STATE OF NEW YORK
COURT OF APPEALS

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 Speaker of the Assembly; and the INDEPENDENT REVIEW COMMITTEE,

Defendants-Respondents.

ATTORNEY AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

Motion No.: 2024-622

Appellate Division Fourth Department Docket No.: CA 23-01332

Onondaga County Index No.: 007623/2022

JOAN P. SULLIVAN, ESQ., hereby affirms under the penalties of perjury as follows:

1. I am a partner with the law firm of LIPPES MATHIAS LLP, attorneys for the Defendant-Respondent INDEPENDENT REVIEW COMMITTEE ("Respondent"), and I am fully familiar with the facts and circumstances surrounding this action.

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NEW YORK STATE
COURT OF APPEALS

2. I submit this affirmation in opposition to Defendants-Appellants' Motion for Leave to Appeal to the Court of Appeals pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a)(1)(i).

3. This Court has jurisdiction because the action originated in Supreme Court, Onondaga County and is taken from a final order of the Appellate Division, Fourth Department, dated July 26, 2024.

4. Robert Ortt is Senate Minority Leader and William Barclay is Assembly Minority Leader of the New York State Legislature and were named as Defendants in this action. Together, they are referred to as the "Minority Leaders" who are now seeking permission for leave to appeal pursuant to CPLR 5602(a)(1)(i) and are appealing as of right under CPLR 5601(b)(1).

FACTUAL SUMMARY

5. In 2022, the New York State Legislature enacted ethics reforms in response to controversies involving the independence of the former Ethics Commission (known as the Joint Commission on Public Ethics or JCOPE).

6. Executive Law §94 was amended which changed the number of members that an elected official nominates, diluting the number selected by the governor and increasing the number of legislative selections.

7. Five members are nominated by the executive branch (*see* Executive Law §94 (3)[a]).

8. Six members are nominated by members of the legislative branch: the temporary president of the Senate nominates two members; the speaker of the Assembly nominates two members; the minority leader of the Senate nominates one member; and the minority leader of the Assembly nominates one member (*see* Executive Law §94 [3] [a]).

9. Executive Law §94 also changed the appointment process with the enlistment of the deans of the 15 accredited law schools in the State of New York to serve as a screening panel for nominees of the elected officials (*see* N.Y. Exec. Law § 94 [2] [c]).

10. The role of the law school deans represented a sorely needed infusion of independence into the ethics regulatory body which had been failing for more than a decade, had been embroiled in several scandals, and was the target of wide-ranging public shame (R. 240-249).

11. In August 2022, State Senate Majority Leader Robert Ortt nominated Petitioner-Appellant, Gary Lavine, to serve on the Commission.

12. Petitioner-Appellant was unanimously rejected for good cause by the IRC.

13. On September 22, 2022, Petitioner-Appellant, alone, commenced this action against the four legislative leaders: Andrea Stewart-Cousins, Robert Ortt, Carl Heastie, William Barclay, and the IRC 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 (Exhibit A).

14. Thereafter, the Governor and the IRC separately moved to dismiss the complaint in its entirety pursuant to CPLR 3211 (a)(3) and (a)(7) on the ground that Petitioner-Appellant lacked standing. 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 and against Heastie, respectively, pursuant to CPLR 3211 (a)(7). (R. 38, 60-62, 233-34,648-49).

15. Senator Ortt and Assemblymember Barclay served only an Attorney Affirmation signed by their counsel stating they did not object to Lavine's requests for relief to the extent he demanded to be seated as a member of the Commission (R. 35-36). The Defendants-Appellants did not otherwise answer or take a position on any of the Complaint's allegations as to the constitutionality of Executive Law §94.

16. At oral argument before Onondaga County Supreme Court (Hon. Joseph E. Lamendola, J.S.C.) on December 22, 2022, the Minority Leaders took a limited role and argued only that they supported the appointment of Lavine (R. 858).

17. In deciding the motions and cross-motions, on February 9, 2023, Supreme Court side-stepped the issue of plaintiff's standing and reached the merits of the action, deciding "that Executive Law §94 is constitutional and that it was proper for the IRC to reject or approve nominees" (Exhibit B).

18. Petitioner alone then sought direct leave to this Court and on June 13, 2023, the Court of Appeals transferred the case to the Appellate Division, Fourth Department upon the ground that a direct appeal did not lie where questions other than the constitutional validity of a statutory provision were involved under CPLR §5601 (b)(2).

19. On appeal, the minority leaders argued their position but did not assert standing as legislators.

20. On appeal to the Appellate Division, the Fourth Department concluded the Petitioner -- the sole party challenging the constitutionality of Executive Law §94 -- lacked standing (Exhibit C).

21. The Fourth Department further stated it is for the courts to decide whether a party has a "sufficient stake in the litigation to necessitate constitutional adjudication, confer standing, and one party does not have the ability to confer standing on another," citing *Matter of Daniel C*., 99 AD2d 35, 46 [1984]; *see Uhlfelder v Weinshall*, 47 AD3d 169, 183 [1st Dept. 2007].

22. The Fourth Department held that Supreme Court should not have addressed the merits of Petitioner-Appellant's claims and because Petitioner-Appellant lacked standing, declined to consider the remaining constitutional claims.

LEAVE TO THE COURT OF APPEALS

23. Defendants-Appellants now appeals to this Court on the pivotal issue of whether Petitioner Lavine or Senator Ortt has standing to bring this suit and whether §94 is constitutional insofar as it gives the IRC a post-nomination vetting role in connection with nominees to the Commission (Minority Leaders Motion for Leave at 4).

24. In addition to Petitioner lacking standing, Senator Ortt also lacks standing because he does not raise a concrete injury and does not argue a legislative function has been usurped.

25. Defendants-Appellants' constitutional claims have not been properly preserved and are not worthy of this Court's review.

26. The same constitutional challenge to Executive Law §94 is currently on appeal before this court in *Cuomo v New York State Comm'n on Ethics & Lobbying in Gov't*, 228 AD3d 175 (3rd Dept. 2024), which will review whether the IRC's power is constitutional.

CONCLUSION

27. It is respectfully requested that this Court deny Defendants-Appellants' Motion for Leave to Appeal, along with any further relief this Court deems appropriate.

Dated: September 9, 2024

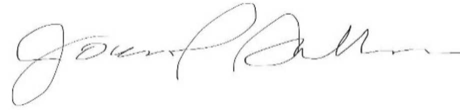

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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

GARY J. LAVINE,

Plaintiff,

-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.

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Index No.

