiguous, because it does not say "upon receiving such opinion, the Legislature may vote." *See Id*. Instead of using the word "vote", the clause says that, upon receipt of the 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…" Article XIX § 1. An amendment is "agreed to" by a vote, the record of which must note the "ayes" and the "noes", terms that, of course, are commonly associated with voting.

The ambiguity here is in Appellants' argument. They do not explain what, exactly, the "upon receiving" clause means if it does not mean that the Legislature may vote only *after* it receives the AG Opinion. Appellants fail to offer an alternative meaning for the language because none exists. Their failure to proffer a legitimate alternative reading of the clause is fatal to their appeal. In the recent *Hoffman* decision, the Court Appeals held that, where the construction of the Constitution is in issue, the failure to offer an "alternative meaning" for the document's plain language "properly ends any analysis" of the meaning of a contested term. *Hoffmann*, 2023 N.Y. LEXIS 1968 at 22-23.

The plain meaning, legislative history, purpose of the Amendment Article and common sense demonstrate beyond question that the "upon receiving" clause empowers the Legislature to vote on a proposed amendment only "upon" receiving the AG Opinion. To hold otherwise would be to render this clause meaningless, such that "upon receiving" would effectively mean its opposite—before receiving or at any time that the Legislature deems convenient.

Such a holding would contravene the fundamental purpose of the Amendment Article by undermining, instead of fostering, a deliberative process for the consideration of constitutional amendments. It would ignore the description of the amendment process outlined by the drafters of the language at the 1938 Convention. It would defy common sense by endorsing a process by which the Legislature may vote before it receives an opinion, rendering the contents of the opinion worthless and superfluous advice given after the fact. It would violate more than a century of case law that has enforced the language of the Constitution as written in order to ensure that neither the Executive, nor the Legislature, nor the Judiciary may create a different Constitution in place of the one that exists.

POINT II

APPELLANTS' EXCUSES FOR THE LEGISLATURE'S FAILURE TO AWAIT THE RECEIPT OF THE AG OPINION ARE MERTILESS

Appellants proffer a series of alleged justifications for the Legislature's failure to await the receipt of the AG Opinion prior to voting on the Proposed Amendment. Appellants contend that these are grounds upon which the Court should reverse the Order and declare the adoption of the Proposed Amendment valid.

A. The Application of the "No Invalidation Clause"

Because Appellants are unable to present any plausible alternative reading of the "upon receiving" clause, they are forced to argue that the so-called "No

Invalidation Clause", the term by which they refer to the last sentence of the Amendment Article, grants the Legislature an escape clause.

The final sentence of the Amendment Article was adopted in 1941 and reads as follows: *"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."* ("the 1941 Amendment"). Article XIX § 1.

Appellants argue that the 1941 Amendment means that the Legislature may vote on a proposed amendment even if the Legislature does not await its receipt. According to Appellants, where, as here, the Legislature refers a proposed amendment to the AG and immediately thereafter votes on the proposal, there is "failure" by the AG to issue an opinion and such failure, under the 1941 Amendment, does not "affect the validity" of the adoption of the proposed amendment. In other words, Appellants argue that, under any circumstances, if the Legislature in not in possession of the AG Opinion, the AG has failed to act. *See* App. Br. at p. 14.

Appellants' argument poses a metaphysical question worthy of the debates of the Scholastics—can the AG "fail" to issue an opinion if she has never been granted the opportunity to issue the opinion? The noun "failure" means an "omission of occurrence or performance; *specifically*: a failing to perform a duty or

expected action." *See* Failure Definition & Meaning - Merriam-Webster. Its synonyms are "negligence", "neglect" and "default." *See* FAILURE Synonyms: 128 Similar and Opposite Words | Merriam-Webster Thesaurus.

The Amendment Article imposes a "duty" upon the AG to issue the AG Opinion within 20 days of the referral of a proposed amendment. Article XIX § 1. The AG can only "fail" to discharge her duty if, by choice or by neglect, she does not carry out her duty within the prescribed timeframe. As the dictionary says, the term "failure" correlates with the term "duty." She fails to carry out her "duty" if she does not render an opinion within 20 days of referral. But a "failure" does not arise where the AG has no feasible opportunity to fulfill her duty or where the timeframe granted for her action has not expired.

Thus, the 1941 Amendment only allows the Legislature to proceed with the amendment process without the AG Opinion in the event that the AG "fails" to perform her duty. It ensures that the Legislature's power to act upon a proposed amendment cannot be stymied by an AG who is unwilling to render an opinion within the 20-day period, and it has never been understood to do otherwise. As Appellants note, at the time that the 1941 Amendment was proposed, the AG opined that the language would clarify the "effect of any *such failure*" to act on the part of the AG (emphasis added). *See* App. Br. at p. 22. Similarly, the opinion of the AG issued in 1961, to which Appellants cite favorably, agrees that the 1941

Amendment only applies where the AG affirmatively fails to act. "The 1941 Amendment in its terms *treats only with the failure* of the Attorney General to render an opinion or to timely do so." *See Id*. at p. 25 (emphasis added).

