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August 30, 2019

BY ECF
The Honorable P. Kevin Castel
United States District Judge
United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: *Steck v. DiNapoli, et al.*, 19-cv-05015 (PKC) (BCM)

Dear Judge Castel:

This Office represents defendants Thomas P. DiNapoli, H. Carl McCall, Scott Stringer, William C. Thompson, Jr. (collectively, "Individual Defendants"), and The State of New York (collectively, "Defendants"). In accordance with Rule 3.A. of Your Honor's Individual Practices, Defendants write to request a pre-motion conference with respect to Defendants' anticipated motion to dismiss Plaintiffs' Amended Complaint ("Am. Compl."), pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Initial Pretrial Conference in this case is scheduled for September 3, 2019.

I. The Parties and Plaintiffs' Claims

Plaintiffs, three members of the New York State Assembly, two spouses of Plaintiff Assembly members, and a constituent of a Plaintiff Assembly member, bring this action alleging that the outside income limitations recommended by the New York State Committee on Legislative and Executive Compensation (the "Committee") violate their constitutional rights. The Individual Defendants were the members of the Committee, which has ceased to exist. Plaintiffs bring this action "pursuant to 42 U.S.C. § 1983 and the principles of constitutional law first enunciated in *Ex parte Young*, 209 U.S. 123 (1908) . . . ." Am. Compl. ¶ 1. Plaintiffs seek money damages and declaratory and injunctive relief.

II. The Committee and the Statute at Issue

The Committee was created pursuant to Part HHH of Chapter 59 of the 2018 New York Laws ("Part HHH"). *See* Part HHH § 1. The Committee's purpose was to "examine, evaluate and make recommendations with respect to adequate levels of compensation, non-salary benefits, and allowances pursuant to section 5-a of the legislative law, for members of the legislature, statewide

elected officials, and those state officers referred to in section 169 of the executive law." *Id*. § 2.1. The Legislature directed the Committee to hold at least one public hearing at which members of the public would have an opportunity to comment, to "make a report to the governor and the legislature of its findings, conclusions, determinations and recommendations," and to submit the report by December 10, 2018. *Id*. §§ 3.1, 4.1.

The Legislature specified that each recommendation by the Committee "shall have the force of law, and shall supersede, where appropriate, inconsistent provisions of section 169 of the executive law, and sections 5 and 5-a of the legislative law, *unless modified or abrogated by statute prior to January first of the year as to which such determination applies to legislative and executive compensation*." *Id*. § 4.2 (emphasis added.) Although the New York State Legislature had the authority and opportunity to "modify or abrogate" the Committee's recommendations, it did not do so, and so the Committee's recommendations began to take effect on January 1, 2019. Pursuant to the statute, the Committee ceased to exist upon issuance of its report. *Id*. § 6.

The Committee made several recommendations, which are set forth in full detail in its Report, issued December 10, 2018. (*See* Committee's December 10, 2018 Report, annexed as Ex. A.) First, the Committee recommended a salary increase for state legislators, beginning with an increase from $79,500 to $110,000 as of January 1, 2019. *Id*. at 14. The Committee also recommended that, *beginning January 1, 2020*, outside income for legislators should be restricted to a maximum of 15% of base salary, or $18,000, and prohibited where a fiduciary relationship exists. *Id.* at 14–16 (emphasis added).

Plaintiffs' claims challenge the Committee's recommendations restricting the outside income of legislators, which are not yet effective. Plaintiffs do not challenge the salary increases that the Committee recommended, the first of which is already in effect. *See* Am. Compl. ¶ 43 ("Legislative salaries are not at issue in this action.").

III. Pending Litigation in State Court Challenging the "Outside Income" Restrictions

Two other challenges to the "outside income" restrictions are currently pending in New York state court: (1) *Delgado, et al. v. State of New York, et al.*, Index No. 907537/2018 (Sup. Ct. Albany Cty.)[1], and (2) *Assemblyman William Barclay, et al. v. New York State Committee on Legislative and Executive Compensation, et al.*, Index No. 901837/2019 (Sup. Ct. Albany Cty.).[2]

[1] *Delgado* is an action brought by four "New York taxpayers," one of whom also is an Assembly member, against the State of New York and Mr. DiNapoli, in his capacity as Comptroller of the State of New York. Plaintiffs seek, among other things, declaratory judgments declaring "unlawful, invalid, and unenforceable" Part HHH regarding legislative and statewide elected official compensation and the determinations in the Committee's report regarding compensation for legislators and state officers, as well as an injunction enjoining "any disbursement of state funds regarding compensation for legislators, statewide elected officials, and state officers referred to in section 169 of the executive law as determined by the [C]ommittee . . . ." *Delgado* Am. Compl. ¶ 132.