Plaintiff, Gary J. Lavine, alleges:

SUMMARY OF ACTION

1. Executive Law §94, established the Commission on Ethics and Lobbying in Government (Commission) and provides that the eleven appointees must be approved by an Independent Review Committee (Committee) comprised of deans or associate deans of the state's accredited law schools. The plaintiff seeks:

i) a declaratory judgment that the supplanting of the Senate by the Committee of private citizens as the confirming entity violates the state Constitution (Constitution): Article III [legislative power], Article V [Senate's advice and consent power], and Article XIX [amending procedure];

ii) a further declaration that the provision for the Committee be severed from the statute;

iii) preliminary and permanent injunctions immediately seating all nominees not approved by the Committee.

JURISDICTION AND VENUE

2. This action is brought pursuant to CPLR §3001 and Article VI of the Constitution.

3. Onondaga County is a proper venue. The plaintiff resides in Onondaga County and one member of the Committee maintains an office in Onondaga County.

PARTIES

4. Plaintiff Gary J. Lavine is an attorney licensed in New York and the District of Columbia. Plaintiff Lavine was nominated to be a member of the Commission by Minority Leader Robert Ortt. The nomination was unanimously rejected (with one recusal) by the Committee (Exhibit "A").

5. The defendants are the State of New York, the Independent Review Committee, the Governor acting in her official capacity, and the four legislative leaders, Member of Assembly Heastie, Member of Assembly Barclay, Senator Stewart-Cousins, and Senator Ortt, acting in their official capacities.

EXECUTIVE LAW, §94

6. In 2022, Executive Law, §94, which had created the Joint Commission on Public Ethics, was repealed by the *Ethics Commission Reform Act of 2022* and replaced by a new §94 creating the successor Commission.

7. Executive Law §94 designates the Governor, Speaker, Temporary President of the Senate, the two Minority Leaders, the Comptroller, and the Attorney General as "selection members" who nominate members to the eleven member Commission.

8. Executive Law §94 established the Committee, which is "tasked with reviewing, approving, or denying the members of the commission as nominated by the selection members...." and provides "(t)he nominating selection member shall nominate a new candidate for those that are denied by the independent review committee."

CONSTITUTIONAL DEFECTS

9. Article III of the Constitution provides at Section 7:

> The legislative power of this state shall be vested in the senate and assembly.

10. Article V of the Constitution at Section 4 provides that appointments are subject to:

> the advice and consent of the Senate.

11. Not all appointments require Senate confirmation. See, *Matter of Cappelli v. Sweeney*, 167 Misc2d 220, aff'd 230 A.D.2d 733 (2d Dept., 1996); *Soares v. State of New York,* 68 Misc3d 249 (2020). Appointment to the former Joint Commission on Public Ethics of which plaintiff was a member did not require Senate confirmation.

12. Nonetheless, the Senate – and the Senate alone – is vested by the Constitution with the power of advice and consent. If confirmation is constitutionally or statutorily required, the confirming entity under Article V, Section 4 must be the Senate. There is no circumstance in which a panel of private citizens can statutorily be granted the Senate's prerogatives to advise and consent with respect to appointments made either by the Governor or any other statutorily empowered appointing officer.

13. The Committee's application of the Executive Law is also unconstitutional. Executive Law §94 provides that nominees

> the independent review committee deems to meet the qualifications necessary for the services required based on their background and expertise . . . shall be appointed as a commission member.

The Committee's rejection of plaintiff's appointment was based on the Committee's disagreement with plaintiff's opinions, not his qualifications (Exhibits "B" and "C"). In doing so, the Committee unconstitutionally arrogated to itself the Senate's prerogative to reject a nomination

for whatever reason the Senate deems appropriate. Further, the Committee violated Article I, Section 8 of the Constitution (Freedom of Speech).

14. The Senate is *representative* of every person of every region of the state. It cannot be credibly posited that law school administrators are representative of anyone except a very narrow professional strata of the state's citizenry.

15. The Senate is *accountable* to every person of every region of the state by dint that the Senate is popularly elected every two years. The law school administrators are accountable to no one save, perhaps, the academic hierarchy of which they are a part.

16. Senate confirmation deliberations are conducted with *open debate* and recorded. The deliberations of the law school administrators are conducted in secret and not recorded – a modern Star Chamber.

17. Article XIX promulgates the process by which the Constitution may be amended. The Constitution cannot be amended by statute. Executive Law, §94 provision for the Committee is a *de facto* amendment of the Constitution by statute and cannot pass constitutional muster. See, *Matter of King v. Cuomo*, 81 NY2d 247 (1993); *Soares v. State of New York, supra.*

<u>THE SEVERABILITY PROVISION OF THE STATUTE PRESERVES THE COMMISSION AND, CONSEQUENTLY, ALL NOMINEES SHOULD BE SEATED</u>

18. Executive Law § 94 provides:

> If any part or provision . . . is adjudged by a court of competent jurisdiction to be unconstitutional . . . such judgment shall not affect or impair any other part or provision or the application thereof to any other person or organization, but shall be confined in its operation to such part or provision.

19. The Committee is unconstitutional. Nonetheless, the Commission remains extant. The Commission has already conducted a meeting but with only seven members. All appointees of "selection members" should assume office without the Committee's action.

FIRST CAUSE OF ACTION FOR DECLARATORY JUDGMENT

20. Plaintiff reiterates the assertions of ¶¶ 1 through 19.

21. Executive Law §94 violates the Constitution to the extent i) the Senate's prerogative of advice and consent is delegated to a cohort of private citizens in violation of Article III and Article V, Section Four and ii) the statute purports to amend the Constitution in violation of Article XIX.

SECOND CAUSE OF ACTION FOR DECLARATORY JUDGMENT

22. In denying plaintiff approval based on plaintiff's opinions, not plaintiff's qualifications, the Committee's application of Executive Law §94 violates Article I, Section 8, Article III and Article V, Section Four of the Constitution.

THIRD CAUSE OF ACTION FOR INJUNCTIVE RELIEF

23. Plaintiff reiterates the assertions of ¶¶ 1 through 19.

24. The supplanting of the Senate by the Committee is unconstitutional on its face. With the Commission continuing to function, injunctive relief to seat all appointees rejected by the Committee is imperative. The likelihood of the plaintiff prevailing is compelling. The plaintiff has been – and continues to be – subjected to "substantial irreparable injury and . . . preliminary injunctive relief is urgently needed . . . to avoid that harm." Weinstein, Korn, Miller, *NY Civil Practice: CPLR,* 6301.04[4]. There is no prejudice to the Commission if the plaintiff is seated.

