

**COURT OF APPEALS OF THE STATE OF NEW YORK**

GARY J. LAVINE,

Plaintiff-Respondent,

v.

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

Defendants-Respondents.

**NOTICE OF MOTION  
FOR LEAVE TO  
APPEAL**

**INDEX NO: 007623/2022**

**APPELLATE DIVISION,  
FOURTH  
DEPARTMENT**

**DOCKET NO: 23-01332**

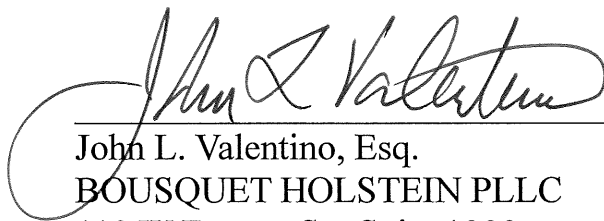
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**PLEASE TAKE NOTICE** that upon the affirmation and accompanying exhibit of John L. Valentino dated August 15, 2024, pursuant to Rules 500.21 and 500.221 of the Court of Appeals Rules of Practice a motion will be made before this Court, at the Court of Appeals Hall, Albany, New York on the 2<sup>nd</sup> day of September, 2024 for an order pursuant to CPLR § 5602 granting leave to appeal to this Court from the Memorandum and Order of the Supreme Court dated and entered July 26, 2024.

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

Argument in person is not permitted.

Dated: August 19, 2024.



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COURT OF APPEALS OF THE STATE OF  
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Defendants-Respondents.

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AFFIRMATION OF  
JOHN L. VALENTINO  
IN SUPPORT OF MOTION  
FOR LEAVE TO APPEAL

INDEX NO: 007623/2022

APPELLATE DIVISION,  
FOURTH DEPARTMENT  
DOCKET NO: 23-01332

John Valentino, an attorney licensed in the State of New York, affirm pursuant to CPLR § 2106, under penalty for perjury which may include a fine or imprisonment:

1. I am counsel to Gary J. Lavine, Plaintiff-Appellant and make this affirmation in support of a motion for an order pursuant to CPLR § 5602 granting plaintiff Lavine leave to appeal to this Court from the Memorandum and Order of the Appellate Division, Fourth Department, dated July 26, 2024, and entered on July 26, 2024 (Exhibit "A"),

2. This motion for leave to appeal is timely. Pursuant to CPLR § 5602 (a)(1)(i) this Court has jurisdiction. The Fourth Department Memorandum and Order finally determined the case.

## SUMMARY OF CASE

3. Executive Law § 94 provides for an Independent Review Committee ("Review Committee") with the power of *advice & consent* to approve or reject *nominations* for appointment to the Commission on Ethics and Lobbying in Government ("Commission"). The Review Committee is comprised of the state's law school deans or designees from their respective law schools.

4. Mr. Lavine asserts that the delegation of the Senate's core legislative power of *advice & consent* to the Independent Review Committee by Executive Law § 94 violates the state Constitution ("Constitution").

5. Article III of the Constitution vests all legislative power with the Senate and Assembly. Article V of the Constitution vests the power of *advice & consent* solely with the Senate. The Constitution can only be amended pursuant to Article XIX.

6. While the law schools and their administrators have a power of *appointment* to the Review Committee, the law school administrators do not have a power of *appointment* to the Commission.

7. Governor Hochul's original proposal to replace the Joint Commission on Public Ethics ("Joint Commission") provided that five of the state's law school deans or their designees serve as the Commission members on a rotating basis. Under the Governor's original proposal, the law schools and their administrators would have had the power of *appointment* to the Commission.

8. The Governor's proposal was not accepted by the Legislature. Instead, a compromise was enacted by which the law school administrators were given the power of *advice & consent* to confirm or reject *nominations* made by the Selection Members which are the Legislative leaders and statewide elected officers.

9. Mr. Lavine, having served on the former Joint Commission, was nominated by the Minority Leader of the Senate to serve on the Commission. The Review Committee rejected Mr. Lavine's *nomination* by unanimous vote with one recusal. (See, Bennett Liebman, *The Constitutionality of the Commission on Ethics and Lobbying in Government*, Albany Law School Government Law Center, June 29, 2023).

10. Mr. Lavine asserts that delegation by Executive Law § 94 of the core legislative power of *advice & consent* to law school administrators violates Article III and Article V and is a *de facto* amendment of the Constitution which violates Article XIX.

11. Supreme Court (Lamendola, J.) held that the Constitution does not require Senate confirmation of appointments to the Commission. Supreme Court also held that the Governor and Legislature are empowered to establish any protocol for appointment they deem appropriate. In this respect, Supreme Court relied, in part, on Article IX, § 9 of the Constitution which was repealed in 1963.

(See, *The Constitutionality of the Commission on Ethics and Lobbying in Government, supra*).

12. The Executive Law does not grant the power of *nomination* or the power of *appointment* to the Review Committee. Nonetheless, Supreme Court held that the law school administrators exercise a *de facto* power of *appointment* and that the power of *appointment* may be delegated to private citizens (or, it might be extrapolated, even to individuals who are not citizens of the state).