Finally, as the Order correctly held, Appellants' interpretation of the 1941 Amendment would violate a fundamental rule of statutory construction by reading the 1941 Amendment in a way that annuls the "upon receiving" clause. R. 14-17. "Indeed, our well-settled doctrine requires us to give effect to each component of the provision or statute to avoid a construction that treats a word or phrase as superfluous." *Hoffmann*, 2023 N.Y. LEXIS 1968 at 22-23 (internal citations and quotations omitted). Under Appellants' reading of the 1941 Amendment, the basic structure erected by the 1938 Convention for the role of the AG in the amendment process would be dismantled. The "upon receiving" clause would have no efficacy because the last sentence of the Amendment Article would cancel out the structure erected in the earlier sentences, allowing the Legislature to vote "upon receiving" the AG Opinion, or not upon receiving the AG Opinion, or whenever it wishes.

The language crafted at the 1938 Convention mandates that the Legislature seek, and the AG provide, an opinion at the commencement of the amendment process. R. 197. The Amendment Article requires immediate referral and limits the time for the AG to act to 20 days. Article XIX § 1. None of those provisions was altered by the adoption of the 1941 Amendment. Had the drafters of the 1941

Amendment intended to re-work the way in which the AG Opinion component of the amendment process functions, they could have done so by changing the timing requirements for action or by eliminating the AG from the process entirely.

Instead, the language adopted in 1941 solely addressed the scenario in which the AG fails to fulfill her duty, making clear that the Legislature is not required to bring a mandamus action against a recalcitrant or neglectful AG in order to adopt properly a proposed amendment.

Here, the AG did not fail to discharge her constitutional duty. She issued an opinion to the Legisature, dated July 6, 2022, that was received by the Legislature on July 13, 2022, well within in the 20-day period. R. 51, 53. The Legislature did not have the AG Opinion at the time of its vote not because of a failure on the part of the AG, but because the Legislature simply did not wait for her to act. The only failure was on the part of the Legislature. It was the Legislature that failed to adhere to the Constitution's mandate by voting on the Proposed Amendment before it received the AG Opinion. It was the Legislature that failed to wait even an hour, much less 20 days, for the AG to carry out her duty.

B. Appellants' Contentions on the Legislative History/1938 Convention

Appellants present a bizarre and contradictory characterization of the work of the 1938 Convention. They admit that the drafters "contemplated that the Attorney General would render the opinion within the 20-day period, and that the

Legislature would then act." *See* App. Br. at p. 19. This statement is accurate, but the drafters did more than "contemplate"; the language that they crafted imposes an affirmative duty upon the AG to act within 20 days and imposes a substantive limit on the power of the Legislature to hold a vote prior to its receipt of the opinion. Appellants then contradict themselves with the inaccurate and nonsensical assertion that "no one at the Convention suggested that the Legislature would have a duty to wait" for the AG Opinion "before proceeding to vote." This claim, of course, is belied by Appellants' own description of the legislative history of the 1938 Convention and the plain meaning of the language that it crafted and adopted. *See* App. Br. at p. 19.

C. The Advisory Nature of the AG Opinion is Irrelevant to the Application of the "Upon Receiving" Clause

Appellants' insistence that, because the AG Opinion is advisory, the Legislature is not bound to wait for its receipt before voting is a classic example of a *non sequitur*. *See Id*. at pp. 19-20. There is no logical connection between the advisory nature of the opinion and the question of whether the Legislature may vote prior to its receipt of the opinion. Of course, by definition, an opinion is advisory. But, again, there is no point to receiving advice on a matter after one has already chosen a course of action.

Moreover, in an analogous context, where a body is required to refer a matter for an advisory opinion prior its vote on the matter, such requirement to

seek and receive the advisory opinion is a jurisdictional pre-requisite that must be fulfilled before the body may vote. *See e.g. Calverton Manor, LLC v. Town of Riverhead*, 160 A.D.3d 842, 845 (2d Dept 2018) ("The Town Board's failure to comply with the referral requirements of General Municipal Law § 239–m constitutes a jurisdictional defect."); *Ferrari v. Town of Penfield Plan. Bd.*, 181 A.D.2d 149, 152 (4th Dept 1992) ("General Municipal Law § 239–m requires that a municipal agency, before taking final action on an application for site plan approval, refer that application to a county or regional planning board for its recommendation….The failure to refer such matters to the county or regional board is a procedural defect rendering any subsequent approval by the municipal agency null and void.").

