Onondaga County Clerk's Index No. 007623/2022
Appellate Division–Fourth Department Docket No. CA 23-01332

Court of Appeals

of the

State of New York

GARY J. LAVINE,

Plaintiff-Respondent,

– against –

ROBERT ORTT, as Senate Minority Leader,
and WILLIAM BARCLAY, Assembly Minority Leader,

Defendants-Appellants,

-and-

STATE OF NEW YORK, KATHY HOCHUL, as Governor,
ANDREA STEWART-COUSINS, as Temporary President of the Senate,
CARL HEASTIE, as Assembly Speaker, and the INDEPENDENT REVIEW COMMITTEE,

Defendants-Respondents.

MOTION FOR LEAVE TO APPEAL

MACKENZIE HUGHES, LLP
Stephen T. Helmer, Esq.
W. Bradley Hunt, Esq.
Attorneys for Defendants-Appellants Robert Ortt, as Senate Minority Leader, and William Barclay, as Assembly Minority Leader
440 South Warren Street, Suite 400
Syracuse, New York 13202
(315) 474-7571
shelmer@mackenziehughes.com
bhunt@mackenziehughes.com

CP COUNSEL PRESS (800) 4-APPEAL • (513956)

COURT OF APPEALS OF THE STATE OF NEW YORK

GARY J. LAVINE,

Plaintiff-Appellant,

v.

ROBERT ORTT, as Minority Leader of the Senate; WILLIAM BARCLAY, as Minority Leader of the Assembly;

Defendants-Appellants, and

STATE OF NEW YORK; KATHY HOCHUL, as Governor; ANDREA STEWART-COUSINS, as Temporary President of the Senate; CARL HEASTIE, as Speaker of the Assembly; and the INDEPENDENT REVIEW COMMITTEE,

Defendants-Respondents.

NOTICE OF MOTION FOR PERMISSION TO APPEAL

Appellate Division, Fourth Dept. Docket No.: 23-01332

Onondaga County Index No.: 007623/2022

PLEASE TAKE NOTICE that, upon the affirmation of W. Bradley Hunt, Esq., pursuant to Rule 500.22 of the Court of Appeals Rules of Practice, a motion will be made before this Court, at the Court of Appeals Hall, Albany, New York on the 9th day of September, 2024, for an order pursuant to CLPR § 5602 and/or CPLR

§ 5601 granting leave to appeal to this Court from the Memorandum and Order of the Appellate Division, Fourth Department dated and entered July 26, 2024.

PLEASE TAKE FURTHER NOTICE, responding papers must be received at the Court of Appeal with proof of service on or before the return date of this motion.

Argument in person is not permitted.

Dated: August 26, 2024

MACKENZIE HUGHES LLP

By: 

Stephen T. Helmer, Esq.
W. Bradley Hunt, Esq.
440 S. Warren Street, Suite 400
Mackenzie Hughes Tower
Syracuse, New York 13202
Telephone: (315) 474-7571
Email: bhunt@mackenziehughes.com

TO: Clerk of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 14604

John L. Valentino, Esq.
BOUSQUET HOLSTEIN PLLC
110 W. Fayette St., Suite 1000
Syracuse, New York 13202-1188

Craig R. Bucki, Esq.
PHILLIPS LYTLE LLP
Attorneys for Defendant Kathy Hochul
One Canalside
125 Main Street
Buffalo, New York 14203-2887

John L. Murad, Esq.
Anneliese Aliasso, Esq.
HANCOCK ESTABROOK, LLP
Attorneys for Defendant Andrea Stewart-Cousins, as Temporary President of the Senate
1800 AXA Tower I
100 Madison Street
Syracuse, New York 13202

Elliot A. Hallak, Esq.
Daniel R, LeCours, Esq.
HARRIS BEACH PLLC
Attorneys for Defendant Carl Heastie as Speaker of the Assembly
677 Broadway, Suite 1101
Albany, New York 12207

Karl J. Sleight, Esq.
Scott S. Allen, Esq.
Joan P. Sullivan, Esq.
Carmen A. Vacco, Esq.
LIPPES MATHIAS LLP
Attorneys for Defendant Independent Review Committee
54 State Street, Suite 1001
Albany, NY 12207

COURT OF APPEALS OF THE STATE OF NEW YORK

GARY J. LAVINE,

Plaintiff-Appellant,

v.

ROBERT ORTT, as Minority Leader of the Senate; WILLIAM BARCLAY, as Minority Leader of the Assembly;

Defendants-Appellants, and

STATE OF NEW YORK; KATHY HOCHUL, as Governor; ANDREA STEWART-COUSINS, as Temporary President of the Senate; CARL HEASTIE, as Speaker of the Assembly; and the INDEPENDENT REVIEW COMMITTEE,

Defendants-Respondents.