[2] *Barclay* is a "hybrid Article 78/Declaratory judgment proceeding" brought by nine New York assemblymen and two senators against the Committee members in their official capacities. The Petitioners allege that, in recommending the outside income restrictions, the Committee exceeded its statutory authority, acted in violation of law and "infringed upon Petitioners' rights guaranteed by the free speech and assembly provisions of the United States Constitution and the Equal Protection and Due Process provisions of the United States and New York State Constitutions." Petition, filed March 29, 2019, ¶¶ 9, 10.

Not only are there two other challenges to the same "outside income" restrictions at issue in this case, but the courts in both state court cases have issued decisions invalidating the outside income restrictions. First, by Decision/Judgment dated June 7, 2019 ("*Delgado* Judgment"), the court in *Delgado* held that the "'recommendations' effective January 1, 2020 and beyond that contemplate prohibited activities and limitations on outside income are null and void." (*See Delgado* Judgment, annexed as Ex. B, at 18.) The *Delgado* defendants filed a Notice of Appeal to the Appellate Division, Third Department on July 15, 2019, and the *Delgado* plaintiffs thereafter filed a cross-appeal.

Second, by Decision, Order & Judgment dated August 28, 2019[3] (the "*Barclay* Judgment"), the court in *Barclay*, among other things, ordered that the provisions of the Committee's recommendations regarding the restrictions on a legislator's ability to earn outside income and maintain outside employment are not entitled to the force and effect of law." (*See Barclay* Judgment, annexed as Ex. C, at 23.) No notice of appeal has yet been filed with respect to the *Barclay* Judgment.

IV. This Action Should Be Dismissed, Or, in the Alternative, Stayed, Pending the Outcome of the State Court Litigation.

A. This Action Should Be Dismissed Because the Court Lacks Subject Matter Jurisdiction Over the Claims Against the State and the Individual Defendants.

Plaintiffs purport to bring this action "pursuant to 42 U.S.C. § 1983 and the principles of constitutional law first enunciated in *Ex parte Young*, 209 U.S. 123 (1908) . . . ." (Am. Compl. ¶ 1.) However, Plaintiffs' claims against the State of New York are barred under the doctrine of Eleventh Amendment immunity. "[A]s a general rule, state governments may not be sued in federal court unless they have waived their Eleventh Amendment immunity or unless Congress has abrogate[d] the states' Eleventh Amendment immunity . . . ." *Gollomp v. Spitzer*, 568 F.3d 355, 366 (2d Cir. 2009). This immunity shields states from claims for monetary damages, injunctive relief and retrospective declaratory relief. *See Green v. Mansour*, 474 U.S. 64, 72-74 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 (1984). Congress has not abrogated the states' immunity for claims under § 1983. *See Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990). And the State of New York has not waived its immunity to suit in federal court. *See Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 40 (2d Cir. 1977). Moreover, the State is not a proper defendant under section 1983 because the State is not a "person" within the meaning of the statute. *Will v. Michigan*, 491 U.S. 58, 65–66 (1989). Accordingly, all claims against the State of New York must be dismissed.

Further, the *Ex parte Young* exception to Eleventh Amendment immunity does not permit this action to proceed against the Individual Defendants in their official capacity.[4] Individuals sued in their official capacity are generally protected by Eleventh Amendment immunity, because an

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[3] The *Barclay* Decision was published on NYSCEF on August 29, 2019.

[4] Despite Plaintiffs' assertion that they seek relief pursuant to *Ex parte Young*, their allegations purport to assert claims against the Individuals solely in their "personal capacity." *See* Am. Compl. ¶¶ 1, 18-21.

official capacity suit "is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will*, 491 U.S. at 71 (internal citation omitted). The doctrine of *Ex parte Young* is a limited exception to the general principle of sovereign immunity and allows "a suit [for injunctive relief] challenging the constitutionality of a state official's actions in enforcing state law" under the theory that such a suit is not "one against the State," and therefore not barred by the Eleventh Amendment. *CSX Transp., Inc. v. New York State Office of Real Prop. Servs.*, 306 F.3d 87, 98 (2d Cir. 2002). But the state officials being sued for ongoing violations of federal law under *Ex parte Young* "must have some connection with the enforcement of the act' that is in continued violation of federal law." *Daily Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367, 372–73 (2d Cir. 2005).