D. The Past Practices of the Legislature

Appellants contend that for "80 years" the Legislature has regarded itself as free to vote upon proposed amendments prior to the receipt of the AG Opinion and has done so many times. *See* App. Br. at p. 25. Appellants contend that Court should give "weight" to the Legislature's custom of ignoring the "upon receiving" clause and reducing the AG Opinion to a meaningless formality. *See Id*. at pp. 24-25.

Yet Appellants also concede that past practice "cannot countermand the Constitution's plan and unambiguous language." *See Id*. at p. 24. On this point,

they are correct. In fact, the Court of Appeals has expressly held that the customs of the political branches do not become constitutional as a result of their use over time or their general acceptance.

> If the guiding principle of statutory interpretation is to give effect to the plain language, especially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State. *These guiding principles do not allow for interstitial and interpretative gloss by the courts or by the other Branches themselves that substantially alters the specified law-making regimen. Courts do not have the leeway to construe their way around a self-evident constitutional provision by validating an inconsistent practice and usage of those charged with implementing the laws.*
>
> The New York Legislature's long-standing recall practice has little more than time and expediency to sustain it. However, the end cannot justify the means, and the Legislature, even with the Executive's acquiescence, cannot place itself outside the express mandate of the Constitution. We do not believe that supplementation of the Constitution in this fashion is a manifestation of the will of the People. Rather, it may be seen as a substitution of the People's will expressed directly in the Constitution.

King, 81 N.Y.2d at 253-254 (internal quotations and citations omitted; emphasis added).

In *King*, the Court of Appeals held that a century-old practice, used thousands of times, allowing the Legislature to "recall" from the Governor's desk a bill duly passed by both houses was unconstitutional. *Id*. at 257. While the practice

was "long-standing" and accepted by both the executive and legislative branches, it was nonetheless not contemplated under the Constitution and was, therefore, illegal. *Id*. at 254-255.

The instant matter presents a similar circumstance. The Legislature's frequent practice of voting upon proposed amendments prior to the receipt of the AG opinion does not alter the fact that Constitution prohibits the practice. Just as the Legislature had no constitutional authority to recall a bill from the Governor's desk, no matter how many times it did so, it likewise has no power to vote upon a proposed amendment prior to its receipt of the AG opinion, no matter how many times it has done so.

"It has never been the law in this State that the clear and unambiguous wording of a statute or constitutional provision may be overlooked entirely when it is seemingly inconsistent with the practice and usage of those charged with implementing the laws." *Anderson v. Regan*, 53 N.Y.2d 356, 362 (1981). This principle is not diluted by good intentions or the alleged importance of the matter under consideration. "Nevertheless, neither practice nor intentions can modify the express provisions of the Constitution. Sometimes the interpretation of a doubtful and obscure clause in an act of the Legislature, or in a Constitution, may be aided by the practice which has grown up under it, but plain and clear provisions of a Constitution require no such aid; they are to be enforced and brought to life early

or late, and must not be smothered by the accumulation of custom or violations." *Wendell v. Lavin*, 246 N.Y. 115, 120 (1927).

E. "Substantial Compliance"

Appellants argue that, even if the Legislature is required to receive the AG Opinion before it votes, the Legislature "substantially complied" with this mandate when it adopted the Proposed Amendment. *See* App. Br. at pp. 26-29. This odd contention is based upon the fact that the Legislature introduced numerous amendment resolutions that were similar to the Proposed Amendment and, apparently, received opinions on those measures. The Legislature, however, did not adopt any of these other proposals. *See Id*. at pp. 27-28.

The fact that the Legislature introduced other similar proposals is entirely irrelevant to the question at hand. As Appellants admit, the Constitution requires the Legislature to refer any proposed amendment to the AG for an opinion. *See Id*. at p. 2. Nonetheless, according to Appellants, it seems that if the Legislature refers one proposed amendment to the AG, it does not have to refer another, somewhat similar measure to the AG because, by referring the first, it has "substantially complied" with the requirement of the Amendment Article. *See Id*. at pp. 27-28. Thus, the Legislature is the judge of its obligations. If it refers one proposed amendment and receives an opinion thereon, it need not refer a second or third

proposed amendment should the Legislature deem them similar in nature to the first.

The failure to receive the AG Opinion prior to holding a vote on the Proposed Amendment is not "substantial compliance" with the Constitution. It is non-compliance. Contrary to Appellants' claim, the circumstances here are nothing like those presented in *Schneider v. Rockefeller*. In *Schneider*, the plaintiff alleged that the Legislature had adopted a bill in violation of the Constitution's three-day aging requirement. 31 N.Y.2d 420 (1972). The Court of Appeals, however, found that the Legislature complied with the three-day waiting period, a period that was only interrupted when the bill was removed from the desks of the members to correct "printing errors." *Schneider*, 31 N.Y.2d at 434. "The bill was originally placed on the legislative desks at 10:00 a.m. on Wednesday, December 15, 1971. Sometime later that day, it was withdrawn for correction of printing errors. The corrected copy of the bill was returned to the legislative desks at about 11:15 p.m. the same day, and the bill was passed three days later, on Saturday, December 18, 1971." *Id.* at 434-435. The Court of Appeals did not excuse the Legislature from compliance with the requirements of Constitution. It held, based upon the precise facts, that the Legislature had complied with its mandate since the "bill was passed three days later". *Id*. at 435.