WHEREFORE, Plaintiff Gary J. Lavine requests:

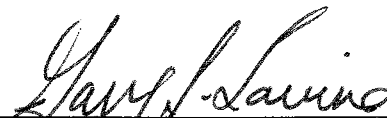
A. judgment, the provisions of Executive Law §94 by which the Senate's advice and consent prerogatives are delegated to the Committee are unconstitutional;

B. Judgment that the Committee's application of Executive Law §94 to the plaintiff is in violation of Article I, Section 8, Article III, and Article V, Section Four of the Constitution;

C. Preliminary and permanent injunctions seating the plaintiff and all other nominees rejected by the Committee as members of the Commission;

D. Granting such other relief as the Court may deem just and proper.

Dated: September 21, 2022



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BOUSQUET HOLSTEIN, PLLC
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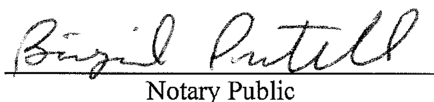
VERIFICATION

STATE OF NEW YORK }
COUNTY OF ONONDAGA } ss.:

Gary J. Lavine, Esq., being duly sworn, deposes and says that deponent is the Plaintiff named in the within action; that deponent has read the foregoing Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.

GARY J. LAVINE

Sworn to before me this
21 day of September 2022

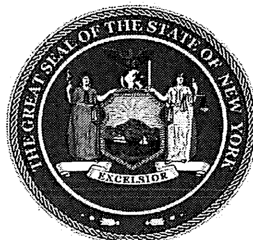


Notary Public

Brigid Purtell
Notary Public in the State of New York
Qualified in Onondaga Co. No. 01PU6410879
My Commission Expires 11/02/24

EXHIBIT A

of Verified Complaint



THE STATE OF NEW YORK
INDEPENDENT REVIEW COMMITTEE
FOR NOMINATIONS TO
THE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT
www.ny.gov/ethics-irc

September 1, 2022

Ms. Kristin Frank
Chief Counsel to the NYS Senate Minority Leader
Legislative Office Building
Room 909
Albany, New York 12247

Dear Ms. Frank,

I write on behalf of the New York State Independent Review Committee ("IRC") for Nominations to the Commission on Ethics and Lobbying in Government.

On August 2, 2022, Senate Minority Leader Ortt nominated Mr. Gary Lavine to serve on the Commission on Ethics and Lobbying in Government. Pursuant to its statutory mandate, and the IRC's Procedures, the IRC has thoroughly reviewed Mr. Lavine's qualifications, substantive answers to a standard questionnaire, and the results of a New York State background integrity check. This process also included a personal interview.

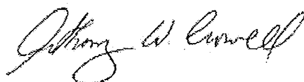
The IRC notes Mr. Lavine's long career as a lawyer. It also recognizes that, in general, prior service on a State ethics commission may lend a valuable set of perspectives to the new Commission, and that such service is not a bar to appointment. However, the IRC unanimously determined not to confirm the nomination of Mr. Lavine.

The IRC identified a series of noteworthy concerns that led to this determination. Chief among them is a clear belief, informed by Mr. Lavine's answers to the IRC's questionnaire and interview questions, that his specific prior ethics commission experience has negatively shaped his expectations regarding the new Commission, and his potential role on it. As a result, he has given the appearance of an inability to act impartially, fairly, and even-handedly, solely with respect to service on the new Commission. Accordingly, we ask that the Minority Leader

present an alternate nomination consistent with the IRC Procedures. When received, the IRC will expedite review of that nomination.

Please note that Syracuse University School of Law Dean Craig Boise was recused and did not participate in the decision on Mr. Lavine's nomination.

Sincerely,



Anthony W. Crowell
Chair

EXHIBIT B

of Verified Complaint

Gary J. Lavine
Attorney & Counselor at Law
110 West Fayette Street, Suite 1000
Syracuse, New York 13202

July 25, 2022

Dean Anthony Crowell
Chair, Independent Review Committee
Anthony.crowell@irc.ny.gov

Dean Crowell,

I ask your indulgence permitting me to express my views in a narrative format.

It appears that I will be the only nominee to have served on the Joint Commission on Public Ethics. I was the only member of JCOPE to have served by appointment of Governor Cuomo and subsequently by legislative appointment.

Tenure as a JCOPE commissioner certainly gave me first-hand experience with the questions you have posed and, hopefully, some insight as well. My record on JCOPE is well documented and well publicized. The attacks by Mr. Cuomo and his minions I take as a vindication of my record.

HISTORICAL PERSPECTIVE

The "modern" era of exertion against corruption can be dated from the New York City fiscal crisis of 1871 which led to the deposing of William Marcy Tweed and Tweed's Tammany ring. Ever since, a recurring "Cycle of Corruption" can be discerned in four phases: 1) revelation; 2) then revulsion; 3) then reform; 4) then recidivism.

Sensational revelation of corruption is the catalyst for the morphing of incipient public cynicism into revulsion. Revulsion is a catalyst for reform. Reform is inevitably followed by recidivism. Overreach by the recidivists starts the cycle all over again.

There is at least 150 years of state history instructing that recidivism will always follow reform. Nonetheless, the reform effort is not futile. Recidivism has never caused a complete reversion to the *status quo ante*. Each wave of reform has had some lasting positive impact. From an historical perspective, we can be optimistic that durable advances can be made by the new commission, particularly if there is diligence in gleaning lessons learned from recent experience.

INTERFERENCE BY THE EXECUTIVE CHAMBER

Governor Cuomo attempted to subvert both JCOPE and the office of Inspector General. Mr. Cuomo was completely successful in undermining the integrity of the IG apparatus and partially so with JCOPE.

The IG reports directly to the Secretary to the Governor. There are no institutional checks and balances. During the Cuomo administration, the IG apparatus was subverted to coverup wrongdoing in the administration and weaponized to be deployed against Mr. Cuomo's opponents.

The apotheosis of Mr. Cuomo's subversion of the IG office was the coverup of the leak to him from the Commission's January 2019, meeting. (See Exhibit "A"). The legislation creating the new commission was fundamentally deficient in not reforming the IG apparatus to make it independent and simultaneously accountable. The new commission must be ever vigilant regarding the integrity of the IG office.

Within JCOPE, Governor Cuomo met resistance from a number of legislative appointees. The fundamental schism in JCOPE was not between Democrats and Republicans. Rather, the fault line was between the Cuomo cohort of commissioners and several of the legislative appointees of both parties.

Allied with the Cuomo cohort of commissioners were certain senior staff. The notion that staff should run the Commission (in effect, the commissioners should be subordinate to staff) was explicitly advocated by several of the Cuomo cohort on the pretext that staff is more knowledgeable and more acute than the commissioners.

As astutely noted by former commissioner George Weissman in a commentary for the Albany Times Union, any matter adversely impacting the Cuomo Executive Chamber was, for certain senior staff, the "third rail". Their fear was that getting near the third rail would result in their political electrocution.