But the Individual Defendants do not have, and never had, any role in enforcing the state law that Plaintiffs assert is unconstitutional. Although the Individual Defendants were granted authority to make non-final recommendations to the legislature regarding certain compensation issues (Part HHH §§ 2, 4, 6), they never had the power to pass or amend legislation. Enforcement of the relief which Plaintiffs seek in this action—specifically, nullifying the Committee's recommendations which became law when the Legislature failed to act—would require the Individual Defendants to amend legislation, something that they are not, and were never, empowered to do.

Moreover, regardless of the scope of their authority under Part HHH, the Individual Defendants currently have no authority as Committee members regarding the questions of legislative and executive compensation set forth in the statute. The Committee's enabling statute expired on December 31, 2018. *See* Part HHH, §§ 6, 7 (providing for expiration and repeal of Part HHH, and the Committee, as of December 31, 2018). None of the Individual Defendants, as Committee members, retains any power to take any further action with respect to legislative or executive compensation. *Id*.

Because the Individual Defendants, as Committee members, do not have the power to take any action to "enforce[e] state law" (*see CSX Transp.*, 306 F.3d at 98)—and, indeed, never had that power—the doctrine of *Ex parte Young* has no application here. In these circumstances, this Court lacks subject matter jurisdiction over Plaintiffs' constitutional claims against the State and the Individual Defendants, and such claims should accordingly be dismissed.

B. Plaintiffs' Claims Against the Individual Defendants Should Be Dismissed in their Entirety Based on the Doctrines of Legislative or Quasi-Legislative Immunity.

Plaintiffs' claims against the Individual Defendants are barred by legislative or quasi-legislative immunity. Put simply, "[a]bsolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). It bars claims for money damages against individuals in their personal capacity, as well as claims for injunctive relief against individuals in their official capacity. *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 88 (2d Cir. 2007). Here, Plaintiffs purport to assert their claims against the Individual Defendants solely in their personal capacity (Am. Compl. ¶¶ 18–21), but also seek injunctive relief through *Ex parte Young* (*see supra* n. 3). Regardless, Plaintiffs' claims for damages and injunctive

relief against the Individual Defendants in any capacity are barred by legislative immunity.

Courts apply a functional test to determine whether an act is legislative, which focuses "not on the official's identity, or even on the official's motive or intent, but on the nature of the act in question." *Id*. at 82. In making the determination whether an act, or a course of conduct, is within the "sphere of legitimate legislative activity," two factors are relevant:

> First, it is relevant whether the defendants' actions were legislative "in form," i.e., whether they were "integral steps in the legislative process." Second, it may also be relevant whether defendants' action were legislative" in substance, i.e., whether the actions "bore all the hallmarks of traditional legislation," including whether they "reflected . . . discretionary policymaking decisions implicating the budgetary priorities of the [government] and the services the [government] provides to its constituents."

Rowland, 494 F.3d 71, 89 (2d Cir. 2007) (citing *Bogan*, 523 U.S. at 55-56).

Accordingly, legislative immunity is not limited to the protection of legislators or individuals in the legislative branch. *See, e.g.*, *Bogan*, 523 U.S. at 55-56 (holding that a mayor was entitled to legislative immunity for acts taken that were "integral steps in the legislative process"); *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 734 (1980) (holding that Virginia Supreme Court justices were entitled to legislative immunity for acts taken in their legislative capacities); *Gallas v. Supreme Court of Pa.*, 211 F.3d 760 (3d Cir. 2000) (finding that a court administrator acting in direct assistance of legislative activity was entitled to quasi-legislative immunity); *Aitchison v. Raffiani*, 708 F.2d 96, 99-100 (3d Cir. 1983) (holding that borough attorney who "was acting in direct assistance of legislative activity" was entitled to absolute immunity); *The Anderson Grp., LLC v. City of Saratoga Springs*, 557 F. Supp. 2d 332, 345 (N.D.N.Y. 2008), *aff'd in part sub nom. Anderson Grp., LLC v. Lenz*, 336 F. App'x 21 (2d Cir. 2009) ("to the extent the board defendants partook in the Council's zoning decisions by voting on and issuing zoning recommendations to the Council, they are also entitled to legislative immunity.").