AFFIRMATION OF W. BRADLEY HUNT, ESQ., IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL

Appellate Division, Fourth Dept. Docket No.: 23-01332

Onondaga County Index No.: 007623/2022

W. Bradley Hunt, Esq., states under penalty of perjury as follows:

1. I am an attorney admitted to practice law in New York and a partner in the law firm Mackenzie Hughes LLP, attorneys for defendants-appellants Robert Ortt, in his capacity as New York Senate Minority Leader, and William Barclay, in

his capacity as New York Assembly Minority Leader. We will refer to Ortt and Barclay together as the "Minority Leaders."

2. I submit this affidavit in support of the Minority Leaders' motion for permission to appeal to the New York Court of Appeals.

Statement of Procedural History and Timeliness

3. The Minority Leaders seek permission to appeal from the Fourth Department's memorandum and order dated and entered on July 26, 2024. This motion is therefore timely.

4. No prior motion for permission to appeal was filed with the Fourth Department.

5. The Fourth Department's order is attached hereto as exhibit A. It affirmed an order of the Supreme Court, Onondaga County, which is attached hereto as exhibit B.

6. In the complaint, plaintiff-appellant Gary Lavine sought an order that he be seated as a member of the New York State Commission on Ethics and Lobbying in Government (the "Commission"). Record on Appeal ("R") at 9.

7. Minority Leader Ortt nominated Lavine to the Commission. R 5.

8. Lavine's nomination was rejected by the "Independent Review Committee" ("IRC"), a body created by Executive Law § 94, the statute that

established the Commission. R 5, 12-13. The IRC is composed of unelected, unappointed deans of accredited New York law schools. Executive Law § 94(2)(c).

9. Lavine filed this lawsuit in Supreme Court, Onondaga County, challenging the constitutionality of the power exercised by the IRC under Executive Law § 94. R 4-9.

10. The Minority Leaders, although sued as defendants, have supported Lavine's request for an order that he be seated as a member of the Commission. *See* Minority Leaders' Fourth Department Brief. *See also* R 35-36 (attorney affirmation stating: "The Minority Leader Defendants do not object to Plaintiff's request for relief to the extent he demands to be seated as a member of the Commission on Ethics and Lobbying in Government …. In fact, Defendant Minority Leader Ortt nominated Plaintiff to be a member of the Commission.").

11. The other defendants filed motions to dismiss in the Supreme Court. *See* ex. B at 2 (Supreme Court, Onondaga County decision).

12. The Supreme Court, Onondaga County ruled "that Defendants are granted judgment declaring that Executive Law § 94 is constitutional and that it was proper for the Independent Review Committee to reject or approve nominees in accordance with the provisions of Executive Law § 94." Ex. B at 8.

13. The Supreme Court did not address the Governor's argument that Lavine lacks standing to bring this case. Ex. B at 2, n. 1.

14. Lavine appealed to the Fourth Department. The Fourth Department did not address the merits of whether Executive Law § 94 is constitutional insofar as it gives the IRC veto power over nominees to the Commission. Ex. A (Fourth Department order).

15. Instead, the Fourth Department affirmed the Supreme Court's order on the basis that Lavine lacks standing. Ex. A at 2-3. The Fourth Department did not explain the reason for its determination that Lavine lacks standing. Ex. A at 2-3.

This Court's Jurisdiction

16. The Fourth Department's memorandum and order dismissed the complaint and finally determined the action. Ex. A. This Court therefore has jurisdiction pursuant to CPLR 5602(a)(1)(i).

17. In addition, as discussed below, the Minority Leaders respectfully submit that this appeal may be taken as of right under CPLR 5601(b)(1), because the Fourth Department's order "directly involved the construction of the constitution of the state."

Novel Questions of Public Importance Presented for Review

18. This case presents two novel issues of public importance that warrant this Court's review: (1) whether Executive Law § 94 is constitutional insofar as it gives the IRC – a committee composed entirely of unelected, unappointed deans of certain New York law schools – unreviewable veto power over nominees to the

Commission; and (2) whether either Lavine or Leader Ortt has standing to challenge the constitutionality of these provisions.

19. The first issue – the constitutionality of the statutory provisions giving the IRC veto power over nominees to the Commission – is exactly the kind of novel and important issue that should be decided by the Court of Appeals.

20. It bears noting that Lavine's reasons for opposing the constitutionality of the IRC provisions are somewhat different from the Minority Leaders' reasons.

