

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

JOSEPH JASTRZEMSKI, as candidate
for the office of Niagara County Clerk
and as voter and taxpayer of Niagara County
and New York State;

COLIN J. SCHMITT, as candidate
for the office of New York State Assembly
and as voter and taxpayer of Orange County
and New York State;

JOSHUA WALKER, as voter and
taxpayer of Niagara County
and New York State;

WILLIAM L. ROSS, as acting
Chairman and Member of the Niagara
County Committee of the Conservative
Party of the State of New York, and as
voter and taxpayer of Niagara County
and New York State;

**NIAGARA COUNTY COMMITTEE OF
THE CONSERVATIVE PARTY OF
THE STATE OF NEW YORK;**

**CONSERVATIVE PARTY OF
THE STATE OF NEW YORK;**

GERARD KASSAR, as Chairman
and Member of the Conservative
Party of the State of New York and as
voter and taxpayer of Kings County
and New York State;

Plaintiffs,

v.

Index No. _____

**THE PUBLIC CAMPAIGN FINANCING
AND ELECTION COMMISSION OF
THE STATE OF NEW YORK;**

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 of
the State of New York;**

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;**

**GOVERNOR OF
THE STATE OF NEW YORK;**

**THE ASSEMBLY OF
THE STATE OF NEW YORK;**

**SPEAKER OF THE ASSEMBLY OF
THE STATE OF NEW YORK;**

**MINORITY LEADER
OF THE ASSEMBLY OF
THE STATE OF NEW YORK;**

**THE SENATE OF
THE STATE OF NEW YORK;**

**MAJORITY LEADER
OF THE SENATE OF
THE STATE OF NEW YORK;**

**MINORITY LEADER
OF THE SENATE OF
THE STATE OF NEW YORK;**

**NIAGARA COUNTY
BOARD OF ELECTIONS,**

Defendants.

VERIFIED COMPLAINT

Plaintiffs, Joseph Jastrzemski, as candidate for the office of Niagara County Clerk and as voter and taxpayer of Niagara County and New York State; Colin J. Schmitt, as candidate for the office of New York State Assembly and as voter and taxpayer of Orange County and New York State; Joshua Walker, as voter and taxpayer of Niagara County and New York State; William L. Ross, as acting Chairman (formerly Vice Chairman) and Member of the Niagara County Committee of the Conservative Party of the State of New York and as voter and taxpayer of Niagara County and New York State; Niagara County Committee of the Conservative Party of the State of New York ("County Conservative Party"); the Conservative Party of the State of New York ("State Conservative Party"); Gerard Kassar, as Chairman and Member of the Conservative Party of the State of New York and as voter and taxpayer of Kings County and New York State (collectively, "Plaintiffs"), for their Complaint seeking a declaratory judgment against Defendants, the Public Campaign Financing and Election Commission of the State of New York; 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 of the State of New York; the State of New York; the Board of Elections of the State of New York ("Board"); Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano, and Gregory P. Peterson, as Commissioner of the Board of Elections of the State of New York; the Governor of the State of New York ("Governor"); the Assembly of the State of New York ("Assembly"); the Speaker of the Assembly of the State of New York; the Minority Leader of the Assembly of the State of New York; the Senate of the State of New York ("Senate"); the Majority Leader of the Senate of the State of New York; the Minority Leader of the Senate of the State of New York; and the Niagara County Board of Elections (collectively, "Defendants"), state:

INTRODUCTION

1. Plaintiffs bring this declaratory judgment action against Defendants seeking a determination that Part XXX of the Laws of 2019, Chapter 59, Bill No. S01509C ("Statute"), enacted by the New York State Legislature ("Legislature") and with approval of the Governor, creating a public campaign financing and election commission is unconstitutional. Part XXX ("Statute") creates a commission entitled the Public Campaign Financing and Election Commission of the State of New York ("Commission"), which is comprised of nine individual commissioners appointed by the Governor and the Majority and Minority leaders of the Assembly and the Senate. The Statute tasks the Commission with determining new election laws governing multiple party candidate nominations and/or designations, among other things. A determination made by a majority of the Commissioners will have the force of law and will supersede any inconsistent provision of the Election Law, unless the Legislature affirmatively repeals or amends by statute the law enacted by the Commission.