The Amendment Article does not create a vague process whereby the Legislature can decide when it has gleaned enough information from the AG about a particular topic. A flurry of referrals to the AG on measures that were never adopted does not cure the failure to await and receive the AG Opinion on the Proposed Amendment. The amendment process is straightforward: introduce, refer, receive opinion (within 20 days) and vote. Nothing more is required, and nothing less is permissible.

POINT III

APPELLANTS' PROCEDURAL ARGUMENTS ARE WITHOUT MERIT

In the alternative to their arguments on the merits of the question, Appellants proffer several procedural bases upon which they claim the Court should reverse the Order and dismiss this case. None has merit.

A. Justiciability

Appellants argue that this matter pertains to the "Legislature's internal affairs" and is therefore not justiciable. *See* App. Br. at pp. 29-30. This contention warrants little comment. A controversy concerning whether the Legislature has acted "*beyond its delegated authority*" under the Constitution "is justiciable." *New York State Bankers Ass'n v. Wetzler*, 81 N.Y.2d 98, 102 (1993) (emphasis original). The determination of such questions goes to the heart of the purpose of the judicial branch. "The courts will always be available to resolve disputes concerning the

scope of that authority which is granted by the Constitution to the other two branches of the government." *Saxton v. Carey*, 44 N.Y.2d 545, 551 (1978). There is no more justiciable question than the one posed by this case, asking the Court to decide whether the Legislature transgressed the limits on its power set down in the Constitution.

B. Statute of Limitations

Appellants maintain that the Court should dismiss this action as untimely. They allege that Respondents' claim could have, and should have, been commenced under CPLR Article 78 and is therefore subject to a four-month statute of limitations. This assertion is simply absurd.

Pursuant to Article III §1 of the Constitution, the Legislature constitutes the legislative branch of the government. The procedures of CPLR Article 78 cannot be used to challenge the acts of the Legislature, and Respondents are aware of no instance in which an Article 78 proceeding has been commenced against the Legislature itself. "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).

When the Legislature acts, by definition, it legislates. It cannot perform an administrative function of the executive branch or the quasi-judicial function of a board or commission, and it did not purport to do so when it adopted the Proposed Amendment. The acts of the Legislature may never be challenged via an Article 78 proceeding.

Furthermore, it is well-established that the validity of a legislative act may be reviewed only by a plenary action for a declaratory judgment. "Whenever governmental activity is being challenged, the immediate inquiry is whether the challenge could have been advanced in a CPLR article 78 proceeding. The determinative question in such case is whether the challenge is to a legislative act since such a challenge cannot be pursued in a CPLR article 78 proceeding but rather must be maintained in an action for a declaratory judgment." *Frontier Ins. Co. v. Town Bd. of Town of Thompson*, 252 A.D.2d 928, 929 (3d Dept 1998) (internal citations omitted); *Wright v. Cnty. of Cattaraugus*, 41 A.D.3d 1303, 1304 (4th Dept 2007) ("Plaintiff commenced this action to challenge a legislative act, and the proper procedural vehicle for challenging a legislative act is a declaratory judgment action."). Put simply, an action for a declaratory judgment is "the appropriate vehicle for examination of the constitutionality of legislation." *Boryszewski v. Brydges*, 37 N.Y.2d 361, 365 (1975).

Appellants advance the nonsensical notion that Respondents' claim is "procedural" and therefore may be challenged by an Article 78 proceeding. Respondents challenge the Legislature's constitutional power to adopt the Proposed Amendment, alleging that the Legislature exceeded its authority and acted in an illegal *ultra vires* manner when it adopted the Proposed Amendment. A challenge to a body's power and jurisdiction to act is properly brought as declaratory action. *Ernalex Constr. Realty Corp. v. City of Glen Cove*, 256 A.D.2d 336, 338 (2d Dept 1998) ("The alleged failure to comply with the referral provisions of the statute is not a mere procedural irregularity but is rather a jurisdictional defect involving the validity of a legislative act. Since the validity of a legislative act is raised, the issue is reviewable in a declaratory judgment action.").

Appellants incorrectly argue that their position finds support in the holding handed down in *Save the Pine Bush v. City of Albany*. In *Pine Bush*, the Court of Appeals reiterated that "[t]he general rule is that an article 78 proceeding is unavailable to challenge the validity of a legislative act such as a zoning ordinance. However, when the challenge is directed not at the substance of the ordinance but at the procedures followed in its enactment, it is maintainable in an article 78 proceeding." 70 N.Y.2d 193, 202 (1987).