21. Lavine takes the position that Executive Law § 94 wrongly confers the Senate's "advice and consent" power on the IRC. *See* Lavine's Fourth Department Brief at 6-17. The Minority Leaders take the position that – regardless of whether one views the IRC as exercising "advice and consent" power or some other form of legislative or executive power – Executive Law § 94 unconstitutionally confers important governmental power on a group of unaccountable private citizens. *See* Minority Leaders' Fourth Department Brief at 4-7.

22. In the only other case we know of to consider this issue, the Supreme Court, Albany County took the position that the Minority Leaders take here, ruling that the IRC's unconstrained veto power over appointments to the Commission violates the Constitution because "the legislature may not transfer to a private party power that the people gave to the government." *Cuomo v. New York State*

Commission, 81 Misc.3d 246, 264 (Sup. Ct. Alb. Co. 2023), *aff'd,* 228 A.D.3d 175 (3d Dept. 2024) (currently on appeal to the Court of Appeals).

23. The second issue – whether Lavine or Leader Ortt (who nominated Lavine) has standing to raise this important constitutional issue – also warrants review by this Court. As this Court has explained:

> our doctrines governing standing must be sensitive to claims of institutional harm …. 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.*

Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 814 (2003) (emphasis added; internal quotation marks and ellipsis omitted). *See also Schulz v. State,* 81 N.Y.2d 336, 355 (1993) ("What this Court should not do is fail to allow the merits of these constitutional issues to be addressed.").

24. With respect to Leader Ortt's standing, the Fourth Department incorrectly described Lavine as "the sole party challenging the constitutionality of Executive Law § 94 in this case" (ex. A at 2), and did not even discuss the Minority Leaders' brief challenging the constitutionality of the IRC provisions in Executive Law § 94.

25. The question of Leader Ortt's standing is particularly important because the IRC's veto power over appointments to the Commission directly undermines the lawful authority of the Minority Leaders to make appointments themselves. *See* Minority Leaders' Fourth Department Brief at 6-7.

26. It is also important to note that the Minority Leaders' interest is different from that of any party in the *Cuomo* case currently on appeal to this Court. *Cuomo,* 228 A.D.3d 175.

27. Unlike the governmental parties in the *Cuomo* case, the Minority Leaders take the position that the provisions in Executive Law § 94 conferring veto power on the IRC are unconstitutional. And unlike former Governor Cuomo, the Minority Leaders take the position that the Commission itself, and the provisions that establish the Commission apart from the IRC provisions, are constitutional. The Minority Leaders seek to uphold their important right to make nominations to the Commission without those nominations being subject to unreviewable veto by an unaccountable committee of law school deans.

This Appeal Also May Be Taken as of Right

28. The Minority Leaders also maintain that this appeal may be taken as of right under CPLR 5601(b)(1), because the Fourth Department's order "directly involved the construction of the constitution of the state."

29. This Court has recognized that, where a case involves the constitutionality of legislation as well as the standing of a party to raise the constitutional issue, there may be an appeal "as of right" under CPLR (b)(1). *See Schulz,* 81 N.Y.2d at 344.

30. Indeed, in *Schulz,* this Court held that an appeal as of right was "properly before us," where the appeal "requires us to decide the standing-to-sue issue in the

context of the challenge to various sections of chapter 190 of the State Laws of 1990." 81 N.Y.2d at 344. Similarly, in this case the appeal presents the issue of standing to challenge the IRC provisions of Executive Law § 94 "in the context of the challenge" to the constitutionality of those provisions. *Id.* *See also* Arthur Karger, *The Powers of the New York Court of Appeals* (3d ed. 2005) § 7.9, pp. 239-41 (discussing circumstances in which appeal as of right may be taken from order dismissing for lack of standing a challenge to constitutionality of statute).

31. The Minority Leaders recognize that this Court previously rejected Lavine's attempt to appeal as of right to this Court from the order of the Supreme Court, Onondaga County. R 1.13 (transferring appeal to Fourth Department). The Minority Leaders respectfully request that this Court now address this issue in the context of the Fourth Department's ruling dismissing Lavine's case solely for lack of standing.

Conclusion

32. For these reasons, this Court should issue an order granting the Minority Leaders' permission to appeal and granting the Minority Leaders such other relief as the Court deems proper.

Dated: August 26, 2024

W. Bradley Hunt

EXHIBIT A

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

GARY J. LAVINE,

Plaintiff-Appellant,

v.

STATE OF NEW YORK; KATHY HOCHUL, as Governor; ANDREA STEWART-COUSINS, as Temporary President of the Senate; ROBERT ORTT, as Minority Leader of the Senate; CARL HEASTIE, as Speaker of the Assembly; WILLIAM BARCLAY, as Minority Leader of the Assembly; and the INDEPENDENT REVIEW COMMITTEE,

Defendants-Respondents.