2. The enactment of the Statute and the creation of the Commission are in violation of the Constitution of the State of New York ("Constitution") and interfere with the constitutionally protected rights of citizens, electors, candidates, and political parties to engage in fusion voting. Accordingly, Plaintiffs seek a judgment declaring that: (1) the Statute violates the Constitution because it improperly delegates to the Commission the core legislative function of creating, repealing, and amending basic provisions of New York statutory law (e.g., the Election Law); (2) the Statute violates the Constitution because it authorizes the creation of law by the Commission without requiring an equivalent legislative act to repeal an act of the Legislature; (3) the Statute violates the Constitution because it authorizes an unconstitutional restriction on fusion voting; and (4) the Defendants may not abridge or in any way interfere with the right to fusion voting.

THE PARTIES

3. Plaintiff Joseph Jastrzemski is a resident, voter, and taxpayer of Niagara County and New York State. Plaintiff Jastrzemski now holds the elective office of Niagara County Clerk to which he was elected in 2015 as the nominee of the Conservative and Independent parties. Plaintiff Jastrzemski is currently organizing his campaign for nomination by those parties for re-election in 2019. Plaintiff Jastrzemski resides at 4815 E. Lake Road, Burt, New York 14028.

4. Plaintiff Colin J. Schmitt is a resident, voter, and taxpayer of Orange County and New York State. Plaintiff Schmitt now holds the elected office Assemblyman for the 99th Assembly District to which he was elected on November 6, 2018 as the nominee of the Republican, Conservative, Independence, and Reform parties. Plaintiff Schmitt is currently organizing his campaign for nomination by those parties in 2020. Plaintiff Schmitt resides at 170 Highwood Drive, New Windsor, New York 12553.

5. Plaintiff Joshua Walker is a registered voter, elector, and taxpayer of Niagara County and New York State. Plaintiff Walker resides at 44 S. Vernon Street, Middleport, New York 14105.

6. Plaintiff William L. Ross is acting Chairman (formerly Vice Chairman) and a Member of the County Conservative Party and is a registered voter, elector, and taxpayer of Niagara County and New York State. Plaintiff Ross resides at 6761 Walmore Road, Niagara Falls, New York 14303.

7. Plaintiff County Conservative Party is an unincorporated association and political party related to the State Conservative Party with independent power to nominate candidates for public office at levels below the State level. Its principal office is located at 6761 Walmore Road, Niagara Falls, New York 14304.

8. Plaintiff State Conservative Party is an unincorporated association and a political party. Its principal office is located at 486 78th Street, Brooklyn, New York 11209.

9. Plaintiff Gerard Kassar is the Chairman and a Member of the State Conservative Party and is a registered voter, elector, and taxpayer of Kings County and New York State. Plaintiff Kassar resides at 7521 10th Avenue, Brooklyn, New York 11228.

10. Defendant Commission is a body created by the Statute and is empowered to enact laws governing multiple party candidate nominations and/or designations and to repeal or amend provisions of the Election Law as enacted by the Legislature.

11. Defendants Mylan Denerstein, Jay Jacobs, DeNora Getachew, John Nonna, Rosanna Vargas, Crystal Rodriguez, Henry Berger, David Previte, and Kimberly Galvin, have been appointed as Commissioners to the Commission by Defendants Governor, Assembly Speaker, Assembly Minority Leader, Senate Majority Leader and Senate Minority Leader. The Statute grants the Commissioners the power to enact laws governing multiple party candidate nominations and/or designations and to repeal or amend provisions of the Election Law as enacted by the Legislature.

12. Defendant State of New York is the body bound by the Constitution, including but not limited to the Governor, Legislature, Board, and Commission.

13. Defendant Board is a body of the State of New York empowered to conduct and supervise elections, including the power to approve or disapprove candidate petitions on factual and/or legal grounds.

14. Defendants Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano, and Gregory P. Peterson, are Commissioners of the Board.

15. Defendant Governor is head of the executive branch of the government of the State of New York. The Governor's powers and duties are expressly set forth in the Constitution. The Governor approved the Statute that created the Commission and has appointed commissioners thereto.

16. Defendant Assembly is a house of the Legislature empowered under the Constitution to exercise the legislative function. The Assembly adopted the Statute.

17. Defendant Speaker of the Assembly is an officer of the Assembly. As authorized by the Statute, Defendant Speaker of the Assembly has appointed commissioners to the Commission.

18. Defendant Minority Leader of the Assembly is an officer of the Assembly. As authorized by the Statute, Defendant Minority Leader has appointed a commissioner to the Commission.