Critically, "legislative immunity is not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process, including the discussions held and alliances struck regarding a legislative matter in anticipation of a formal vote." *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007). Here, Plaintiffs sue the Individual Defendants in connection with their roles as members of the Committee, which recommended changes to existing law ultimately adopted by the Legislature. That conduct, which was "integral" to the legislative process, is immune from challenge.

For this reason, Plaintiffs' claims against the Individual Defendants should be dismissed in their entirety.

C. Plaintiffs' Claims Against the Individual Defendants in Their Personal Capacity Are Barred by Qualified Immunity.

"Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards*, 566 U.S. 658, 664 (2012). Qualified immunity "'is an immunity from suit rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

In this case, Plaintiffs have made no factual allegation from which this Court could conclude that any of the Individual Defendants did not reasonably believe he was acting lawfully. Accordingly, Plaintiffs' claims against the Individual Defendants in their personal capacity should be dismissed in their entirety.

D. Plaintiffs Patricia K. Steck, Janet Longo-Abinanti, and Joseph E. O'Brien Lack Standing to Assert Plaintiffs' Constitutional Claims.

Plaintiffs have the burden of establishing the essential requirements of standing under Article III for each plaintiff, for each claim asserted, and for each type of relief sought. *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010). As the Supreme Court has made clear, a "threatened injury must be *certainly impending* to constitute injury in fact" for standing purposes. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). "Allegations of *possible* future injury" are not sufficient. *Id.* (emphasis in original) (quoting *Whitmore*, 495 U.S. at 158).

Even assuming, for purposes of argument, that the legislator-Plaintiffs have standing to assert the constitutional claims in this action, the other named Plaintiffs—Patricia K. Steck and Janet Longo-Abinanti, who are wives of two of the legislator-Plaintiffs (Am. Compl. ¶¶ 12, 13), and Joseph E. O'Brien, a constituent in legislator Steck's Assembly district (Am. Compl. ¶¶ 14, 15)—do not have standing. *See, e.g., Hardy v. Daly*, No. 17 CV 2906, 2018 WL 4631831, at *1 (2d Cir. Sept. 26, 2018) (holding husband lacked standing to bring constitutional claim on behalf of wife where he failed to articulate why his wife was unable to protect her own interests); *Hill ex rel. Hill v. Pennsylvania Department of Corrections*, 521 F. App'x 39, 40–41 (3d Cir. Apr. 3, 2013) (affirming the district court's conclusion that the plaintiff-wife lacked standing to assert her husband's rights in a Section 1983 action); *Ross v. White*, No. 17 CV 4149, 2018 WL 1918511, at *5 (C.D. Cal. Apr. 20, 2018) (husband did not have standing to assert civil rights claims based on his community property interest in his wife's income), appeal dismissed, 2018 WL 7046888 (9th Cir. Oct. 16, 2018); *Burton v. City of N.Y.*, No. 97 CV 0202, 1997 WL 793105, at *2–3 (E.D.N.Y. Nov. 28, 1997); *Knoll v. City of Chesterfield*, 71 F. Supp. 2d 959, 962 (E.D. Mo. 1999) (wife of city employee did not have standing to assert First Amendment challenge to city regulation that prohibited city employees from assisting any candidate for city office except by individual ballot).

Because the non-legislator Plaintiffs cannot demonstrate that they have suffered an injury,

or that any injury is "certainly impending," they cannot establish standing in this action, and their claims should be dismissed.

E. Counts I and II of the Amended Complaint Should Be Dismissed Because the Outside Income Restrictions at Issue Do Not Violate Plaintiffs' First Amendment Rights.

Plaintiffs' facial challenge to the outside income restrictions on First Amendment grounds fails as a matter of law.[5] To succeed on a facial challenge, "the challenger must establish that no set of circumstances exists under which the [regulation] would be valid." *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third and Fourth Department*, 852 F.3d 178, 184 (2d Cir. 2017) (hereinafter "*J&M*") (quoting *N.Y.S. Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 342, 265 (2d Cir. 2015)). For several reasons, Plaintiffs cannot meet that burden.