NOTICE OF ENTRY

Fourth Department Case No. CA 23-01332

Onondaga County Index No. 007623/2022

PLEASE TAKE NOTICE that the accompanying **Exhibit A** is a true copy of a Memorandum and Order that was issued by the New York State Supreme Court, Appellate Division, Fourth Department, and entered in the Office of the Clerk of the New York State Supreme Court, Appellate Division, Fourth Department, on July 26, 2024, in the above-captioned action.

Dated: Buffalo, New York
July 26, 2024

PHILLIPS LYTLE LLP

By: Craig R. Bucki

Craig R. Bucki
Attorneys for Defendant
Governor Kathy Hochul
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400
cbucki@phillipslytle.com

TO: BOUSQUET HOLSTEIN PLLC
Gary J. Lavine, Esq., *pro se*, & John L. Valentino, Esq., Of Counsel
Attorneys for Plaintiff-Appellant Gary J. Lavine
110 West Fayette Street, Suite 1000
Syracuse, New York 13202
Telephone No. (315) 422-1500 ext. 308
glavine@bhlawpllc.com
jvalentino@bhlawpllc.com

HANCOCK ESTABROOK, LLP
John L. Murad & Alan J. Pierce, Esqs., Of Counsel
Attorneys for Defendant Andrea Stewart-Cousins, as Temporary President of the Senate
1800 AXA Tower I
100 Madison Street
Syracuse, New York 13202
Telephone No. (315) 565-4500
jmurad@hancocklaw.com
apierce@hancocklaw.com

MACKENZIE HUGHES, LLP
Stephen T. Helmer & W. Bradley Hunt, Esqs., Of Counsel
Attorneys for Defendants Robert Ortt as Minority Leader of the Senate and William Barclay as Minority Leader of the Assembly
Mackenzie Hughes Tower
440 South Warren Street, Suite 400
Syracuse, New York 13202
Telephone No. (315) 474-7571
shelmer@mackenziehughes.com
bhunt@mackenziehughes.com

HARRIS BEACH PLLC
Elliot A. Hallak, Daniel R. LeCours, & Brian D. Ginsberg, Esqs., Of Counsel
Attorneys for Defendant Carl Heastie as Speaker of the Assembly
677 Broadway, Suite 1101
Albany, New York 12207
Telephone No. (518) 427-9700
ehallak@harrisbeach.com
dlecours@harrisbeach.com
bginsberg@harrisbeach.com

LIPPES MATHIAS LLP
Karl J. Sleight & Joan P. Sullivan, Esqs., Of Counsel
Attorneys for Defendant Independent Review Committee
54 State Street, Suite 1001
Albany, New York 12207
Telephone No. (518) 462-0110
ksleight@lippes.com
jsullivan@lippes.com

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

286

CA 23-01332

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

GARY J. LAVINE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, KATHY HOCHUL, AS GOVERNOR, ANDREA STEWART-COUSINS, AS TEMPORARY PRESIDENT OF SENATE, ROBERT ORTT, AS SENATE MINORITY LEADER, CARL HEASTIE, AS ASSEMBLY SPEAKER, WILLIAM BARCLAY, AS ASSEMBLY MINORITY LEADER AND THE INDEPENDENT REVIEW COMMITTEE, DEFENDANTS-RESPONDENTS.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (JOHN L. VALENTINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR DEFENDANT-RESPONDENT KATHY HOCHUL, AS GOVERNOR.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR DEFENDANT-RESPONDENT ANDREA STEWART-COUSINS, AS TEMPORARY PRESIDENT OF SENATE.

MACKENZIE HUGHES, LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ROBERT ORTT, AS SENATE MINORITY LEADER AND WILLIAM BARCLAY, AS ASSEMBLY MINORITY LEADER.

HARRIS BEACH PLLC, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT CARL HEASTIE, AS ASSEMBLY SPEAKER.

LIPPES MATHIAS LLP, ALBANY (KARL J. SLEIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT INDEPENDENT REVIEW COMMITTEE.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered February 9, 2023. The judgment declared Executive Law § 94 constitutional, declared that defendant the Independent Review Committee properly acted in accordance with that statute and dismissed plaintiff's cause of action seeking injunctive relief.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the motions and cross-motions pursuant to CPLR 3211 (a) (3), vacating the first decretal paragraph, and dismissing the complaint in its entirety, and as modified the judgment is affirmed without costs.

