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VIA FEDERAL EXPRESS
Clerk's Office
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: Matter of Amanda K. Vignone (Peregrine Enterprises, Inc. d/b/a Rick's Cabaret – Commissioner of Labor) – Third Department Case No. 526466

Dear Clerk of the Court:

This firm represents employer-appellant Peregrine Enterprises, Inc. d/b/a Rick's Cabaret ("Peregrine") in the above-referenced appeal before this Court.

Pursuant to the Court's letter, dated May 20, 2020, we write to provide our comments demonstrating the propriety of the Court's retention of subject matter jurisdiction over this appeal pursuant to CPLR § 5601(b)(1). That section of the CPLR provides that "[a]n appeal may be taken to the court of appeals as of right … from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States." As demonstrated in this letter, in the briefing and record that was before the Appellate Division, and the Appellate Division's Memorandum and Order determining the appeal, the retention of subject matter jurisdiction here is proper because (i) the appeal is from an order of the Appellate Division that finally determined this action; and (ii) the only issue arising from the Appellate Division's decision is, and the only basis for the Appellate Division's decision was, the construction of both the United States Constitution and the New York State Constitution and whether New York Labor Law § 625 constitutes an unconstitutional bar to access to the courts by indigent defendants in violation of, among other things, the Due Process and Equal Protection Clauses of the United States and New York Constitutions.

As per the Court's request, we also enclose herewith copies of each brief filed by each party in the Appellate Division, all motion papers filed in the Appellate Division, the record on appeal and addendum record. A proof of service of one copy of this letter on each party is also enclosed.

Relevant Background and Procedural History

In June 2017, the New York Unemployment Insurance Appeal Board (the "Board") affirmed an Administrative Law Judge's August 27, 2013 decision, which assessed Peregrine in the amount of $660,573.40 in unemployment insurance contributions and a penalty in the amount of $330,286.70. With interest, the assessment and penalty owed by Peregrine ballooned to over $2.2 million. The basis for this assessment and penalty was that certain exotic dancers were found by the Board to be misclassified as independent contractors when they were, according to the Department of Labor, employees.

On June 30, 2017, Peregrine timely filed a Notice of Appeal from the Board's decision to the Third Department. Peregrine's right to appeal is authorized by Labor Law § 624. Almost two years after Peregrine filed its Notice of Appeal, the Commissioner of Labor (the "Commissioner") filed a Motion to Dismiss Appeal with the Third Department, requesting that the appeal be dismissed because Peregrine had not satisfied the condition precedent to being permitted to appeal under Labor Law § 625. Specifically, the Commissioner argued that the appeal should be dismissed because Peregrine had not either deposited a certified check or filed an undertaking with the Commissioner in the amount of $2,247,947.10, plus daily interest of $326.98 for each day from May 26, 2018 to the date that the check or undertaking is sent.

Labor Law § 625 states as follows:

> No appeal shall be taken by an employer from a decision of the appeal board determining a sum to be due from such employer unless the amount involved, with interest and penalties thereon, if any, shall be first deposited with the commissioner and an undertaking filed with the commissioner, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that the employer will pay all costs and charges which may be adjudged against him in the prosecution of such appeal. At the option of the employer, such undertaking may be in a sum sufficient to cover the said amount, interest, penalties, costs, and charges as aforesaid, in which event the employer shall not be required to deposit such amount, with the interest and penalties, as a condition precedent to the taking of an appeal.

Peregrine opposed the Commissioner's Motion to Dismiss Appeal and filed a Cross-Motion, in which Peregrine demonstrated that it could not either pay or bond the amount the Board assessed and argued at length that Labor Law § 625 violates the New York and United States Constitutions. That critical and substantial constitutional question – the very same question presented on appeal to this Court – was briefed in great detail on the Motion and Cross-Motion. The Third Department ultimately denied both the Motion and Cross-Motion, without prejudice to the issues involved being raised upon argument of the appeal. A copy of that order is enclosed.