I strongly urge that the Independent Review Committee give its close attention to the Hogan Lovells report summarizing its inquiry into the staff approval of Mr. Cuomo's book deal which was released to the public by the vote of JCOPE on the last day of its existence. The report demonstrates the potential for insidious interference by staff at the behest of the Executive Chamber to thwart the commissioners.

CONFIDENTIALITY

Over the decade and a half existence of JCOPE, certain senior staff and the Cuomo cohort of commissioners, exhorted the rest of us that confidentiality is paramount, that the commissioners are bound by their oath and the Executive Law to elevate confidentiality above all other considerations and that we risked litigation exposure by not erring on the side of secrecy.

These high tone exhortations had as their ulterior objective institutionalizing JCOPE as a modern-day Star Chamber.

The Star Chamber court started out as a noble idea that was corrupted by the monarch. It functioned in secrecy to serve the monarch, not justice, leading Parliament to abolish it.

JCOPE started out as a noble idea that was subverted by Governor Cuomo with JCOPE meeting the same fate as the Star Chamber. Secrecy was essential to keeping the Cuomo machinations *sub rosa* and controlling recalcitrant legislative appointees.

The Court of Appeals has long championed openness and held that statutory exceptions to openness are to be strictly construed against secrecy. *Matter of James Q*, 32 NY3d 671 (2019). The new commission should diligently resist imposing secrecy unless explicitly required by the statute.

The definition of confidentiality posited by Question 6 is not the definition under the current or former statute. It is essentially the definition propounded by the Cuomo cohort and senior staff, more or less endorsed by Executive Director Sanford Berland, and not adopted by JCOPE. (See Exhibit "B").

COMMUNICATION WITH THE APPOINTING OFFICER

The appointing officer stands for election and is directly accountable to the citizenry. Commissioners are selected not elected. I have long taken the position that information deemed confidential under the Executive Law may not be divulged to the appointing officer. However, it is most assuredly within the bounds of legal and ethical propriety to discuss matters not deemed confidential with the appointing officer.

REMOVAL OF A COMMISSIONER WITHOUT THE ASSENT OF THE APPOINTING OFFICER

My responsibility as a commissioner has been and will be to follow the law. Nonetheless, it is a commissioner's prerogative to challenge the constitutionality of the removal provision. I have expressed to Minority Leader Ortt the opinion that the removal provision violates the state Constitution. Commission removal of a commissioner serving by legislative appointment without the assent of the appointing legislative officer is antithetical to the principle of separation of powers. The Court of Appeals has held that "separation of powers is the bedrock of the system of government adopted by this state in establishing three co-ordinate and co-equal branches of government . . ." *Matter of Maron v. Silver*, 14 NY3d 230 (2010). Removal by the Commission of a legislative appointee over the objection of the legislative appointing officer would be an exercise of hegemonic coercion against the legislative branch which will not pass constitutional muster. John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers : Legislators and Legislative Appointees Performing Administrative Functions*. 66 Temple Law Review 1205.

The much maligned former special voting rules had the salutary effect of significantly deterring partisan weaponization of investigations. The potential for removal by the Commission of commissioners on spurious grounds accentuates the danger of partisan capture of investigations.

I would be delighted to amplify upon my views in the interview.

Very truly yours,

Gary J. Lavine

GJL/lad

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Exhibit A

FILED: ONONDAGA COUNTY CLERK 09/22/2022 03:49 PM
NYSCEF DOC. NO. 3
INDEX NO. 007623/2022
RECEIVED NYSCEF: 09/22/2022

Gary J. Lavine
Attorney & Counselor at Law
110 West Fayette Street, Suite 1000
Syracuse, New York 13202

January 28, 2022

Lucy Lang, Esq.
New York State Inspector General
Agency Building 2
Empire State Plaza
Albany, New York 12223

Re: Joint Commission Public Ethics
Breaches of Confidentiality

Inspector General Lang:

Following discussion with Investigator Leslie Arp, I call your attention to i) the subversion of the Inspector General Office by the Cuomo Administration to cover-up the breach of confidentiality that occurred the afternoon of the Commission meeting of January 29, 2019, and ii) the likelihood that previous breaches of confidentiality in violation of the Executive Law occurred during the Cuomo Administration.

I urge an inquiry by you into these circumstances. In doing so, I am not acting on behalf of the Commission.

Two criminal referrals pursuant to the Executive Law were made by the Commission to the Attorney General in September 2021, regarding the confidentiality breach of January 29, 2019 and an alleged cover-up by the Inspector General Office in its purported investigation. The cover-up may have constituted Official Misconduct. A parallel inquiry by you not subject to a "beyond a reasonable doubt" burden of proof is warranted by the importance of holding those responsible administratively accountable if wrongdoing occurred.

Following the January 29, 2019 meeting a breach of confidentiality unquestionably occurred. The vote following a deliberation of a confidential investigatory matter was divulged to Governor Cuomo. That afternoon, Governor Cuomo twice confronted Speaker Heastie to chastise the Speaker for the votes cast by the Speaker's appointees. Commissioner James Yates was contacted by the Speaker and Commissioner Julie Garcia was contacted by the Speaker's Executive Counsel to discuss the disclosure to Governor Cuomo.

Commissioners Garcia and Yates discharged their responsibility pursuant to the Executive Law §§ 55 and 94 by reporting the breach to the then Executive Director Seth Agata who in turn reported the breach on January 30, 2019 to the Inspector General. The then Inspector General

recused herself and a purported investigation was conducted under the aegis of the then Executive Deputy Inspector General.

In his report of October 4, 2019, the Executive Deputy Inspector General concluded that "the investigation was unable to substantiate whether or by whom confidential information was in fact improperly disclosed." The three-page report appears to have been a sham in starkly etched contrast to a similar investigation of confidential breaches occurring during the tenure of the Commission On Public Integrity. (See, Report of the Office of the Inspector General, May 13, 2009). Abolition of the Commission On Public Integrity and the establishment of the Joint Commission On Public Ethics were in part attributable to the Inspector General's investigation.

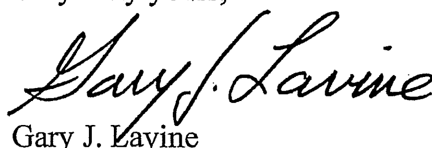
I request that the investigation by the Inspector General Office of the breach of confidentiality that occurred on January 29, 2019 be re-opened.

It is plausible, if not likely, that the breach of confidentiality was perpetrated by one or more individuals who were acculturated by previous experience to believe that leaks could be made to the Executive Chamber with impunity.

In particular, during the investigation by the Commission of Member of the Assembly Vito Lopez, Governor Cuomo threatened the appointment of one or more Moreland commissioners to investigate the Commission. The chronology of events strongly hints that details of the Lopez investigation were being divulged to Governor Cuomo.