Memorandum: In 2022, the New York State Legislature amended Executive Law § 94, abolishing the former Joint Commission on Public Ethics and replacing it with the Commission on Ethics and Lobbying in Government (Commission) (*see* L 2022, ch 56, part QQ). Defendant Robert Ortt, as Senate Minority Leader, thereafter nominated plaintiff to serve on the Commission. This case arises from the determination of defendant the Independent Review Committee (IRC), the body responsible for vetting nominations for the Commission, not to confirm the nomination.

Plaintiff, alone, commenced this action against defendants seeking, inter alia, injunctive relief and a declaration that Executive Law § 94 is unconstitutional insofar as it delegated the Senate's "prerogative of advice and consent" to the IRC. Thereafter, defendants Kathy Hochul, as Governor, and the IRC separately moved to dismiss the complaint in its entirety pursuant to CPLR 3211 (a) (3) and (7). Defendants Andrea Stewart-Cousins, as Temporary President of the Senate, and Carl Heastie, as Assembly Speaker, separately cross-moved for an order dismissing the complaint in its entirety and against Heastie, respectively, pursuant to CPLR 3211 (a) (7). In deciding the motions and cross-motions, Supreme Court did not rule on the issue of plaintiff's standing but instead reached the merits of the action. The court effectively granted the motions and cross-motions insofar as they sought relief under CPLR 3211 (a) (7) by dismissing plaintiff's cause of action seeking injunctive relief and declaring "that Executive Law § 94 is constitutional and that it was proper for the [IRC] to reject or approve nominees in accordance with the provisions of [the statute]" (*see generally Matter of Kerri W.S. v Zucker*, 202 AD3d 143, 149, 151-153 [4th Dept 2021], *lv dismissed* 38 NY3d 1028 [2022]).

Plaintiff attempted to appeal as of right to the Court of Appeals, and the Court of Appeals, sua sponte, transferred the appeal to this Court "upon the ground that a direct appeal does not lie where questions other than the constitutional validity of a statutory provision are involved" (*Lavine v State of New York*, 39 NY3d 1174, 1174 [2023]; *see* CPLR 5601 [b] [2]).

Contrary to plaintiff's contention, we conclude that plaintiff, the sole party challenging the constitutionality of Executive Law § 94 in this case, lacks standing. We therefore conclude that, although the court properly granted the respective motions and cross-motions of Hochul, the IRC, Stewart-Cousins and Heastie (collectively, defendants), it should have done so on the " 'threshold determination' " of lack of standing rather than on the merits (*Matter of Borrello v Hochul*, 221 AD3d 1484, 1484 [4th Dept 2023], *appeal dismissed* 41 NY3d 1006 [2024]). Thus, we modify the judgment accordingly.

"Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, *when challenged*, must be considered at the outset of any litigation" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991] [emphasis

added]). "Where, as here, a defendant makes a pre-answer motion to dismiss based on lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied" (*Matter of Violet Realty, Inc. v County of Erie*, 158 AD3d 1316, 1317 [4th Dept 2018], *lv denied* 32 NY3d 904 [2018] [internal quotation marks omitted]). "A plaintiff has standing to maintain an action upon alleging an injury in fact that falls within [their] zone of interest" (*Silver v Pataki*, 96 NY2d 532, 539 [2001], *rearg denied* 96 NY2d 938 [2001]). "The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution" (*Society of Plastics Indus.*, 77 NY2d at 772 [internal quotation marks omitted]).

Here, the issue of plaintiff's standing to challenge the constitutionality of a statute has been properly raised by Hochul and the IRC. We conclude that they met their burden by establishing that plaintiff did not suffer an injury-in-fact and, in response, plaintiff failed to raise a question of fact as to his standing (*see generally Violet Realty, Inc.*, 158 AD3d at 1317; *Town of Islip v Cuomo*, 147 AD2d 56, 67 [2d Dept 1989]).

The issue of plaintiff's standing applies to all defendants, even those who have not raised that issue. "[L]ack of standing in the context of the constitutionality of a statute is not a matter for waiver by parties, for it is the courts which must decide whether the parties have a sufficient stake in the litigation to necessitate constitutional adjudication, and one party does not have the ability to confer standing upon another" (*Matter of Daniel C.*, 99 AD2d 35, 46 [1984], *affd* 63 NY2d 927 [1984]; *see Uhlfelder v Weinshall*, 47 AD3d 169, 183 [1st Dept 2007]).

In light of our determination, we do not address plaintiff's remaining contentions.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

EXHIBIT B

STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY

DECISION AND ORDER

GARY J. LAVINE,

Plaintiff,

Index No: 007623/2022

v.

