STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

LINDA HURLEY and REV. REX STEWART, Duly Registered Voters in the State of New York; DAVID BUCHWALD, ROBERT CARROLL, HARVEY EPSTEIN, ROBERT JACKSON, WALTER MOSLEY, and PHIL STECK, Individually and as Qualified Candidates for Public Office Under the Laws of the State of New York; ANITA THAYER and JONATHAN WESTIN, Individually and as Co-Chairs of the New York State Committee of the Working Families Party and Members of the Executive Board of the New York State Committee of the Working Families Party; THE NEW YORK STATE COMMITTEE OF THE WORKING FAMILIES PARTY; and THE EXECUTIVE BOARD OF THE NEW YORK STATE COMMITTEE OF THE WORKING FAMILIES PARTY

Plaintiffs,

vs.

Index No. E169547/2019

THE PUBLIC CAMPAIGN FINANCING AND ELECTION COMMISSION; MYLAN DENERSTEIN, JAY JACOBS, DeNORA GETACHEW, JOHN NONNA, ROSANNA VARGAS, CRYSTAL RODRIGUEZ, HENRY BERGER, DAVID PREVITE, and KIMBERLY GALVIN, as Commissioners of the Public Campaign Financing and Election Commission; THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; PETER S. KOSINSKI, DOUGLAS A. KELLNER, ANDREW J. SPANO, AND GREGORY P. PETERSON, as Commissioners of the Board of Elections of the State of New York; THE GOVERNOR OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE SPEAKER OF THE ASSEMBLY; THE MINORITY LEADER OF THE ASSEMBLY; THE SENATE OF THE STATE OF NEW YORK; THE MAJORITY LEADER OF THE SENATE; and THE MINORITY LEADER OF THE SENATE

Defendants.

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DECISION & ORDER

Boniello, III, J.

By Notice of Motion, Defendants The Assembly of the State of New York; the Speaker of the Assembly of the State of New York Hon. Carl E. Heastie; The New York State Senate, the Senate Majority Leader Hon. Andrea Stewart-Cousins; The Public Campaign Financing and Election Commission; Mylan Denerstein, Jay Jacobs, Denora Getachew, John Nonna, Rosanna Vargas, Crystal Rodriguez, Henry Berger as Commissioners of the Public Campaign Financing and Election Commission; The State of New York; and Douglas A. Kellner and Andrew J. Spano as Commissioners of the Board of Elections of the State of New York (hereinafter and collectively, the "Moving Defendants") moved to dismiss the Plaintiffs' Complaint pursuant to various provisions of CPLR § 3211. In response, Defendants David Previte and Kimberly Galvin as Commissioners of the Public Campaign Financing and Election Commission, Assembly Minority Leader Hon. William A. Barclay (replacing Brian Kolb) and Senate Minority Leader Hon. John J. Flanagan (hereinafter and collectively, the "Minority Defendants") have cross-moved for Summary Judgment on their Cross-Claims which was adopted and joined in by Defendants Peter S. Kosinski and Gregory P. Peterson as Commissioners of the Board of Elections of the State of New York and Plaintiffs herein seeking a declaratory judgment, as a matter of law, that Part XXX of the Laws of 2019, Chapter 59 (hereinafter, the "Statute") is unconstitutional in all respects. In addition, the Court granted the Government Justice Center, Inc.'s application for leave to participate in this proceeding as *amicus curiae* on December 10, 2019.

Previously, this case was originally assigned to the Hon. Richard C. Kloch, Sr. Judge Kloch held a preliminary conference on September 9, 2019 and a Scheduling Order was issued. Pursuant to the Scheduling Order, six (6) Defendants filed Answers. The Minority Defendants filed Answers with Cross Claims. The Defendants, the New York State Senate and the Majority Leader of the Senate and the Assembly of the State of New York and the Speaker of the Assembly, in lieu of Answers to the Complaint, filed Motions to Dismiss pursuant to CPLR § 3211. The case was reassigned to this Court on October 1, 2019. On November 12, 2019, at the request of the Plaintiffs and after notice to all parties was given, the Court converted the Motions to Dismiss to Motions for Summary Judgment pursuant to CPLR § 3211(c). Further, the prior Scheduling Order was amended to give the parties an opportunity to submit additional papers to develop an appropriate record. The parties submitted additional papers in support of their position but no pleadings were amended by the Plaintiffs nor did the Moving Defendants submit verified Answers. The oral argument on the motions was rescheduled from November 12, 2019 to December 12, 2019.