First, Plaintiffs do not, and cannot, properly identify any First Amendment right that has been violated. Plaintiffs' allegations rely exclusively on *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (*see* Am. Compl. ¶¶ 63-69), but that is unavailing. In *Citizens United*, the Supreme Court held that a federal statute barring corporations from making independent contributions for "electioneering communications" within 30 days of a primary election or 60 days of a general election violated the First Amendment. *Id.* at 372. In so holding, the Court emphasized that "*political speech* must prevail against laws that would suppress it, whether by design or inadvertence" (*id.* at 340) (emphasis added), and that "*political speech* does not lose First Amendment protection 'simply because its source is a corporation'" (*id.* at 342) (emphasis added).

However, this case has nothing to do with "political speech"; or with restrictions on contributing money for political elections, by corporations or otherwise; or with the rights of the electorate to advocate for or support political candidates. Rather, the restrictions Plaintiffs challenge relate to a legislator's supposed right to earn money "outside" of his or her legislative activities. Indeed, it is not even clear that Plaintiffs' challenge to the outside income restrictions in this case involves "speech" at all, much less "political speech." *See J&M*, 118 F. Supp. 3d 554, 568 (S.D.N.Y. 2015), *aff'd*, 852 F.3d 178 (2d Cir. 2017) (holding that law firm's challenge to New York's prohibition of non-lawyer equity investment in law practices "had nothing to do with speech, despite J & M's best efforts to convince the Court otherwise.").

Second, even assuming Plaintiffs' claims raise a valid First Amendment concern—which they do not—the outside income restrictions about which Plaintiffs complain are narrowly tailored to advance the compelling government interests of combatting government corruption and the appearance of corruption. Indeed, these restrictions mirror those imposed on members of the United States Congress.[6] Courts have routinely upheld similar laws against First Amendment

[5] A "facial challenge" to a statute "considers only the text of a statute itself, not its application to the particular circumstances of an individual," while an "as-applied challenge" requires "an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right." *See Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174–75 (2d Cir. 2006). Here, where Plaintiffs fail to allege that any specific application of the challenged legislation deprived them of a protected right, they bring a facial challenge.

[6] *See* https://www.ethics.senate.gov/public/index.cfm/conflictsofinterest; https://ethics.house.gov/outside-

challenges. *See J&M*, 852 F.3d at 191; *see also U.S. v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) (striking down a ban on the receipt of honoraria by government employees for lower-level executive branch employees, but *not* as to "high-level" executive branch employees or to members of Congress or judges); *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1666 (2015) (upholding a bar on the direct solicitation of funds for judicial campaigns because it "advances the State's compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech."); *Ognibene v. Parkes*, 671 F.3d 174, 178–79 (2d Cir. 2012) (New York City's laws which limited campaign contributions by individuals and entities that had business dealings with the City, excluded such contributions from matching with public funds, and expanded the prohibition on corporate contributions did not violate the First or Fourteenth Amendment because the "laws were closely drawn to address the significant governmental interest in reducing corruption or the appearance thereof."). Accordingly, these claims fail as a matter of law.

Count II of the Amended Complaint purports to assert a violation of the First Amendment to the extent that legislative pay increases are tied to passage of an on-time budget. But as Plaintiffs acknowledge, the tying of legislative pay increases to the passage of an on-time budget is a feature of existing law—New York Legislative Law § 5(1)—"that was in effect at the time plaintiffs entered the New York State Assembly." *See* ECF No. 21, at 2. Plaintiffs do not challenge that existing law independent of their challenge to the outside income limitations; nor can they do so, because Plaintiffs cannot plausibly allege any personal involvement by the Individual Defendants with respect to that statute. In any event, the New York Court of Appeals has upheld New York Legislative Law § 5(1) against several constitutional challenges. *Cohen v. State of New York*, 94 N.Y.2d 1 (1999). Accordingly, Count II of the Amended Complaint also should be dismissed.

F. Plaintiffs' Equal Protection Claim Should Be Dismissed Because Plaintiffs Do Not Allege a "Suspect Class" or "Similarly Situated" Parties.

Plaintiffs' Equal Protection claim should be dismissed for failure to state a claim. Plaintiffs allege that the outside income restrictions impermissibly differentiate, and thus discriminate, between professions such as physicians (who are excepted from the restrictions), on the one hand, and lawyers and pharmacists, on the other (who are not). *See* Am. Compl. ¶¶ 82 –93. But such professionals are not members of a "suspect class," and thus, contrary to Plaintiffs' assertion, the alleged "discrimination" is not subject to a heightened scrutiny standard.