The breach of confidentiality on January 29, 2019, its alleged cover-up by the Inspector General Office and breaches of confidentiality prior to January 29, 2019 (if they occurred) have all fundamentally corroded executive branch ethics compliance.

Very truly yours,



Gary J. Lavine

cc: Jose L. Nieves, Esq.

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Exhibit B

JOSE L. NIEVES
CHAIR

RICHARD F. BRAUN
TERRYL L. BROWN
COLLEEN C. DIPIRRO
WILLIAM P. FISHER
SHARON STERN GERSTMAN
C. RANDALL HINRICHS
MARVIN E. JACOB
GARY J. LAVINE
DAVID J. McNAMARA
GEORGE H. WEISSMAN
JAMES A. YATES
MEMBERS

NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS

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ALBANY, NEW YORK 12207
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SANFORD N. BERLAND
EXECUTIVE DIRECTOR

PHONE: (518) 408-3976
FAX: (518) 408-3975

June 29, 2022

Honorable Lucy Lang
Inspector General of the State of New York
61 Broadway, Suite 2100
New York, NY 10006

Dear Inspector General Lang,

We, the Joint Commission on Public Ethics ("the Commission"), write in connection with a letter sent to you by Rita M. Glavin, Esq., of Glavin PLLC, dated April 1, 2022, and further to the conversations members of your staff have had with our Executive Director, Sanford Berland. The caption of Ms. Glavin's letter references a confidential Commission investigative and enforcement matter in which, the letter recites, Ms. Glavin's client, former Governor Andrew M. Cuomo, is the subject and respondent. The thrust of the letter is Ms. Glavin's contention that there may have been "breaches of confidentiality by Joint Commission on Public Ethics Commissioners . . . and/or staff relating to that matter . . . ." She asks that your Office investigate what she characterizes as "apparent breaches" and requests that "to the extent that there is evidence that the breaches were intentional and without authorization, . . . your Office refer the matter for criminal prosecution."

You should know that the Commission has been, and remains, unwaveringly committed to maintaining the full confidentiality of its investigative and enforcement proceedings and guidance functions in accordance with the requirements of Section 94 of the Executive Law, including subsections 9, 9-a, 13(b), 16 and 19(b), and as further required by the Public Officers Law and the Legislative Law. Further, all Commissioners and Commission employees are required to sign confidentiality and non-disclosure agreements upon the commencement of their Commission service, acknowledging their respective obligations to maintain the confidentiality of Commission matters and proceedings and agreeing to abide by those obligations, and the Commission has also adopted rules governing matters to be addressed in confidential executive session and who may attend such sessions. At the same time, the Commission is no less committed to providing the openness and public transparency of its operations and proceedings that is required by these same statutes, and has implemented rules, regulations and practices aimed at affording such openness and transparency to the fullest extent permitted by law. Any suggestion by Ms. Glavin that the Commission, as a body, or its staff acting pursuant to its direction, has failed to adhere to these precepts and requirements is, thus, spurious.

While not discussing confidentially protected matters related to a pending investigation, the Commission and its members, on many occasions, have discussed matters and procedures in open and public session. This includes mention of her client. This has always been done in full compliance with the statute, the regulations, and our non-disclosure agreement. Further, once a matter is in the public domain, either because it was discussed in the Commission's open and public session or because the subject has placed it there, there is no bar to further comment, in public, of the information disclosed and discussed in an open session. Any listener or attendee at our public sessions, whether a party, an interested observer, a news reporter, or a Commissioner, is free to continue the discussion by way of repeating and even broadcasting the publicly disclosed information. To permit less would place an improperly broad restraint upon public discourse of important ethical matters and flies in the face of proper calls for greater transparency.

In a blatant attempt to avoid examination or consequences of alleged improper conduct by her client, Ms. Glavin cites reports of matters and information previously discussed in open session or in the public domain and, without evidence or support, claims improper disclosure of confidential information, but can point to nothing more than news reports of non-confidential information.

Further, while the Commission has articulated standards of conduct and circumspection for its members, and ensures that Commission members are apprised of and individually acknowledge their duties and obligations as Commission members, by law, Commission members ultimately are answerable to their appointing authorities for deficiencies in their performance, including for the failure to abide by the confidentiality restrictions in Section 94(9-a) of the Executive Law, and it is their appointing authorities who are vested, by law, with the sole power to remove them. *See id.*, §94(7). Further, while it is correct that, without more, information obtained by the Commission is confidential during the pendency of a matter, as are investigative and enforcement proceedings as well as guidance sought and given pursuant to Executive Law §94(16), the Commission has adopted policies and regulations that authorize the Commission or staff to disclose certain information notwithstanding those proscriptions when it is in the public interest for it to do so and other criteria are met. Hence, the blanket assertions of breach of confidentiality by Ms. Glavin in her April 1 letter cannot be accepted at face value and require an analysis that she has not, so far as her letter discloses, undertaken.

Although the current Commission sunsets on July 8, Commission staff will be available to answer any questions you may have about the Commission's policies and procedures.

Very truly yours,

The Joint Commission on Public Ethics

Copy to Rita M. Glavin, Esq. (by email)

EXHIBIT C
of Verified Complaint

Lavine, Gary

From: Chris Bragg <bragg.chris@gmail.com>
Sent: Tuesday, July 26, 2022 3:38 PM
To: Lavine, Gary

ALBANY — The 11 nominees to the state's new ethics panel are being asked about their relations with the Fourth Estate as part of a lengthy confirmation process.

A questionnaire recently distributed to the candidates asked: "When, if ever, is it appropriate for commission members to speak to the press about commission related matters?"

The responses from the nominees to the Commission on Ethics and Lobbying and Government will be weighed by an "independent review committee" — made up of the deans of New York's 15 accredited law schools — who have the power to confirm or reject the candidates nominated by top New York lawmakers.

The state's prior ethics agency that was recently disbanded, the Joint Commission on Public Ethics, was frequently criticized for being too secretive over its 11 years in operation.

For the new panel, the vetting questionnaire sent out by the law school deans focuses attention on the issue of "confidentiality," and how commissioners will go about ensuring it. The most detailed of its seven questions asks commissioners what protocols the body should pass to ensure that their deliberations remain secret, and whether they would commit to voting other members off the body who ran afoul of rules they formulate.

"Maintaining confidentiality in the communications between commission members, staff, and other public servants, and in the management of information possessed by the commission, and the content of its deliberations, will be fundamental to the commission's legitimacy and safeguarding the public's trust and confidence in sensitive processes," the questionnaire states.

Anthony Crowell, dean of New York Law School, is chairman of the vetting panel that has the power to reject nominees.