Applying the rule, the Court of Appeals dismissed causes of action that challenged the defendant's compliance with the State Environmental Quality Review Act ("SEQRA"), holding that such causes of action should have been brought under CPRL Article 78 within four months of the SEQRA determination. At the same time, the Court refused to dismiss the cause of action challenging the constitutionality of the statute in issue. "Plaintiffs/petitioners also raised a constitutional question based upon the claimed vagueness of the ordinance…As this challenge could not be maintained in an article 78 proceeding, the four-month limitation period is inapplicable to this claim." *Save the Pine Bush, Inc.*, 70 N.Y.2d at 203-204.

A determination under SEQRA is a distinct and independent administrative determination that precedes the adoption of certain legislation. The issuance of a SEQRA determination is not a legislative act and, therefore, is plainly reviewable via a CPLR Article 78 proceeding. CPLR §7803(3); *Ecumenical Task Force of Niagara Frontier, Inc. v. Love Canal Area Revitalization Agency*, 179 A.D.2d 261, 265 (4th Dept 1992). Here, there is no separate administrative component to the Legislature's act—only the validity of its adoption of the Proposed Amendment is in issue.

Moreover, where, as here, a legislative body acts in an *ultra vires* manner and in excess of its jurisdiction, its action is defective and void *ab initio*. No statute

of limitations runs against a challenge to it. *Foy v. Schechter*, 1 N.Y.2d 604, 615 (1956) (statute of limitations not applicable "where the commission's resolution is attacked for lack of power."). An invalid law "cannot become operative through the mere passage of time" and is always subject to challenge. *Hoehmann v. Town of Clarkstown*, 40 N.Y.3d 1, 6 (2023); *Fichera v. New York State Dep't of Env't Conservation*, 159 A.D.3d 1493, 1496 (4th Dept 2018) ("Contrary to the contentions of the Town respondents and the Owners, where, as here, there is a jurisdictional defect, the statute of limitations does not begin to run upon the filing of [the] jurisdictionally defective document.").

Therefore, Appellants' contention that Respondents' claim is time barred is baseless.

C. Laches

Appellants next allege that the Court should dismiss this case under the principles of laches. Appellants allege that Respondents' "delay" in the commencement of this action is causing "uncertainty" about "what is at stake in the in the forthcoming general election." *See* App. Br. at p. 35.

"Laches is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' (2 Pomeroy, Equity Jurisprudence (5th ed.), s 419, pp. 171—172). The essential

element of this equitable defense is delay prejudicial to the opposing party." *In re Estate of Barabash*, 31 N.Y.2d 76, 81 (1972). None of the elements of the defense is applicable to this matter.

Respondents commenced this action more than a year in advance of the November 2024 general election, allowing ample time for the adjudication of the claim. The Supreme Court issued a dispositive ruling on the matter six months in advance of the election. The relief that the Supreme Court awarded to Respondents is prospective only. The Order removes the Proposed Amendment from the ballot at an election that has not yet occurred and that is still months away.

The Court of Appeals recently rejected laches as a bar to the enforcement of the mandates of the Constitution in the *Hoffmann* case. In *Hoffmann*, although congressional districts had been determined pursuant to court-sanctioned maps in 2022, the Court of Appeals held that the Constitution's limit on the duration on such maps trumped any concern about re-drawing the district lines in 2024 for the November election. 2023 N.Y. LEXIS 1968 at 37-40. Like the petitioners' claim in *Hoffmann*, Respondents' claim looks to an "act in the future" where there is sufficient time for the courts to decide whether the Proposed Amendment is valid. "We therefore see no basis to impose a laches bar to prevent the citizens of New York from having districts drawn as the Constitution commands." *Hoffmann*, 2023 N.Y. LEXIS 1968 at 39-40. The same is true for the Proposed Amendment—there

is no basis to "impose a laches bar" to the question of whether the Legislature has followed the process for the amendment of the Constitution.

By contrast, in *Schulz v. State*, to which Appellants cite, the Court of Appeals was asked to invalidate a past action upon which parties had relied in making significant decisions. In *Schulz*, the plaintiffs alleged that "various public financing statutes violate provisions of the New York State Constitution pertaining to how the State may incur debt." *Schulz v. State*, 81 N.Y.2d 336, 342 (1993). The *Schulz* plaintiffs commenced their challenge to the statutes a year after their enactment, by which time the State had, in reliance on the law, sold more than $377 million in bonds to investors. The Court of Appeals declined to consider the merits of the plaintiffs' claims "in light of the great prejudice certain to be inflicted on the State and its citizens at large when financial transactions of such magnitude and destabilizing impact are at stake and may be upset." *Schulz*, 81 N.Y.2d at 349-350.