19. Defendant Senate is a house of the Legislature empowered under the Constitution to exercise the legislative function. The Senate adopted the Statute.

20. Defendant Majority Leader of the Senate is an officer of the Senate. As authorized by the Statute, Defendant Majority Leader of the Senate has appointed commissioners to the Commission.

21. Defendant Minority Leader of the Senate is an officer of the Senate. As authorized by the Statute, Defendant Minority Leader of the Senate has appointed a commissioner to the Commission.

22. Defendant Niagara County Board of Elections is a body of the State of New York, County of Niagara, empowered to conduct and supervise local elections, including the power to approve or disapprove candidate petitions on factual and/or legal grounds.

JURISDICTION AND VENUE

23. The Court has jurisdiction over the parties and the substantive issues and claims set forth in this action pursuant to Article 3 of the New York Civil Practice Law and Rules ("CPLR").

24. The declaratory judgment action is brought pursuant to CPLR § 3001. An actual justiciable controversy exists among Plaintiffs and Defendants within the meaning of CPLR § 3001.

25. Pursuant to CPLR § 503, venue of this action is proper in the County of Niagara, State of New York.

BACKGROUND

A. Fusion Voting

26. Fusion voting is a system that permits a single candidate to appear on the same ballot multiple times under the lines of more than one political party. Thus, with fusion voting, more than one political party can support a common candidate. This is often referred to as a cross-endorsement. When a party appears on more than one line on the same ballot, each vote for that candidate is aggregated regardless of the party line under which it was cast.

27. Fusion voting increases the influence of minority parties and minority party voters, by enabling voters to voice their support for the policies and positions held by their respective parties without sacrificing their ability to impact the election of candidates.

28. Fusion voting arose from efforts to reform corrupt election practices at the end of the 19th century. It has been an effective tool for citizen engagement, for political reform, and for limiting rule by party bosses.

29. Fusion voting has existed in the State of New York for well over a century (since the creation of political parties in New York), and applies to local and statewide legislative and judicial elections and federal legislative elections, including presidential elections.

30. Fusion voting includes the right of a candidate to run on more than one ballot line, the right of the voter to vote for a candidate who appears on more than one party line on the ballot and to have that vote counted on the party line of the voter's choosing, the right of the voter and the political party to campaign and advocate for others to vote on that party line, and the right of the political party to grant or withhold an endorsement and/or nomination for a candidate seeking to

appear on more than one party line. These rights, singularly and collectively, are fundamental to the full and robust exercise of the political process in New York.

31. Fusion voting is enjoyed by every voter, political party, candidate and any other person or entity who participates in the electoral process.

32. Fusion voting has survived repeated attempts by the Legislature and political parties to repeal or diminish its scope.

33. Fusion voting has been upheld by the Judiciary of the State of New York as a protected right under the Constitution. *See In Re Callahan*, 200 N.Y. 59, 63 (1910) ("the legislative provision is solely intended to prevent political combinations and fusions, and this is the very thing that...there is no right to prevent or hamper as long as our theory of government prevails, that the source of all power is the people...."); *Hopper v Britt*, 203 N.Y. 144, 156 (1911) ("...the legislature could not constitutionally prevent the nomination of fusion or combination candidates"); *Devane v. Touhy*, 33 N.Y. 2d 48, 52 (1973) ("What exclusion could be more arbitrary than that one party or organization should not be permitted to nominate the candidate of another." (Internal citations and quotations omitted)).

34. Fusion voting is expressly authorized in the Election Law as enacted by the Legislature.

35. Although constitutionally protected, Fusion voting is not explicitly created by statute, but is repeatedly referenced in the Election Law. *See e.g.* NY CLS Elec. §§ 6-146 and 7-104.

36. The State Conservative Party and the County Conservative Party ("Conservative Party") are political parties that have long exercised their right to fusion voting in local and statewide legislative and judicial elections.

37. The ability to engage in fusion voting has been a significant, positive, and influential tool for the Conservative Party and the political process as a whole.