13. Supreme Court noted that Mr. Lavine's standing was challenged but did not resolve the question.

14. Mr. Lavine proceeded with a direct appeal to this Court from Supreme Court pursuant to CPLR § 5601 (b)(2). However, the appeal was transferred by this Court to the Appellate Division, Fourth Department, upon the ground that parties opposite challenged Mr. Lavine's standing to bring the action. The Appellate Division held *inter alia* that Mr. Lavine did not have standing to challenge the statute's constitutionally.

A SIGNIFICANT ISSUE IS PRESENTED OF STANDING  
TO CHALLENGE STATUTORY CONSTITUTIONALITY

15. The Appellate Division's decision explicitly held that plaintiff Lavine did not "suffer an injury-in-fact" and, therefore, did not have standing. The decision implicitly held that Senate Minority Leader Ortt (as well as Assembly Minority Leader Barclay) did not have standing to pursue an argument challenging the constitutionality of the statute.

16. The Appellate Division did not articulate an analysis of plaintiff Lavine's standing other than to express that the defendants "met their burden by establishing that plaintiff did not suffer an injury-in-fact".

17. Presumably, the Appellate Division accepted defendant's argument that plaintiff Lavine has no right to hold any public office and, thus, suffered no injury when his nomination was not confirmed.

18. The defendants made an argument to counter an argument Mr. Lavine never made. While plaintiff Lavine has argued that the Independent Review Committee provisions should be severed from the statute and, consequently, he should be seated, Plaintiff Lavine has never argued he has an inalienable "right" to hold a public office. He has asserted that as a nominee of the Senate Minority Leader requiring confirmation, he is entitled to a constitutional confirmation process.



19. As a nominee, Mr. Lavine has suffered an injury-in-fact if the confirmation process to which the nomination is subject does not pass constitutional muster.

20. If the Constitution or statute requires confirmation of a nomination, the exercise of the core legislative power of "*advice & consent*" must be by the Senate which constitutes for the nominee a "matured legally protectible interest". *Dekdebrun v. Hardt*, 68 AD2d 241 [4<sup>th</sup> Dept., 1979]; *Phelan v. Buffalo*, 54 AD2d 262 [4<sup>th</sup> Dept., 1976], 5 *Weinstein, Korn, Miller* ¶ 3001.04[2].

21. A nominee subject to an unconstitutional confirmation process suffers "a personal and private deprivation". See *Urban Justice Ctr v. Pataki*, 38 AD3 20 [1<sup>st</sup> Dept., 2006] citing *Powell v. McCormack*, 395 US 486 [1969].

22. This Court stated in *Boryszewski v. Brydges*, 37 NY2d [1975]

In other settings in which questions of standing have been posed it has been our disposition to expand rather than to contract the doctrine. . . We are now prepared to recognize standing where . . . the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action.

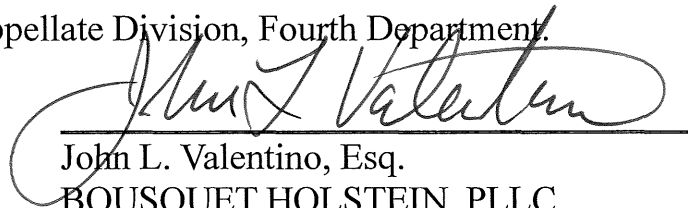
23. If the nominee does not have standing and the nominating officer does not have standing, the question is invited: Who does have standing?

24. The Appellate Division's holding is contrary to the precept enunciated by this Court in *Boryszewski v. Brydges*, supra,

Where the prospect of challenge to the constitutionality of State legislation is otherwise effectually remote, it would be particularly repellant today, when every encouragement to the individual citizen-taxpayer is to take an active, aggressive interest in . . . State . . . local and national government, to exclude . . . from access to the judicial process.

WHEREFORE, plaintiff, Gary J. Lavine, requests leave to appeal the Memorandum and Order of the Appellate Division, Fourth Department.

Dated: August 15, 2024



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# Exhibit A

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 Ort, 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

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**GARY J. LAVINE,**

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**REVIEW COMMITTEE,**

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Respondents.

**AFFIDAVIT OF**  
**SERVICE**

INDEX NO: 007623/2022

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DOCKET NO: 23-01332

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

**Brigid Purtell,** being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides in Jamesville, New York.

That on 19<sup>th</sup> day of August, 2024, deponent served a copy of Plaintiff-Appellant's **Motion for Leave to Appeal** upon:

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Hon. Letitia James  
Office of the Attorney General  
Attn: Managing Attorney's  
Office/Personal Service  
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Albany, NY 12224-0341

attorneys for Defendants in the above-captioned matter by mailing copies of said documents in a postpaid, properly addressed wrapper, and placed in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Dated: August 21, 2024

  
\_\_\_\_\_  
Brigid Purtell

Sworn to before me this  
21 day of August, 2024.

  
\_\_\_\_\_  
Notary Public

7106476.1

**BRIDGET A. MCHALE**  
Notary Public in the State of New York  
Qualified in Onondaga Co. No. 01MC5071501  
My Commission Expires 1/13/27