Here, there is nothing to undo. In *Schulz*, the Court of Appeals faced a situation in which it was called upon to declare invalid hundreds of millions of dollars in financial transactions, affecting both investors and the finances of the State. "Metaphorically, the impossibility of putting genies back in their bottles springs to the imagination." *Schulz*, 81 N.Y.2d at 348. The dilemma was the result of the fact that the plaintiffs had waited a year, during which time the State and private parties had engaged in a series of transactions in reliance on the law as

enacted. By contrast, Respondents commenced this action more than a year *prior* to the time at which the Proposed Amendment would appear on the ballot. In fact, even if the Proposed Amendment were returned to the ballot and approved, pursuant to the terms of the Amendment Article, it would not become effective until January 1, 2025.

The disappointment of partisans of the Proposed Amendment who planned to campaign for its adoption is not "prejudice." Appellants allege that the campaign in favor of the Proposed Amendment began in mid-2023, but do not explain why, given the alleged import of this matter, the Legislature decided to submit the Proposed Amendment to the voters at the 2024 election instead of the 2023 election.

Regardless, should Respondents ultimately prevail, the parties that support the Proposed Amendment will lose nothing. They will merely have to save their campaign for another general election. Respondents do not seek to bar permanently the Proposed Amendment from the ballot. The Legislature is free to put the Proposed Amendment to another vote, and, if adopted, to send it on to the electorate, so long as it does so in manner that conforms to the requirements of the Amendment Article.

Finally, if, as Respondents allege, the adoption of the Proposed Amendment is invalid, then it lacks operative effect and is always subject to challenge. A law

that is improperly adopted "cannot become operative through the mere passage of time." *Hoehmann*, 40 N.Y.3d at 6. In *Hoehmann*, the Court of Appeals struck down three local laws, adopted in 2014, as invalid because they had not been submitted to a mandatory referendum prior to their adoption. The case reached the Court nearly a decade after the enactment of the laws in question. Thus, even if the Proposed Amendment were placed upon the ballot and approved, it would always be subject to challenge on the grounds that Legislature's initial adoption of the amendment was invalid and void *ab initio*.

It is a far better for the courts to dispose of the question of the Proposed Amendment's validity before it may become a component of the Constitution than to strike it from the Constitution after its adoption by the electorate. Indeed, if the Proposed Amendment were restored to the ballot and ratified by the electorate, in any action brought for a violation of its terms, the defendant in such an action could seek dismissal by asserting the same claim that Respondents assert here. There is no "deadline" that shields an invalid legislative act from review—if the Proposed Amendment is invalid *ab initio*, then it may be annulled at any time for its lack of operative effect.

As such, laches has no application here and does not bar the Court's consideration of Respondents' claim.

D. Standing

Appellants' last stand is standing. In summary, Appellants allege that Respondents cannot maintain this action as citizens-taxpayers because such standing is limited to "challenges to the expenditure of state funds." *See* App. Br. p. 37. Fifty years of Court of Appeals' precedents demonstrate that Appellants' cramped depiction of taxpayer standing is simply inaccurate.

The Court of Appeals established a right of standing for any taxpayer who challenges the acts of the political branches on constitutional grounds in *Boryszewski v. Brydges*.

> We are satisfied that the time has now come when the judicially formulated restriction on standing (which we recognize has had a venerable existence) should be modified to bring our State's practice with respect to review of State legislative action into conformity not only with the practice in the majority of other States but also with the procedural standing of taxpayers to challenge local actions (General Municipal Law, s 51). We are now prepared to recognize standing where, as in the present case, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action. In the present instance it must be considered unlikely that the officials of State government who would otherwise be the only ones having standing to seek review would vigorously attack legislation under which each is or may be a personal beneficiary. Moreover, it may even properly be thought that the responsibility of the Attorney-General and of other State officials is to uphold and effectively to support action taken by the legislative and executive branches of government. As Judge Fuld wrote generally in St. Clair (supra, 13 N.Y.2d p. 79, 242 N.Y.S.2d p. 47,

> 192 N.E.2d p. 19) 'The suggestion * * * that the Attorney-General and other state officials may be relied upon to attack the constitutional validity of state legislation is both unreal in fact and dubious in theory'. His estimate of the situation has been verified in the years since St. Clair.
>
> Where the prospect of challenge to the constitutionality of State legislation is otherwise effectually remote, it would be particularly repellant today, when every encouragement to the individual citizentaxpayer is to take an active, aggressive interest in his State as well as his local and national government, to continue to exclude him from access to the judicial process—since Marbury v. Madison, 1 Cranch (5 U.S.) 137, 2 L.Ed. 60, the classical means for effective scrutiny of legislative and executive action. The role of the judiciary is integral to the doctrine of separation of powers. It is unacceptable now by any process of continued quarantine to exclude the very persons most likely to invoke its powers.
>
> We, therefore, recognize the standing of these petitioners to raise for judicial adjudication the claims of unconstitutionality that they now urge upon us.