B. The Statute

38. A true and accurate copy of the Statute is attached hereto as **Exhibit A**.

39. Section 1 of the Statute states, in pertinent part:

(a) Establishment of commission. The state shall establish a system of voluntary public campaign financing for statewide and state legislative public offices. There is hereby established a public campaign financing and election commission to examine, evaluate and make recommendations for new laws with respect to how the State should implement such a system of voluntary public campaign financing for state legislative and statewide public offices, and what the parameters of such a program should be. The commission shall make its recommendations in furtherance of the goals of incentivizing candidates to solicit small contributions, reducing the pressure on candidates to spend inordinate amounts of time raising large contributions for their campaigns, and encouraging qualified candidates to run for office. The commission shall also review and recommend changes to certain aspects of the state election law as detailed herein. The commission's report is due by December 1, 2019 and shall have the full effect of law unless modified or abrogated by statute prior to December 22, 2019.

(b) Members of commission. The commission shall be comprised of nine members, two of which shall be appointed by the governor, two of which shall be appointed by the senate majority leader, two of which shall be appointed by the speaker of the assembly, one of which shall be appointed by the senate minority leader, and one of which shall be appointed by the assembly minority leader. The governor, senate majority leader, and speaker of the assembly shall jointly appoint a ninth member to serve on the commission. The commission shall not be fully constituted without the appointment of the ninth member. There shall be no chairperson appointed, and the commission shall be governed by a majority vote, and at all times the commission shall act with a quorum. [Ex. A (emphasis added)].

40. Section 2 of the Statute states, in pertinent part:

The commission shall specifically determine and identify all details and components reasonably related to administration of a public financing program, and shall also specifically determine and identify new election laws in the following areas:

(j) rules and definitions governing: candidates' eligibility for public financing; political party qualifications; multiple party candidate nominations and/or designations; and civil violations of public financing rules. [Id. (emphasis added)].

41. Section 5 of the Statute states, in pertinent part:

The commission shall make a report to the governor and the legislature of its findings, conclusions, determinations and recommendations and shall submit such report by December 1, 2019.

Any findings, conclusions, determinations and recommendations in the report must be adopted by a majority vote of the commission. Each member of the commission shall report their vote and describe their reasoning for their determination.

The commission may report recommendations supported by a majority. Each recommendation made to implement a determination pursuant to this act shall have the force of law, and shall supersede, where appropriate, inconsistent provisions of the election law, unless modified or abrogated by statute prior to December 22, 2019. *[Id.* (emphasis added)].

42. Plaintiffs do not challenge the constitutionality of those portions of the Statute pertaining to public campaign financing.

C. The Constitution

43. Article III Section 1 of the Constitution sets forth the power of the Legislature and states that "[t]he legislative power of the state shall be vested in the senate and assembly."

44. Article III, Section 13 of the Constitution further states that "no law shall be enacted except by bill."

45. Article III, Section 14 of the Constitution further states that "no bill shall be passed or become a law... except by the assent of a majority of the members elected to each branch of the legislature."

D. The Statute is Unconstitutional

46. Pursuant to the Constitution, the Legislature may not delegate its lawmaking power to an administrative agency.

47. In the Statute, the Legislature gave the Commission broad and unbridled authority to "determine and identify new election laws" governing "multiple party candidate nominations and/or designations." *See Ex. A* § 2(j).

48. The Statute is unconstitutional as it delegates to the Commission the core legislative function of creating, repealing, and amending New York State Election Law.

49. Pursuant to the Constitution, a statute enacted by the Legislature may not be amended or repealed but for a legislative act of equal dignity and import. Nothing less than another statute will suffice.

50. The various sections of the New York State Election Law sanctioning fusion voting were enacted by a vote of the Legislature and approved by the then governor of the State of New York.

51. A determination by the Commission is not a legislative act of equal dignity to that of a statute enacted by the Legislature and approved by the governor.

52. The Statute is unconstitutional as it authorizes the Commission to create, amend, and repeal law enacted by a vote of the Legislature without requiring an equivalent legislative act.

53. The Statute improperly authorizes the Commission to enact laws that restrict and/or interfere with the constitutionally protected right to fusion voting.

54. Plaintiffs are presently suffering harm as a result of the enactment of the Statute. Plaintiffs are currently engaged in political activities in preparation for elections to take place in 2019 and 2020. These activities include, but are not limited to, proceeding on endorsements and nominations, community and political organizing, fundraising, issue development, candidate recruitment in primary and general elections, etc. In conducting many of these activities, Plaintiffs must be able to rely on their ability to exercise their constitutional right to fusion voting.

55. As a result of the Statute, Plaintiffs' engagement in the above political activities has been chilled, and candidates are hesitant to pursue multiple-party nominations. Plaintiffs stand to be severely harmed by any further interference with their constitutionally protected right to fusion voting and cross-endorsements.