The April law creating the ethics body charges its commissioners with writing confidentiality protocols. And in an interview, Crowell said that the questionnaire was meant to gauge nominees' views of what confidentiality protocols they should adopt. The nominating committee was not making a case for broadly keeping the internal deliberations of the panel confidential, he said.

As for the question about speaking to the news media, Crowell said that the genesis was 11 years he spent as a senior government attorney for former New York City Mayor Michael Bloomberg.

"It's perfectly fine to talk to the press, but there has to be boundaries about what you're not allowed to not talk about," Crowell said. "As a management tool, good government almost requires that you have some sort of guideline that serves to provide a basis for the ability to speak."

At times, confidentiality was controversial for the prior ethics body. The Times Union reported in 2019 that details of a vote that the commission took on whether to move forward with an investigation was leaked to former Gov. Andrew M. Cuomo, although it was never revealed how he became aware of the information. The matter apparently concerned a complaint filed against Joseph Percoco, a former top aide to Cuomo who had been accused of misusing government resources for campaign work.

Leaking that information would have been considered a misdemeanor crime under state law.

The new body's writing of additional rules leaves the possibility of more sweeping secrecy measures being adopted, according to Gary Lavine, a Senate Republican nominee to the new panel.

Lavine — who previously served for a decade as a JCOPE commissioner — wrote in response to the questionnaire that the deans' statement about confidentiality was essentially the definition embraced by Cuomo's appointees to former ethics commission, as well as its senior staff. According to Lavine, that secrecy helped Cuomo exert control over the commission.

"Over the decade and a half existence of JCOPE, certain senior staff and the Cuomo cohort of commissioners exhorted the rest of us that confidentiality is paramount, that the commissioners are bound by their oath and the Executive Law to elevate confidentiality above all other considerations and that we risked litigation exposure by not erring on the side of secrecy," Lavine wrote to the law school deans. "These high tone exhortations had as their ulterior objective institutionalizing JCOPE as a modern-day Star Chamber."

The Cuomo-appointed commissioners, as well as the former commission's staffers, routinely sought to keep matters out of the public domain beyond what was required to be released under state law. As one recent example, the former executive director, Sanford Berland, steered a discussion about the transition to the new ethics body into a private executive session; a spokesman declined to tell the Times Union why it was necessary.

For much of the prior ethics panel's history, commissioners routinely referred media inquiries to a spokesman. Public portions of monthly meetings sometimes lasted fewer than five minutes, while the executive sessions often went on for hours.

That began changing in 2019, when several legislatively appointed commissioners began speaking up about the Cuomo leak allegation. Lavine's frequent comments to the media recently about internal disputes had drawn the ire of Cuomo commissioners, staffers, as well as at one point Jose Nieves, the body's final chairman, who was appointed by Gov. Kathy Hochul in 2021.

Lavine said that on two occasions, former JCOPE general counsel Monica Stamm told him that speaking to the Times Union could expose him to criminal prosecution. More recently, Cuomo's attorney Rita Glavin filed a complaint with the state inspector general's office alleging that Lavine had improperly shared information about the former governor with the media. In late June, former commissioners responded with a lengthy statement calling Glavin's allegations "spurious."

Lavine's conversations with the Times Union have focused on internal disputes at the commission.
But Lavine refused to speak about ongoing confidential investigations and other matters off limits under state law.

On JCOPE, commissioners had no power to throw another commissioner off the body for allegedly violating confidentiality rules. By contrast, a commissioner on the new panel who is found to violate confidentiality rules can be removed by a simple majority vote.

The new confidentiality protocols will also be made by a majority vote of the commission, which at its outset, will feature nine appointments made by Democrats, and only two by Republican leaders. Lavine wrote in response to the questionnaire that, "the potential for removal by the commission of commissioners on spurious grounds accentuates the danger of partisan capture of investigations."

Crowell said the questionnaire was written by the law school deans. The sentiments of government officials previously consulted by the vetting panel, however, were weighed in writing the questions, including discussions with staffers for the various politicians that are making the nominations.

"There is a sentiment among appointing officials that the confidentiality issue is a real problem," Crowell said.

Specifically, he said, government staffers cited concern that the "absence of confidentiality can really be prejudicial" to investigations. The issue of airing other types of internal disputes did not come up, Crowell added.

Among those consulted was Hochul's ethics counsel, Pei Pei Cheng-de Castro, a former longtime JCOPE staffer. But Crowell said that unlike some of the other government staffers, de Castro did not bring up confidentiality when she spoke to the deans.

Hochul's administration pushed for the new ethics panel to be subject to the state Freedom of Information Law, a change that was included in the legislation creating the new commission in April. The prior ethics commission had been exempted from the records-access statute.

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Cell: 917-982-1332

EXHIBIT B

STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY

DECISION AND ORDER

Index No: 007623/2022

GARY J. LAVINE,

Plaintiff,

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]

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[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,*

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[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.

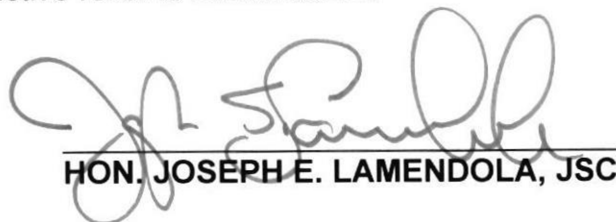
Inc., 75 AD3d 1076, 1076 [4th Dept., 2010); *Sutton, DeLeeuw, Calrk & Darcy v. Beck*, 155 AD2d 962, 963 [4th Dept., 1989]. Likewise, Plaintiff's allegations with respect to the balancing of equities are conclusory and contrary to the findings of the Court, i.e. granting declaratory judgment to the Defendants.

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)

EXHIBIT C

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

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, **Ann Dillon Flynn**, *Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.*

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this July 26, 2024*

Ann Dillon Flynn

Clerk

STATE OF NEW YORK
COURT OF APPEALS

GARY J. LAVINE,

Plaintiff-Respondent,

-against-

Defendants-Appellants,

-and-

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.

Motion No.: 2024-622

Appellate Division Fourth Department Docket No.: CA 23-01332

Onondaga County Index No.: 007623/2022

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NEW YORK STATE COURT OF APPEALS

INDEPENDENT REVIEW COMMITTEE'S MEMORANDUM OF LAW IN OPPOSITION TO MINORITY LEADERS MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS FROM THE FOURTH DEPARTMENT'S MEMORANDUM AND ORDER ENTERED ON JULY 26, 2024

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PRELIMINARY STATEMENT

The Independent Review Committee (the "IRC") respectfully submits this Memorandum of Law in opposition to Defendants-Appellants' Motion for Leave to Appeal from the Memorandum and Order entered by the New York State Supreme Court, Appellate Division, Fourth Department, on July 26, 2024, which determined Petitioner Lavine lacked standing to challenge the constitutionality of Executive Law §94 and affirmed the dismissal of the Verified Complaint. The Minority Leaders now seek to appeal by permission and "as of right" (*see* CPLR 5601 [a]).