Boryszewski, 37 N.Y.2d at 364–65.

Ironically, Appellants argue that there is no "impenetrable barrier" to standing because the AG has standing to commence this action while, at the same time, it is the AG that is defending against Respondents' claim on behalf of the Legislature. Appellants also concede that a member of the Legislature has standing to bring the instant action, but simultaneously argue that Respondent Byrnes, a sitting member of the Assembly, does not have standing because she did not expressly allege the magical words that conjure up "legislator standing." *See* App.

Br. at p. 37. When members of the Assembly brought a challenge to the governor's practice of submitting budget bills to the Legislature outside of the deadlines set by the Constitution, the Third Department, citing *Boryszewski*, did not quibble over the technicalities of "legislator standing" in recognizing that these members were impacted in their duties by the governor's unconstitutional submissions. "Inasmuch as plaintiffs suffer injury within their zone of interest, protected by NY Constitution, article VII, § 3 and State Finance Law § 24, they have standing here." *Winner v. Cuomo*, 176 A.D.2d 60, 63-64 (1992).

The same is true here, where a member of the Assembly challenges the practice of her house by which it engaged in the unlawful adoption of a constitutional amendment that she voted against. A legislator has standing to vindicate her interest in her core duty—to consider and vote upon valid legislation. Where, as here, the Legislature improperly and illegally adopts a measure that it has no authority to adopt, and where the individual legislator votes against its adoption, she has the "capacity and standing to sue when conduct unlawfully interferes with or usurps" her prime duty as a member of the body. *Silver v. Pataki*, 96 N.Y.2d 532, 542 (2001).

Whether applied to a legislator or citizen, the standing rule in constitutional challenges is as broad as it is simple. "None may read the majority opinion in *Boryszewski v. Brydges* without concluding that *a citizen or taxpayer has the right*

to challenge in the courts, as unconstitutional, acts of government—'the classical means for effective scrutiny of legislative and executive action.'" *Wein v. Carey*, 41 N.Y.2d 498, 500–01 (1977) (internal citations omitted) (emphasis added).

Appellants' attempts to erect hyper-technical barriers to the review of this matter are just that—sham efforts to shield this important constitutional question from review. To do so, they rely heavily upon the holding in *Silver*, but *Silver* is only marginally relevant to this matter and, in its limited application, supports Assemblywoman Byrnes' standing. In *Silver*, the Speaker of the Assembly brought a separation of powers claim against the governor and, in so doing, essentially sought to represent the interests of the Assembly as body. The Assembly was not named as a party. Thus, the analysis of standing turned upon whether the Speaker, as individual legislator, suffered himself a direct injury that allowed him to assert a claim that would otherwise belong to Assembly as an institution. Here, Assemblywoman Byrnes does not seek to represent the interests of her house against the executive branch. She is, on the contrary, adverse to the Legislature, as she claims that both houses violated the Constitution by their adoption of the Proposed Amendment. She has standing to vindicate her own rights as a member of a body and to seek a remedy to correct the Legislature's defiance of the constitutional order.

Furthermore, and critically, the dissent in *Silver* expressly notes that "citizen-taxpayer standing" was "a ground not asserted in this action." *Silver*, 96 N.Y.2d 532, 544-545 (Graffeo, J. dissenting). In fact, apparently because the Assembly Speaker did not raise the issue, the holdings in *Boryszewski* and *Wein* are not referenced in *Silver*. Unlike Assemblywoman Byrnes, Speaker Silver never claimed the right of standing in constitutional cases that belongs to every citizen.

There is no requirement that Respondents show anything other than that they are citizens of the State. Every citizen has an inherent interest in upholding the Constitution and every citizen suffers an inherent harm when the political branches violate its commands and exceed the limits on their powers. The Constitution is the voice of the People, and it is from the People that all political power flows.

> To draw from the key language of *Boryszewski*, should the Executive and Legislative Branches, with the support of our subsequent standing cases, be allowed to erect an impenetrable barrier to any judicial scrutiny of legislative actions which are alleged to have violated the highest organ of law, the State Constitution itself? We conclude not. *History and sound checks-and-balances principles of governance recognize the People as the source of all governmental power.*

Schulz, 81 N.Y.2d at 345 (internal citations and quotations omitted) (emphasis added).

In New York, a citizen has standing to commence an action to enforce the provisions of the Constitution or to challenge an act of the executive or legislative branches as unconstitutional. This salutary principle, enabling citizens to call upon

the courts to review the acts of the political branches, is the surest means to make effective the mandates of the Constitution, just as Respondents here seek to do. To close the door of the courts to citizens, including a sitting member of the Legislature, who have assumed a duty shirked by the elected members of both the executive and the legislative branches, and by an AG who refuses to defend the role that the Constitution assigns to her office, would violate fifty years of sound judicial reasoning under which citizens have secured the basic right to be heard in defense of the Constitution.