**STATE OF NEW YORK;
KATHY HOCHUL, as Governor;
ANDREA STEWART-COUSINS, as
Temporary President of the Senate;
ROBERT ORTT, as Senate Minority Leader;
CARL HEASTIE, as Assembly Speaker;
WILLIAM BARCLAY, Assembly Minority
Leader; and the INDEPENDENT REVIEW
COMMITTEE,**

Defendants.

Before: Honorable Joseph E. Lamendola, JSC

Plaintiff commenced the instant action on September 22, 2022, by filing a Verified Complaint seeking a) declaratory judgment that the provisions of Executive Law §94 by which the Senate's advice and consent prerogatives are delegated to the Independent Review Committee are unconstitutional; b) declaratory judgment that the Committee's application of Executive Law §94 to the Plaintiff violates provisions of Article I, Article III, and Article V of the Constitution; and c) preliminary and permanent injunctions seating the Plaintiff and all other nominees rejected by the Committee as members of the Commission on Ethics and Lobbying in Government.

Section 94 of the Executive Law provides, in part, that the Commission on Ethics and Lobbying (hereinafter "the Ethics Commission") is comprised of eleven appointees who are nominated by the various Defendants and must be approved by the Independent Review Committee (hereinafter "IRC") which is comprised of the deans of

New York State's accredited law schools. It is the approval of the IRC to which Plaintiff objects as an unlawful delegation of the Legislature's constitutional powers of advice and consent to a panel of private citizens.

Presently before the Court is an Order to Show Cause filed by Plaintiff on September 22, 2022, as well as four Cross-Motions to Dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action brought by Defendants Andrea Stewart-Cousins, Governor Hochul[1], IRC, and Speaker Heastie. Defendants Ortt and Barclay filed an Attorney Affirmation asserting they had no objection to the relief sought by Plaintiff. By letter dated December 14, 2022, Plaintiff withdrew his second cause of action asserting IRC's application of Exec. Law §94 was unconstitutional as applied. (NYSCEF Doc. # 70). Oral argument was heard on December 22, 2022.

As a matter of judicial economy, the Court will first address the Defendants' motions to dismiss for Plaintiff's failure to set forth a cause of action, pursuant to CPLR §3211(a)(7). "We note at the outset that upon a motion to dismiss for failure to state a cause of action, a court may reach the merits of a properly pleaded cause of action for declaratory judgment where no questions of fact are presented [by the controversy] … Under such circumstances, the motion to dismiss…should be taken as a motion for a declaration in the defendant's favor and treated accordingly." *Kaplan v. State*, 147 AD3d 1315, 1316 [4th Dept., 2017] citing *North Oyster Bay Baymen's Assn. v Town of Oyster Bay*, 130 AD3d 885, 890 [2nd Dept., 2015]

[1] Defendant Hochul additionally seeks dismissal pursuant to CPLR §3211(a)(3) alleging that Plaintiff lacks standing to bring the present action.

Presently there are two causes of action before the Court. The first cause of action alleges that Executive Law §94 is unconstitutional as either an improper usurping of the Senate's advice and consent power or as an improper delegation of legislative power (i.e. the non-delegation doctrine). Plaintiff additionally asserts a cause of action seeking preliminary and permanent injunctions.

Defendants move to dismiss primarily based upon the alleged failure of the Plaintiff to state a cause of action. In support, Defendants proffer legal authority which demonstrates that 1) Article V, §4 of the New York Constitution requires Senate "advice and consent" only for appointments of executive branch department heads and appointments to the judiciary, not for appointments to subsidiary commissions; and 2) the non-delegation doctrine does not apply to delegations of power to approve or deny nominees to a body such as the Ethics Commission.

The Court must start its inquiry with the presumption that Executive Law §94 is constitutional. "There exists a strong presumption of constitutionality which accompanies legislative actions... [which is] not to say...that such actions must always be sustained without question...; they are, however, entitled to the benefit of the presumption, and will be sustained absent a clear showing of unconstitutionality." *Kaplan v. State*, 147 AD3d at 1317, quoting *Wein v. Beame,* 43 NY2d 326, 331 [1977] See *Dunlea v. Anderson*, 66 NY2d 265, 267 [1985](as a matter of substantive law every legislative enactment is deemed constitutional until proof to the contrary is adduced) In fact, Courts should only "strike them down" as a "last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted

to, and reconciliation has been found impossible." *White v. Cuomo*, 38 NY3d 209, 216 [2022] (internal citations omitted).