Further, Plaintiffs fail to allege, as they must, that physicians are "similarly situated" to lawyers and pharmacists. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Indeed, in order to determine that these groups of professionals are "similarly situated," they must be considered "'*prima facie* identical' to the persons alleged to receive irrationally different treatment." *See Progressive Credit Union v. City of New York*, 889 F.3d 40, 49 (2d Cir. 2018). Further, "[w]hen a statute or regulatory regime imposes different classifications or regulatory burdens on groups of regulated participants, rational basis review contemplates 'a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negat[e] every conceivable basis which might support it.'" *Id.* at 49 (quoting *F.C.C. v. Beach Commc'ns*, 307, 314–15 (1993)). The distinction here survives rational basis review: the Legislature could have

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employment-income/outside-earned-income-limitation-applicable-members-and-senior-staff.

rationally excluded physicians from the outside income restrictions because of the vital health care services that they provide.

Because Plaintiffs' allegations are insufficient to show that lawyers or pharmacists are part of a suspect class or that they are "*prima facie* identical" with physicians, Plaintiffs cannot meet their burden to "negat[e] every conceivable basis which might support" the distinction between physicians, on the one hand, and lawyers and pharmacists, on the other—for which there is a rational basis. Therefore, this claim should be dismissed.

G. Count IV of the Amended Complaint Should Be Dismissed Because It Fails to Allege the Conditional Loss of an Underlying Constitutional Right.

Count IV of the Amended Complaint, titled "Placing Unconstitutional Conditions on the Receipt of Government Benefits," asserts that the "outside income" restrictions effectively force Plaintiffs to forfeit their constitutional rights in order to retain their positions as legislators in the New York Assembly. Plaintiffs allege that "[b]y enacting and/or by enforcing the . . . outside income limitations on plaintiffs as a condition of their continuing to hold legislative office and receive the salary afforded thereto, by tying pay increases to an on-time budget, and by providing that legislators are not paid unless an on-time budget is passed, the Pay Committee and the State of New York have coercively conditioned each plaintiff's receipt of these benefits on either forgoing his First Amendment right to speak as a citizen and to have others hear his voice or forgoing his constitutionally protected property interests in his law practice, legal partnership, pharmacy license and business . . . ." Am. Compl. ¶ 102.

Contrary to Plaintiffs' assertion, the outside income restrictions do not deprive Plaintiffs of a constitutional right. *See Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126–27 (2011) (holding that restrictions upon legislators' voting are not restrictions upon legislators' protected speech); *Velez v. Levy*, 401 F.3d 75, 86 (2d Cir.2005) (plaintiff had no "constitutionally cognizable property interest in her elected office."). In the absence of any conditional forfeiture of an underlying constitutional right, Count IV of the Amended Complaint fails to state a claim and should be dismissed.

H. Counts V and VII Fail to State a Claim for Violation of Plaintiffs' Alleged Due Process Rights Because Plaintiffs Were Provided Meaningful Notice and an Opportunity to Be Heard.

The Amended Complaint contains two alleged due process claims: Count V, titled "Violation of Plaintiff's Right Not to Have Property Taken Without Due Process of Law," and Count VII, titled "Unlawful Rule-Making in Violation of Plaintiff's Right Not to Have Property Taken Without Due Process of Law." As a matter of law, both of these claims are invalid and should be dismissed.

"Official action that is legislative in nature is not subject to the notice and hearing requirements of the due process clause . . . . [D]ue process does not require any hearing or participation in 'legislative' decisionmaking other than that afforded by judicial review after rule promulgation." *Interports Pilots Agency v. Sammis*, 14 F.3d 133, 142 (2d Cir. 1994). But even if

the notice and hearing requirements of due process applied, both of these requirements were satisfied here. Indeed, because Plaintiffs Steck, Abinanti, and McDonald were and are members of the New York State Assembly, they not only participated in the creation of the Committee through the passage of Part HHH,[7] but they had the opportunity to vote to reject or modify the Committee's recommendations set forth in the Committee's Report before they became law.[8] Because Plaintiffs had more than the minimal procedural guarantees provided to citizens under the due process clause, Count V should be dismissed. *Id.*

Plaintiffs' due process claim under Count VII is based on the assertion that they were impermissibly deprived of property without adequate due process because of an unlawful rule-making process. But, as stated above, Plaintiffs Steck, Abinanti, and McDonald were not only part of the process by which the Committee was created and pursuant to which its recommendations became law, but they had the opportunity to vote against the Committee's recommendations once the Committee's Report was issued. Plaintiffs' rule-making due process claim is therefore invalid and should be dismissed.