> Were we to agree with the State and deny standing as to all plaintiffs in this action, an important constitutional issue would be effectively insulated from judicial review, something we cautioned against in *Boryszewski v. Brydges*…
>
> It follows that our doctrines governing standing must be sensitive to claims of institutional harm. Actions of this type can serve as a means for citizens to ensure the continued vitality of the constraints on power that lie at the heart of our constitutional scheme. Thus, where a denial of standing would pose in effect an impenetrable barrier to any judicial scrutiny of legislative action, our duty is to open rather than close the door to the courthouse…
>
> Standing is properly satisfied here, lest procedural hurdles forever foreclose adjudication of the underlying constitutional issue.

Saratoga Cnty. Chamber of Com., Inc. v. Pataki, 100 N.Y.2d 801, 814–15 (2003) (internal citations and quotations omitted).

In spite the of the repeated and emphatic holdings of the Court of Appeals, Appellants insist that this Court should "forever foreclose" review of this constitutional question. It is a position that finds no support in the law, nor in the basic principles that underpin our constitutional order.

E. Prospective Application

Echoing St. Augustine, Appellants ask the Court to make them follow the Constitution—but not yet. This plea for "prospective application" would have the Court permit the Legislature to place the illegally adopted Proposed Amendment upon the ballot so as not to upset the political plans of some members of the body.

There is absolutely no basis for limiting a holding in this manner. Respondents have presented a live actual controversy for adjudication. They have a right to an efficacious determination, not an advisory opinion that admonishes the Legislature against future transgressions. CPLR §3001 permits the Court to determine "the rights and other legal relations of the parties to a justiciable controversy." A Court may not issue a declaration regarding speculative future contingencies that may never come to pass. "But a request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur. Then any determination the court may make would be merely advisory since it can have no immediate effect and may never resolve anything."

New York Public Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527, 531 (1977).

Contrary to Appellants' claim, the Court of Appeals in *King v. Cuomo* did not issue the kind of "prospective" declaration that they seek here. As discussed above, in *King*, the Court of Appeals held that the Legislature lacks the power to recall a bill that it has passed and sent to the Governor. When the matter came before the Court, the relevant act was complete—the Legislature had already recalled the bill that gave rise to the controversy. Since the act was finished, the Court could only declare that it was illegal when taken and that the practice must cease.

The plaintiff in *King* also sought relief by way of mandamus under CPLR Article 78, whereby the plaintiff asked the Court to order the Secretary of State to certify that the recalled bill had become law. The Court declined to issue such a directive, principally because it found that, under the circumstances, the bill was not on the Governor's "desk for the requisite 10 days, within the meaning of article IV, § 7" and had lapsed at the end of the legislative session. *King*, 81 N.Y.2d at 256. As such, the Court in *King* did not render an academic declaratory judgment. It declared the recall practice illegal. It merely declined to issue a writ of mandamus compelling the Secretary of State to issue a certificate.

Similarly, in *Campaign for Fiscal Equity v. Marino*, the Court of Appeals declared unconstitutional the Legislature's practice of refusing to present bills that had passed both houses to the governor for approval or veto. 87 N.Y.2d 235 (1995). While the Court held that the practice was not permitted, the specific bill in question had passed the Legislature a year-and-a-half before the matter came in front of the Court of Appeals. Although the bill should have been presented to the governor upon passage, it was not so presented, and, as a practical matter, the Court could not go back in time to remedy the violation. "Finally, although the practice of withholding bills passed by both houses of the Legislature is not constitutionally authorized, a retroactive ruling in the instant case is not warranted." 87 N.Y.2d at 239.

Here, the question before the Court pertains to a future event—the submission of the Proposed Amendment to the voters and its possible ratification. Unlike the circumstances in *King* and *Marino*, there is no completed act that the Court would need a time machine to correct. As Respondents stress above in relation to laches, there is no act to undo. Respondents no more seek a "retroactive" ruling than does any party that challenges the validity of a law on constitutional grounds. The courts do not allow unconstitutional laws to stand because striking them down would be "disruptive," and thereby limit their holdings to warning against future illegal enactments.

Barring the Proposed Amendment from appearing on the ballot at the November 2024 general election would not be "profoundly disruptive for voters" because some voters expect to see the Proposed Amendment on the ballot. Some voters may be disappointed, but the election will go on. Their disappointment is not a ground upon which to excuse the Legislature from obedience to the Constitution.

CONCLUSION

Wherefore, based upon the foregoing, the Court should uphold the Order in its entirety.

Dated: Garden City, New York
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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(j) the foregoing brief was prepared on a computer.

Type: a proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count: I certify that the total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum containing statues, rules, regulations, etc., is 11,042.