Executive Law §94 establishes a two-step process for appointment to the Ethics Commission, whereby nominations are made by the governor, speaker of the assembly, temporary president of the senate, minority leaders of the assembly and senate, comptroller, and the attorney general. Those nominations are then subject to approval or denial by the IRC, which is composed of members of "the American Bar Association accredited New York state law school deans, interim deans, or their designee who is an associate dean." Exec.Law §94(2)9(c), (3)(a)-(b). Nominees are appointed if they are found by the IRC to meet the qualifications necessary by virtue of their background and expertise, and who are found to have the ability to impartially, fairly, and even-handedly with respect to service on the commission. *Id*, §94(3)(d) If a nominee is rejected, the nominator submits a new nominee. In performance of its duties, the IRC is required to publish the procedure it will utilize on its website, which it did in June of 2022. The process provided for a questionnaire, interview, financial disclosures, fingerprinting, releases to permit review of a nominee's criminal, tax, and credit history. It additionally provided a seven-day public comment period.

Plaintiff argues that Executive Law §94 is facially unconstitutional as it violates the New York State Constitution's "advice and consent" provisions, or in the alternative, is an improper delegation of legislative power. Defendants' motion asserts that Plaintiff's arguments are contrary to long-standing, binding Court of Appeals precedent.

The "advice and consent" power of the Senate applies in only two circumstances; 1) the appointment of heads of departments of the executive branch, and 2) the

appointment of the judiciary. *See* NY Const. Art. V, §4; *Soares v. State of New York*, 68 Misc.3d 249, 272 (Sup. Ct. Albany County., 2020) (advice and consent provision applies to "commissions or boards that serve as heads of departments in the executive branch, but not to every other 'subsidiary board or commission within the twenty permanent departments'") In fact, Article IX, §9 of the New York Constitution provides in pertinent part that "all other officers whose ... appointment is not provided for in this constitution...shall be ...appointed as the legislature may direct." *See also, Lanza v. Wagner,* 11 NY2d 317, 330 [1962]. An appointment to the Ethics Commission is neither an appointment to a head of department of the executive branch, nor an appointment to the judiciary and therefore entirely within the discretion of the legislature to direct as it sees fit. Plaintiff's argument that the appointment process for the Ethics Commission violates the "advice and consent" power of the Senate is without merit, and not grounds upon which to find a constitutional violation.

While Petitioner concedes that not all appointments require Senate confirmation, he conclusively asserts that the IRC approval process for nominees "fundamentally subverts the Senate's authority and demeans the Senate's stature in violation of Articles III and V of the Constitution. Article III §1 provides that the "legislative power of this state shall be vested in the senate and assembly" and is the origin of the "non-delegation doctrine." Typically, non-delegation cases involve a legislative delegation of law-making powers to an administrative agency. Plaintiff attempts to apply the non-delegation doctrine to the case at bar, arguing that it is impermissible for the legislature to delegate the power to confirm Commission nominees arguing that such confirmation is a non-delegable legislative act.

Contrary to Plaintiff's position, the Court of Appeals has held that "the exercise of the power of appointment to public office is not a function of such essentially legislative character as to fall afoul of the constitutional proscription." *Lanza v. Wagner*, 11 NY2d 317, 333 [1962]. Further, where the Constitution does not specifically prescribe the manner in which officers were to be selected, "the Constitution itself grants the Legislature the power to prescribe the method" by which appointments may be conducted. *Id.* 11 NY2d at 329.

Plaintiff misconstrues *Lanza,* arguing that the Court's holding only applied to the power of nomination, not the power of appointment. In essence, Plaintiff argues that while the Court upheld the delegation to a group of private citizens the power to *nominate* members who would then be chosen by an elected office, it did not extend to allowing a "cohort of private citizens" to make the ultimate selection of members. In marked contrast however, the Court of Appeals made no such distinction. Instead, the Court reaffirmed the holding in *Sturgis v. Spofford*, 45 NY 446 [1871], stating "[t]he statute upheld in the *Sturgis* case, instead of providing for a selection or nominating board, actually vested the very power of appointment in specified private organizations…reject[ing] the contention that 'the power of appointment can only be conferred [by the Legislature] upon somebody or officer representing or responsible to the people.'" *Lanza*, 11 NY2d at 329. See *Sturgis v. Spofford*, 45 NY446 [1871] Much like the Plaintiff's present argument, the Plaintiffs in *Sturgis* argued that "the power of appointment can only be conferred upon somebody or officer representing or responsible to the people." The Court of Appeals rejected that argument, holding, "[t]he

language of the Constitution does not justify this position. The power is not restricted." *Sturgis*, 45 NY at 450.