Initially, the Court finds that The Public Campaign Financing and Election Commission of the State of New York (hereinafter, the "Commission") lacks the capacity to be sued and therefore, must be dismissed from this suit (*see*, *Cmty. Bd. 7 v Schaffer*, 84 NY2d 148 [1994]). Further, the Court finds that Kimberly Glavin and David Previte from the Commission as well as New York State Board of Election Commissioners Peter S. Kosinski and Gregory P. Peterson lack capacity and standing to assert their Cross-Claims in this action (*see*, *Cmty. Bd. 7 v Schaffer*, *supra*; *Pooler v Public Service Com.*, 43 NY2d 750 [1977]; *Matter of State Univ. of N.Y. v Town of Amherst*, 81 AD3d 1476 [4th Dept 2011]). Further, Assembly Minority Leader Hon. William

A. Barclay and Senate Minority Leader Hon. John J. Flanagan failed to establish that there was nullification of their votes or usurpation of their power and thus, they also lack standing to sue (*see*, *Silver v. Pataki*, 96 NY2d 532 [2001]; *Matter of Colton v Town Bd. of Town of Amherst*, 72 AD3d 1638 [4th Dept 2010]). As result, the Court must dismiss, as a matter of law, the Cross-Claims asserted by the Minority Defendants (joined in by the New York State Board of Election Commissioners Peter S. Kosinski and Gregory P. Peterson as well as the Plaintiffs).

The record reflects that on April 1, 2019, the New York State Legislature (hereinafter, "Legislature") approved a budget that included the passage of the Statute which established the Commission. Thereafter, on July 3, 2019, the Governor announced the appointment of nine (9) commissioners. The Commission consisted of two members appointed by the Governor; two members appointed by the Senate Majority Leader; two members appointed by the Speaker of the Assembly; one member appointed by the Senate Minority Leader; one member appointed by the Assembly Minority Leader; and the final appointment was jointly made by the Governor, the Senate Majority Leader and the Speaker of the Assembly. The qualifications and affiliations of each of the members of the Commission are set forth on pages 1 and 2 of the Commission's report.

The Commission was tasked with making recommendations which have the force of law and which would supersede existing law. The Statute empowered the Commission to "examine, evaluate and make recommendations for new laws with respect to how the State should implement...a system of voluntary public financing for state legislature and statewide public offices...". In addition, the Commission was empowered to review and recommend changes to certain aspects of the State Election Law and the State Public Finance Law. Such

recommendations by the Commission would become law unless modified or abrogated by statute prior to December 22, 2019 by the Legislature. The Commission issued its report on December 1, 2019 and no part of the report was modified or abrogated by statute nor by any other legislative action. Thus, the recommendations by the Commission now have the full force and effect of law.

The Plaintiffs assert that insofar as the Statute explicitly or effectively interferes with the right to fusion voting the Statute is unconstitutional. More broadly, however, the Plaintiffs further allege that both the New York State Constitution (hereinafter, "Constitution") and the Laws of the State of New York (hereinafter, "State") do not permit the creation of any entity for the purpose of making laws other than the Senate and the Assembly nor can any entity other than the Legislature modify or repeal an enactment of the Legislature. As a result, the Plaintiffs have brought this declaratory judgment action against Defendants herein seeking a determination that the Statute enacted by the Legislature creating the Commission and the actions of Defendants are unconstitutional. Specifically, the Plaintiffs are seeking a judgment declaring that (1) the Constitution and laws of the State guarantee the right of fusion voting, and that insofar as the Statute or any action by the Commission which explicitly or effectively interferes with that right is unconstitutional and null and void and that no Defendant may take any action abridging or interfering with the Plaintiffs' right to fusion voting (First Cause of Action); (2) the Constitution and laws of the State do not permit the creation of any entity for the purpose of making laws other than the Senate and Assembly, nor may such entity including the Commission, take any actions which actually or effectively create law; nor will any such action be of legal force and effect (Second Cause of Action); and (3) the Constitution and laws of the State do not permit the modification or repeal of an enactment except by means equivalent to those used to create such

enactment (Third Cause of Action). In response, the Moving Defendants argue that the Complaint is moot when viewed against the recommendations of the Commission and that the Plaintiffs' claims have not been properly pled.

Summary Judgment is, of course, a drastic remedy which should not be granted if there is a possible relevant factual issue (Siegel, NY Prac § 278, at 459-460 [4th ed]). On a motion for summary judgment, the proponent of the motion must set forth evidentiary proof, in admissible form, eliminating any material issue of fact from the suit (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). However, the Court of Appeals has held that an inquiry into the constitutional validity of a statute is purely a question of law (*Cayuga Indian Nation of N.Y. v Gould*, 14 NY3d 614 [2010]).