In the subsequently-filed appeal briefs, both the Commissioner and Peregrine again briefed at length the issue of whether Labor Law § 625 violates the New York and United States Constitutions. In fact, in its brief, the Commissioner did not even address the merits – whether

the dancers were properly classified as employees or independent contractors. Rather, the Commissioner's ***only*** argument on appeal was that the appeal should be dismissed under Labor Law § 625 and that said statute was not unconstitutional.

In its appeal briefs, Peregrine demonstrated that it did not have the financial resources to pay or obtain an undertaking in the amount required by Labor Law § 625. Thus, Peregrine argued that dismissing the appeal for failure to comply with Labor Law § 625 would be akin to ruling that New York's legislature is permitted to (i) limit the undisputed right to appeal decisions of the Board to the wealthy, and (ii) discriminate against litigants who cannot afford the purported payment and undertaking requirements of Labor Law § 625. But, as Peregrine demonstrated in its brief below, the United States Supreme Court, Second Circuit and New York Courts have all made clear that the courthouse doors cannot be closed to those who cannot afford the price of admission. Rather, the legislature must remove financial barriers to the courts, including to appellate courts. Indeed, the Supreme Court of the United States has made clear that it is "fundamental" that, once established, avenues of appellate review must be kept free of unreasoned distinctions, such as financial barriers, that can only impede open and equal access to courts. Accordingly, Peregrine demonstrated that, Labor Law § 625, as applied to Peregrine, violates both the due process and equal protection clauses of the New York and United States Constitutions.[1]

The Third Department issued its Memorandum and Order on April 23, 2020 (the "Decision"). In that Decision, the Third Department did not address the merits. Instead, the Third Department dismissed the appeal solely on the grounds that Peregrine had failed to comply with Labor Law § 625 – that is, "Peregrine has failed to either deposit the sum due, as determined by the Department and sustained by the Board, or file an undertaking 'in a sum sufficient to cover' the sum due, which is a condition precedent to the taking of an appeal." In so holding, the Third Department indicated that it was "unpersuaded by Peregrine's argument challenging the constitutionality of Labor Law § 625 as applied due to its alleged inability to pay." The Third Department further concluded that "[a]lthough the undertaking requirement ***may have the effect of preventing certain litigants from bringing an appeal due to the inability to pay***, any change to the jurisdictional prerequisite prescribed in Labor Law § 625 is a matter properly addressed by the Legislature."

The Court of Appeals has Subject Matter Jurisdiction

This Court has subject matter jurisdiction because this appeal is taken "from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States." *See* CPLR § 5601(b)(1).

[1] In its brief below, Peregrine made additional arguments, including that (1) the court should not require Peregrine to pay, or file an undertaking for, over $2.2 million to exercise its statutorily-authorized right to appeal, because Peregrine does not have the financial ability to do so, (2) the court should not, and need not, interpret Labor Law § 625 as requiring, without exception, that the full assessment with penalties and interest be paid or bonded before an appeal can be prosecuted (i.e., the court should not interpret Labor Law § 625 as stripping the court of any discretion to waive or reduce the payment and undertaking requirement), and (3) the court should determine that, under the well-established "divisibility" exception, Peregrine need only pay, at most, the assessment and penalties attributable to one employee for one quarter to prosecute its appeal. The Third Department did not address these arguments.

As explained in The New York Court of Appeals Civil Jurisdiction and Practice Outline (the "Practice Outline") – available on the Court's website – "[t]he constitutional question must be both directly involved in the Appellate Division order and substantial." Practice Outline, at 4. The Practice Outline further counsels that (1) "[t]he constitutional question must have been properly raised in the courts below," and (2) "[t]he Appellate Division must have taken a view of the case that necessarily required it to pass upon the constitutional issue raised." *Id.*

Here, there can be no question that the constitutional question was directly involved in the Appellate Division order. Indeed, that constitutional question served as the ***entire basis*** for the Third Department's Decision. The constitutional question is also clearly "substantial." The Practice Outline states that:

> Whether a substantial constitutional question is presented is a determination that must be made on a case by case basis. The Court has examined the nature of the constitutional interest at stake, the novelty of the constitutional claim, whether the argument raised may have merit, and whether a basis has been established for distinguishing a state constitutional claim (if asserted) from a federal constitutional claim. The Court has stated that questions that have been "clearly resolved against an appellant's position . . . lack the degree of substantiality necessary to sustain an appeal as of right under CPLR 5601(b)(1)"

The constitutional question at issue on this appeal raises significant questions regarding the due process and equal protection clauses of the New York and United States constitutions – specifically, whether New York's legislature is permitted to (1) limit the undisputed right to appeal decisions of the Board to the wealthy, and (2) discriminate against litigants who cannot afford the purported payment and undertaking requirements of Labor Law § 625. The statute flies in the face of Supreme Court precedent holding that it is "fundamental" that, once established, avenues of appellate review must be kept free of unreasoned distinctions, such as financial barriers, that can only impede open and equal access to courts. Thus, a ***critical*** constitutional interest is at stake: access to the Courts.

The briefs and motion papers filed with and considered by the Third Department also make clear that (1) this is a novel question that has not been directly addressed by the Supreme Court of the United States or this Court, and (2) Peregrine's arguments have merit. Indeed, the Third Department's Decision fails to address Peregrine's legal analysis entirely, and merely cites three cases from the Third Department that Peregrine analyzed in great depth in its brief and demonstrated to be distinguishable and inapposite. This is certainly ***not*** the situation where the constitutional issues underlying an appeal "are not more than a restatement of questions whose merit has been clearly resolved against appellant's position." *See Matter of David A.C.*, 43 N.Y.2d 708, 709 (1977).

In fact, in its Decision, the Third Department acknowledged that "the undertaking requirement may have the effect of ***preventing certain litigants from bringing an appeal due to the inability to pay*** …" The Third Department concluded, however, that "any change to the jurisdictional prerequisite prescribed in Labor Law § 625 is a matter properly addressed by the

Legislature." Respectfully, that is incorrect. It is precisely the responsibility and obligation of the judicial branch to declare the constitutionality of state and federal statutes. Indeed, this Court has recognized that "[t]he courts are vested with a unique role and review power over the constitutionality of legislation." *Cohen v. State*, 94 N.Y.2d 1, 12 (1999). *See also Maron v. Silver*, 14 N.Y.3d 230, 263 (2010) ("whether the Legislature has met its constitutional obligations … is within the province of this Court"). That it is within the province of the courts to determine the constitutionality of legislative enactments – such as Labor Law § 625 – was decided over 200 years ago in the landmark decision of *Marbury v. Madison*, 5 U.S. 137 (1803).

Further, the fact that Peregrine did not prevail in its argument before the Third Department does not impact this Court's subject matter jurisdiction and the substantiality of the constitutional question. A party need not prevail on its constitutional argument in the court below to support an appeal on constitutional grounds. *See Rose v. Moody*, 83 N.Y.2d 65, 69 (1993) (in a case concerning federal preemption, finding that "while a substantial constitutional question is directly involved in this appeal, we resolve the issue against the appellants").

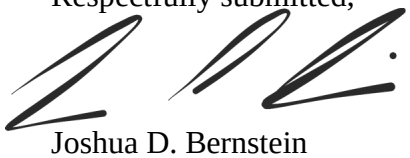
The constitutional question was also properly raised in the Appellate Division below.[2] As discussed above, not only was the constitutional issue raised in the parties' briefs, but it was also the subject of substantial motion practice before the Third Department.

Finally, the Third Department certainly took a view of the case that necessarily required it to pass upon the constitutional issue raised. There is clearly no independent non-constitutional ground for the Appellate Division's Decision. Rather, the Decision rests entirely on the Third Department's determination that Labor Law § 625 is constitutional.

For all of these reasons, the Court of Appeals has subject matter jurisdiction to hear this appeal under CPLR 5601(b)(1).

Thank you for your attention to this matter.

Respectfully submitted,



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[2] The constitutional question could not have been raised before the Board because Labor Law § 625's "pay or bond" requirement only applies when a litigant seeks to appeal the decision of the Board to the Third Department.