The Minority Leaders question, for the first time, whether Senator Ortt should have standing to challenge the constitutionality of the selection process under Executive Law §94 alleging the IRC's post-nomination vetting role diminished his lawful authority to make an appointment to the Commission. The Minority Leaders' position that Executive Law §94 should not have provided the IRC with this role and responsibility is the very same issue raised in *Cuomo v New York State Comm'n on Ethics & Lobbying in Gov't*, 228 AD3d 175 (3rd Dept. 2024) on appeal presently before this Court.[1] There, the lower court held that the IRC's vetting role violated

[1] In *Cuomo v New York State Comm'n on Ethics & Lobbying in Gov't*, 228 AD3d 175 (3rd Dept. 2024), the court ruled that the use of the IRC usurped the Governor's power to ensure the faithful execution of the applicable ethics laws whereas Petitioner Lavine argued it violated the advice and consent of the Senate (*see* Lavine's Fourth Department Brief at 6-17). Nevertheless, the Minority Leaders admit 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" (Minority

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. Albany County 2023], aff'd 228 AD3d 175 [3d Dept. 2024]. Since this very issue will be decided shortly, there is no reason to burden the Court with further review of the instant case, where standing is lacking. Even if Senator Ortt did have standing, his constitutional challenge is without merit and unpreserved. Accordingly, Petitioner-Appellant's Motion for Leave should therefore be denied.

ARGUMENT

POINT I

THE MINORITY LEADERS LACK STANDING TO BRING THIS SUIT BECAUSE THEY HAVE FAILED TO DEMONSTRATE AN INJURY IN FACT OR ANY CONCRETE HARM

The Fourth Department recognized that "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" (*Lavine v State*, 229 AD3d 1173, 1175-1176 (4th Dept. 2024]).

Leaders Motion for Leave at ⁋22). The issue therefore is the same: whether the IRC's role is constitutional.

On appeal to the Fourth Department, the Minority Leaders contended that Petitioner Lavine had standing to bring this action (Minority Leaders Brief at 9), without raising their own stake in the matter as legislators. Now, for the first time on appeal to this Court they argue Senator Ortt has the requisite standing because it was his nomination, as Senate Majority Leader, under Executive Law 94 (3)(a), that is in dispute.

A petitioner challenging government agency action pursuant to an Article 78 petition has the burden of demonstrating an "injury in fact" and that the alleged injury falls within the "zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted" in order to have standing to challenge that action (*Matter of Mental Hygiene Legal Servs. v Daniels*, 33 NY3d 44, 50 [2019], *quoting New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *see also Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9 [1976]). "The injury-in-fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and has suffered a cognizable harm that is not tenuous, ephemeral, or conjectural but is sufficiently concrete and particularized to warrant judicial intervention" (*Daniels*, 33 NY3d at 50 [internal quotation marks and citation omitted]; *see also Ass'n for a Better Long Island, Inc. v New York State Dep't of Env't Conservation*, 23 NY3d 1, 7 [2014]).

This Court has recognized whether a legislator has standing, “generally falls into one of three categories: lost political battles, nullification of votes and usurpation of power” (*Silver v Pataki*, 96 NY2d 532, 539 [2001] (holding plaintiff-legislators lacked standing to sue because they suffered no direct, personal injury beyond an abstract institutional harm). Only “nullification of votes and usurpation of power will bestow legislator standing” (*Id.*; *see, e.g., Coleman v. Miller,* U.S. 433 [1939] [vote nullification]; *Dodak v State Admin. Bd.,* 495 N.W.2d 539 [1993] [Supreme Court of Michigan] [usurpation of power belonging to legislative body]; *cf., Raines v Byrd,* 521 U.S. 811 [1997] [no standing to challenge lost vote]; *Matter of Posner v Rockefeller*, 2NY2d 970 [1970]).

Where a petitioner's claimed injury is no more than “a mere ‘abstract dilution of institutional legislative power,’ [it is] insufficient to confer standing” (*Urban Justice Ctr. v Pataki*, 38 AD3d 20, 25 [1st Dept. 2006], *quoting Raines*, 521 U.S. at 826; *see also Montano v Cnty Legislature of Cnty of Suffolk*, 70 AD3d 203 [2d Dept. 2009] (no vote nullification where petitioner did not serve on or have a vote in the committee); *Corbin v County of Nassau*, 26 Misc. 3d 572 [2009] (no nullification of votes or the usurpation of power where allegation that taxpayers would be encumbered by an unfair tax burden in the event the enactment was not annulled; no injury-in-fact to confer legislative standing).

Here, the Minority Leaders do not allege any injury other than claiming the IRC's role in the appointment process to the Commission directly undermines the lawful authority of the Minority Leaders to make appointments themselves (Minority Leaders Motion for Leave at ⁋25). In fact, Senator Ortt's ability to make appointments to the Commission (and the other legislators designated by Executive Law §94) has not been affected. Senator Ortt is free to submit another nominee, with suitable qualifications, to the IRC for a seat on the Commission As such, his appointment power remains wholly intact. He has not lost his ability to make an appointment. The IRC simply plays a minimal role of vetting the qualifications of candidates because of a decade long struggle by state government officials to bring a measure of independence to its ethics regulating agency. Because there is no injury-in-fact alleged it is insufficient to establish standing.

In *Urban Justice*, *supra*, the court noted the distinction between legislators who alleged particularized injuries and legislators who alleged "only a type of institutional injury." *Urban Justice,* 38 AD3d at 25. There, legislators who were able to articulate specific injuries to themselves, satisfied the standing requirements. For example, the members alleged that as minority members they were receiving a disproportionate allocation of funds than their counterparts in the majority, such as office space, computers, travel reimbursements, and member-initiated projects in

their home districts. These detailed allegations were deemed sufficient allegations of a concrete, personal injury.

On the other hand, in *Borrello v Hochul*, 221 AD3d 1484 (1st Dept. 2023), the First Department ruled that three state legislators lacked standing to bring an Article 78 proceeding and declaratory judgment action against state officials and entities because they did not allege direct and personal injury that represented concrete and particularized harm, and thus had failed to fulfill the injury-in-fact requirement to establish standing. The legislators had alleged that isolation and quarantine regulations adopted by the Department of Health (DOH) to control the spread of COVID-19 was invalid and unenforceable. Critically, the legislators did not allege that they sustained different injury than any other members of legislature but merely asserted alleged harm to separation of powers shared by the legislative branch as whole. The argument -- that DOH's promulgation of regulations violated the separation of powers doctrine by exceeding the scope of their authority and encroached upon the legislature's domain of policymaking – proved unpersuasive to establish standing.