"While it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support." *Dominski v. Frank Williams & Son, LLC*, 46 AD3d 1443, 1444 [4th Dept., 2007]. Plaintiff's arguments are conclusory, unsupported,[2] and self-contradictory. As Plaintiff has failed to establish any question of fact with respect to the underlying controversy, Defendants are entitled to declaratory judgment in their favor. *Kaplan v. State*, 147 AD3d 1315, 1316 [4th Dept., 2017]

Finally, with respect to Plaintiff's cause of action seeking "injunctive relief to seat all appointees rejected by the [IRC]," Plaintiff has failed to establish his entitlement to such relief. "It is well settled that preliminary injunctive relief is a drastic remedy that is not routinely granted." *Eastview Mall, LLC v. Grace Holmes, Inc.*, 182 AD3d 1057, 1058 (4th Dept., 2020). In order to grant such relief, the moving party must show a probability of success, danger of irreparable harm without injunctive relief, and that the balance of equities is in his favor. *See Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 862 (1990). If any one of these requirements are not satisfied, injunctive relief must be denied. *Faberge Intern., Inc. v.* DiPino, 109 AD2d 235 [1st Dept., 1985]. Here, all three elements are lacking. There is no probably of success on the merits, given the Court's decision *supra*. Further, Plaintiff's conclusory allegations that he will suffer irreparable harm are insufficient to grant injunctive relief. *See White v. FF Thompson Health Sys,*

[2] Most of Plaintiff's arguments are based upon law-review articles and other non-binding sources and fail to adequately address relevant, binding Court of Appeals precedent.

Inc., 75 AD3d 1076, 1076 [4th Dept., 2010); *Sutton, DeLeeuw, Calrk & Darcy v. Beck*, 155 AD2d 962, 963 [4th Dept., 1989]. Likewise, Plaintiff's allegations with respect to the balancing of equities are conclusory and contrary to the findings of the Court, i.e. granting declaratory judgment to the Defendants.

Accordingly, it is hereby

ORDERED, ADJUDGED, AND DECREED, that Defendants are granted judgment declaring that Executive Law §94 is constitutional and that it was proper for the Independent Review Committee to reject or approve nominees in accordance with the provisions of Executive Law §94; and it is further

ORDERED, ADJUDGED, AND DECREED, that Plaintiff's cause of action seeking preliminary and/or permanent injunctive relief is **DISMISSED.**

DATED: February 9, 2023
Syracuse, New York

HON. JOSEPH E. LAMENDOLA, JSC

PAPERS CONSIDERED:

1) Order to Show Cause (Plaintiff), filed September 22, 2022 (NYSCEF #7)
2) Affirmation in Support of OTSC, filed September 22, 2022 (NYSCEF #5)
3) Attorney Affirmation (Ortt/Barcley), filed December 7, 2022 (NYSCEF #29)
4) Notice of Cross-Motion (Motion #2 - Stewart-Cousins), filed December 7, 2022 (NYSCEF #30)
5) Affirmation in Support (Motion #2), with exhibit, filed December 7, 2022 (NYSCEF #31-32)
6) Notice of Motion (Motion #3 – Hochul), filed December 7, 2022 (NYSCEF #34)

7) Attorney Affirmation, together with exhibits A through J (Motion #3), filed December 7, 2022 (NYSCEF #35-45)

8) Memorandum of Law (Motion #3), filed December 7, 2022 (NYSCEF #46)

9) Notice of Motion (Motion #4 - IRC), filed December 7, 2022 (NYSCEF #47)

10) Attorney Affirmation, together with exhibits A through O (Motion #4), filed December 7, 2022 (NYSCEF #48-63)

11) Memorandum of Law (Motion #4), filed December 7, 2022 (NYSCEF #64)

12) Notice of Motion (Motion #5 – Heastie), filed December 7, 2022 (NYSCEF #65)

13) Attorney Affirmation, with exhibit (Motion #5), filed December 7, 2022 (NYSCEF #66-67)

14) Memorandum of Law (Motion #5), filed December 7, 2022 (NYSCEF #68)

15) Plaintiff's Affidavit in Opposition (Motions 2,3,4, & 5), filed December 13, 2022 (NYSCEF #69)

16) Plaintiff's Letter (withdrawing 2nd COA), filed Dec. 14, 2022 (NSYCEF #70)

17) Reply Memorandum of Law (Motion #3 – Hochul), filed December 21, 2022 (NYSCEF #72)

18) Reply Attorney's Affirmation (Motion #3), together with exhibits A & B, filed December 21, 2022 (NYSCEF #73-75)

19) Reply Memorandum of Law (Motion # 2 – Stewart-Cousins), filed December 21, 2022 (NYSCEF #76)

20) Reply Memorandum of Law (Motion # 5 - Heastie), filed December 21, 2022 (NYSCEF #77)

21) Attorney Affirmation in Reply (Motion #4 – IRC), filed December 21, 2022 (NYSCEF #78)