It is well settled that in an action for declaratory judgment there must be a genuine legal dispute between the parties as declaratory relief will not be granted where it would result only in an advisory opinion (*New York Public Interest Research Group, Inc. v Carey*, 42 NY2d 527 [1977]). The law is clear that "to constitute a 'justiciable controversy,' there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" (*Chanos v Madac, LLC*, 74 AD3d 1007 [2nd Dept 2010]). Further, "a justiciable controversy is one solvable by a court rather than some other forum" (*Schulz v Silver*, 212 AD2d 293 [3rd Dept 1995]). However, a party must present a controversy that is "definite and concrete" and be a "real and substantial controversy admitting of specific relief through a decree of a conclusive character" (*New York State Asso. of Ins. Agents, Inc. v Schenck*, 44 AD2d 757 [4th Dept 1974], quoting *Aetna Life Ins. Co. v. Haworth*, 300 US 227 [1937]). The Court notes that when evaluating whether a justiciable controversy exists there is

a distinction between an administrative action being reviewed and a legislative action which has the full force of law. Moreover, ripeness pertains to an action which is final and produces an alleged harm (*see*, *Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510 [1986]; *Matter of Brighton Grassroots, LLC v Town of Brighton*, 2020 NY Appellate Division Lexis 787 [4th Dept 2020]).

Here, the recommendations of the Commission are now the law of the State and thus, each recommendation is final and binding. Significantly, the Commission's recommendations amended Election Law §1-104 (3) by increasing the threshold for political parties to receive ballot access. The Plaintiffs have challenged the constitutionality of the Statute in the context of the Election Law. Specifically, the Plaintiffs have argued that such action would be unconstitutional and violate New York State's Constitutional prohibition against delegating or granting legislative power to any entity or persons other than the Senate and Assembly. The Plaintiffs also claim that this amendment will indirectly interfere with fusion voting as it will eliminate minor parties from the ballot. Based upon the facts and circumstances, the Court finds that there is a justiciable controversy herein.

The primary legal issue in this case is whether the Legislature improperly delegated its law making powers to the Commission. It is fundamental that the legislative power of this State shall be vested in the Senate and Assembly (*see*, NY Const., Art. III, § 1; *Boreali v Axelrod*, 71 NY2d 1 [1987]). Though the Legislature cannot delegate its authority and pass on its law-making functions to other bodies or communities, New York Courts have recognized that the Legislature may delegate certain matters to administrative agencies (*Boreali v Axelrod, supra*; *Mooney v Cohen*, 272 NY 33 [1936]; *St. Joseph's Hosp. v Novello*, 43 AD 3d 139 [4th Dept 2007]). In

Boreali v Axelrod, the Court of Appeals acknowledged that the Legislature has considerable leeway on delegating its regulatory powers. Notwithstanding, the Court of Appeals also stated that "a legislative grant of authority must be construed, whenever possible, so it is no broader than that which the separation of powers doctrine permits" *Id.*

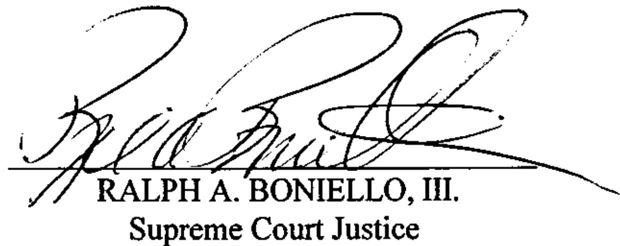
In this case, the Court finds that the Legislature, clearly and unequivocally, empowered the Commission to legislate new law and repeal existing statutes. The line between administrative rule-making (which can be delegated) and legislative action (which cannot be delegated) has clearly been transgressed. The Legislature established the Commission and delegated to it the authority to create new law and to repeal existing law which is a function reserved solely to the Legislature under the Constitution. The transgression became final when the recommendations of the Commission became law without further action by the Legislature. The Court notes that the fact that the Legislature reserved the right to modify or abrogate by statute the recommendations of the Commission does not validate the process. The legislative function must be followed with proper procedure as mandated by the Constitution and adopted and historically followed by the Legislature. The vote taken by the Legislature to pass the statute cannot be deemed to blindly ratify the recommendations of the Commission especially since such recommendations would not be known at the time of the passage of the Statute on April 1, 2019. The Court further notes that the doctrine of legislative equivalency requires that "to repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice" (*Moran v LaGuardia*, 270 NY 450 [1936]).

Accordingly, the Motions for Summary Judgment Dismissing the Complaint by the Moving Defendants are denied. Although there is a severability clause in the Statute, the Court

finds that the Statute is an improper and unconstitutional delegation of legislative authority to the Commission. The Court awards summary judgment to the Plaintiffs (*see*, CPLR § 3212 [b]; *Estate of Giffune v Kavanagh*, 302 AD2d 878 [4th Dept 2003]).

The signing of this Decision and Order shall not constitute notice of entry under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to service of notice of entry.

This Decision shall constitute the Order of this Court and shall be filed as such.



RALPH A. BONIELLO, III.
Supreme Court Justice

Dated: March 12, 2020
Niagara Falls, New York