As noted above, in very limited circumstances, legislators have standing to sue when the conduct unlawfully interferes with or usurps their duties as legislators. Here, the Minority Leaders do not even identify whether the delegation of a role to the IRC is a legislative or an executive function. They claim, "regardless of whether

it is an exercise of legislative or executive power, Executive Law §94 unconstitutionally confers important governmental power on a group of unaccountable citizens" (Minority Leaders Motion for Leave at ⁋21; Minority Leaders Brief at 5). But as noted recently in *Cuomo v New York State Comm'n on Ethics & Lobbying in Gov't*, 228 AD3d 175 (3rd Dept. 2024), there are situations, where "the Legislature may delegate many of [their] powers that 'it may rightfully exercise itself'" (*Delgado v State of New York,* 39 NY3d 242, 251 [2022](separation of powers not violated by legislature's creation of a committee to recommend pay raises). On this record, the Minority Leaders fail to demonstrate unlawful interference or a usurpation of legislative power to confer standing. It is incumbent to demonstrate the alleged action must have caused a direct and personal injury that is within a legislator's zone of interest and represents a concrete and particularized harm. This was not shown, and Defendants-Appellants motion for leave should be denied.

POINT II

EVEN IF THE MINORITY LEADERS HAD STANDING THEIR CONSTITUTIONAL CHALLENGE TO EXECUTIVE LAW §94 HAS NOT BEEN PROPERLY PRESERVED FOR THIS COURT'S REVIEW

Petitioner-Appellant Lavine commenced this action in Onondaga County Supreme Court, alleging that Executive Law §94 violated the advice and consent powers of the Senate because it delegated those powers to private citizens in

violation of Article III, V and XIX of the Constitution (Exhibit A). The other Defendants -- the Governor, State Senator Andrea-Stweart Cousins, Assembly Speaker Carl Heastie and the IRC responded to the allegations and moved to dismiss the action.

The Minority Leaders, however, chose not to respond to the allegations raised and did not serve a formal answer to the Verified Complaint. Instead, their counsel filed an attorney affirmation stating they did not object to Petitioner's appointment to the Commission. Supreme Court dismissed the Complaint and ruled the delegation to the IRC was proper and in accordance with the provisions of Executive Law §94. Petitioner then, alone, sought to appeal directly to this Court, which appeal was unavailable for jurisdictional reasons and the case was transferred to the Fourth Department. The Minority Leaders did not assert their standing or that a substantial constitutional question was presented in their primary pleadings.

Upon appeal to the Fourth Department the court correctly concluded that Lavine was "the sole party challenging the constitutionality of Executive Law §94" in this case and lacked standing, "because he did not suffer "injury-in-fact." (*Lavine*, 229 AD3d at 1175). The court declined to consider the merits of the claims citing *Uhlfelder v Weinshall*, 47 AD 3d 169, 183 [1st Dept. 2007] (*see also Clara C. v William L.*, 96 N.Y.2d 244, 250 [2001] ("[w]e are bound by principles of judicial

restraint not to decide constitutional questions unless their disposition is necessary to the appeal").

A constitutional question raised on appeal must have been properly raised in the court below and preserved before this Court in the first instance (*Schulz v State*, 81 NY2d 336, 344 [1993]; *see also People v Baumann & Sons Buses*, 6 NY3d 404, 408 (2006) (a challenge to the constitutionality of a statute must be preserved); *see also Matter of Barbara C.*, 64 NY2d 866 [1985] (holding that constitutional issues not raised or preserved at trial court were not within scope of review of Court of Appeals, so that Court could not exercise its discretion to retain appeal despite its mootness). "To preserve an argument for review by this Court, a party must 'raise the specific argument' in Supreme Court 'and ask the court to conduct the analysis in the first instance" (*US Bank Nat'l Ass'n v DLJ Mortg. Capital, Inc*., 33 NY3d 84, 89 [2019], *quoting Matter of New York City Asbestos Litig*. 27 NY3d 1172, 1176 [2016]).

Because the Minority Leaders did not assert in their pleadings their standing in their own right or raise any challenge to Executive Law §94 no substantial constitutional question is presented here and the motion for leave should be denied (*see Schulz*, 81 NY2d at 344).

CONCLUSION

For the reasons described throughout this memorandum of law, this Court should deny Defendants-Appellants' Motion for Leave to Appeal, along with any further relief this Court deems appropriate.

Dated: September 9, 2024

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STATE OF NEW YORK
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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 Speaker of the Assembly; and the INDEPENDENT REVIEW COMMITTEE,

Defendants-Respondents.

AFFIDAVIT OF SERVICE

Motion No.: 2024-622

Appellate Division Fourth Department Docket No.: CA 23-01332

Onondaga County Index No.: 007623/2022

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COURT OF APPEALS

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

Michele Korkemaz-Christie, being duly sworn, deposes and says:

1. That I am over the age of eighteen years and not a party to this proceeding.

2. That on September 9, 2024, I served true copies of Defendant-Respondent Independent Review Committee's Attorney Affirmation with exhibits

and accompanying Memorandum of Law in Opposition to Defendants-Appellants' Motion for Leave to Appeal upon Counsel as follows:

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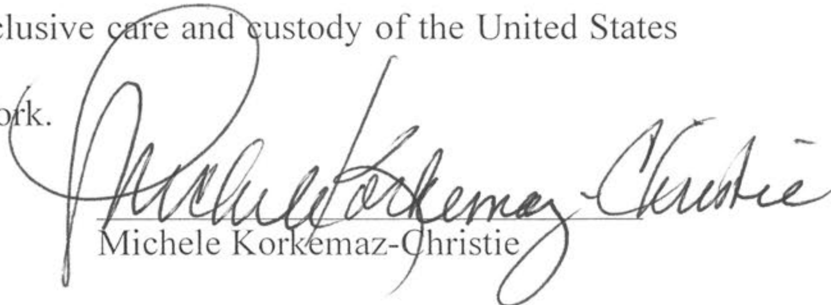
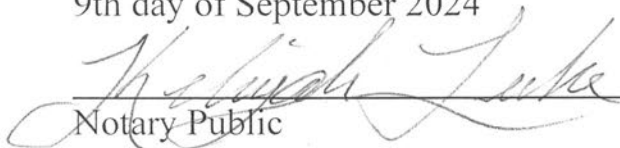


Michele Korkemaz-Christie

Sworn before me this
9th day of September 2024



Notary Public