FIRST CAUSE OF ACTION
(Declaratory Judgment)

56. Plaintiffs repeat and reallege all of the foregoing paragraphs as if fully set forth herein.

57. The Statute gives the Commission broad and unbridled authority to "determine and identify new election laws" governing "multiple party candidate nominations and/or designations." *See Ex. A, § 2(j).*

58. In the Statute, the Commission is permitted to freely enact new laws governing multiple party candidate nominations and/or designations and to repeal or amend provisions of the Election Law as enacted by the Legislature.

59. That portion of the Statute is unconstitutional on its face as an improper delegation of Legislature's lawmaking power.

60. There exists an actual and justiciable controversy over the interpretation of the Statute and its constitutionality.

61. Accordingly, Plaintiffs are entitled to a judgment declaring the Statute unconstitutional because it improperly delegates the Legislature's lawmaking power to the Commission.

SECOND CAUSE OF ACTION
(Declaratory Judgment)

62. Plaintiffs repeat and reallege all of the foregoing paragraphs as if fully set forth herein.

63. Pursuant to the Statute, each recommendation made to implement a determination by the Commission "shall have the force of law, and shall supersede, where appropriate, inconsistent provisions of the election law, unless modified or abrogated by statute prior to December 22, 2019."

See Ex. A, § 5.

64. Thus, the Statute gives the Commission authority to repeal existing law enacted by the Legislature without a majority vote of the Legislature that enacted the law being repealed.

65. That portion of Statute is unconstitutional on its face as it violates the equivalency doctrine.

66. There exists an actual and justiciable controversy over the interpretation of the Statute and its constitutionality.

67. Accordingly, Plaintiffs are entitled to a judgment declaring the Statute unconstitutional because it authorizes the Commission to create, amend, and repeal law enacted by a vote of the Legislature without requiring an equivalent legislative act.

THIRD CAUSE OF ACTION
(Declaratory Judgment)

68. Plaintiffs repeat and reallege all of the foregoing paragraphs as if fully set forth herein.

69. The Statute gives the Commission broad and unbridled authority to "determine and identify new election laws" governing "multiple party candidate nominations and/or designations."

See Ex. A, § 2(j).

70. The Statute enables the Commission to enact laws that restrict and/or interfere with the constitutionally protected right to fusion voting.

71. The Legislature cannot lawfully enact laws that restrict or in any way interfere with the constitutionally protected right to fusion.

72. Consequently, the Legislature cannot lawfully authorize the Commission to enact laws that restrict or in any way interfere with the constitutionally protected right to fusion voting.

73. There exists an actual and justiciable controversy over the interpretation of the Statute and its constitutionality.

74. Accordingly, Plaintiffs are entitled to a judgment declaring the Statute unconstitutional because it authorizes the Commission to enact laws that explicitly or effectively interfere with the constitutionally protected right to fusion voting.

WHEREFORE, Plaintiffs ask this Court for an order and declaratory judgment in favor of Plaintiffs and against Defendants:

- (a) declaring the Statute unconstitutional because it improperly delegates the Legislature's lawmaking power to the Commission;
- (b) declaring the Statute unconstitutional because it authorizes the Commission to create, amend, and repeal law enacted by a vote of the Legislature without requiring an equivalent legislative act;
- (c) declaring the Statute unconstitutional because it authorizes the Commission to enact laws that explicitly or effectively interfere with the constitutionally protected right to fusion voting;
- (d) declaring that the defendants may not in any way abridge or interfere with the right to fusion voting; and
- (e) for such other and further relief as the Court deems just and proper.

Dated: July 22, 2019
Buffalo, New York

WOODS OVIATT GILMAN LLP

By: /s/ William F. Savino
William F. Savino
Andrea K. DiLuglio
Attorneys for Plaintiffs
1900 Main Place Tower
350 Main Street
Buffalo, New York 14202
716-248-3210
wsavino@woodsoviatt.com

VERIFICATION

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

WILLIAM L. ROSS, being duly sworn, deposes and states that deponent is Vice Chairman of the Niagara County Committee of the Conservative Party of the State of New York, and a resident, voter and taxpayer of Niagara County, New York; that deponent is a named Plaintiff in the above-matter; that deponent has read the foregoing Verified Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except for those matters therein stated to be alleged upon information, and as to those matters deponent believes them to be true.

William L. Ross

Sworn to before me this _____
day of July, 2019.

Notary Public