I. Count VI of the Amended Complaint, Based on an Alleged Violation of the Constitutional Prohibition on the Impairment of Contracts, Fails to State a Claim for Relief and Should Be Dismissed.

Count VI of the Amended Complaint, titled "Violation of the Constitutional Prohibition on the Impairment of Contracts," erroneously relies on the allegation that Plaintiffs' purported contractual right to earn "outside income" became "vested" under Article III, § 6 of the New York State Constitution, when "plaintiffs were elected to serve a two-year term in the New York State Assembly." *See* Am. Compl. ¶ 118. Contrary to Plaintiffs' assertion, however, one elected to hold a public office for a set term does *not* have any contractual right to either that office or its associated salary. *See, e.g., Dodge v. Board of Ed. of City of Chicago*, 302 U.S. 74, 78–79 (1937) ("[A]n act merely fixing salaries of officers creates no contract in their favor, and the compensation named may be altered at the will of the Legislature."). Without an underlying contractual relationship, Plaintiffs cannot—and fail to—allege the threshold requirement for a claim under Article I, section 10, clause 1 of the United States Constitution. *See Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006).

Moreover, even if Article III, section 6, of the New York State Constitution, which states that legislators have a right to a salary for "his or her services" as a legislator, did create such a contractual or vested right, Plaintiffs' impairment of contracts claim still fails because Plaintiffs' outside income is not derived from "his or her services" in the legislature. In response to Defendants' pre-motion letter concerning the original complaint, Plaintiffs conceded that "additional facts need to be pleaded in the complaint in further support of Plaintiffs' position on this issue." *See* ECF 21, at 6. However, the additional facts that Plaintiffs have pleaded in the

[7] In fact, Plaintiffs Steck, Abinanti and McDonald all voted in favor of the passage of the bill that included Part HHH. (*See* Ex. D.)

[8] Plaintiffs concede that the Assembly and Senate "could have met to override the Pay Committee," but argue that it would have required a special session of the Legislature. *See* ECF No. 21, at 5. However, the mere fact that a special session may have been required is insufficient for Plaintiffs to plausibly allege that they were deprived of due process.

Amended Complaint— presumably those set forth in new paragraph 39—are insufficient, and do not salvage Plaintiffs' claim in Count VI. Accordingly, Count VI of the Amended Complaint fails to state a claim for relief and should be dismissed.

J. Count VIII of the Complaint, Based on the Alleged Contravention of the Constitutional Provision Guarantying a Republican Form of Government, Is Non-Justiciable and Therefore Should Be Dismissed.

Count VIII of the Complaint**,** brought pursuant to the so-called Guaranty Clause, should be dismissed because it is non-justiciable. *See Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937). Contrary to Plaintiffs' assertion (*see* ECF 21, at 7), this case does not warrant a "change in the law" regarding the justiciability of the republican form of government clause. Given the Pendency of Similar Actions in New York State Court, this Court Should Defer to the State Court Proceedings and Abstain from Exercising Jurisdiction Here.

Principles of comity and judicial economy warrant that this Court abstain from exercising jurisdiction in this case or, at the very least, stay this case pending further proceedings in *Delgado* and *Barclay* (*see infra* Point IV.L.). Where similar actions are concurrently pending in state and federal court, a federal district court may, in the interests of judicial economy and sound judicial administration, defer to the state action and abstain from exercising its jurisdiction. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983).

This authority to dismiss a federal case in favor of a concurrent state court action rests on "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 817 (1976). In deciding whether to abstain pursuant to *Colorado River*, courts consider six factors, including whether staying or dismissing the federal action will avoid piecemeal litigation; the order in which the actions were filed and whether proceedings have advanced more in one forum than in the other; and whether the state procedures are adequate to protect the plaintiff's federal rights. Although no single factor is dispositive, the most important factor driving *Colorado River* and its progeny is the clear federal policy of avoiding piecemeal adjudication. *See, e.g.*, *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 210–211 (2d Cir. 1985) (noting that, "[a]s in *Colorado River*, the danger of piecemeal litigation is the paramount consideration"); *Abe v. New York University*, No. 14-cv-9323 (RJS), 2016 WL 1275661, at *7 (S.D.N.Y. Mar. 30, 2016).

Here, not only were both state court cases commenced before this action, but the state court proceedings have advanced far more than in this forum. Indeed, as stated above, the *Delgado* court issued a Decision/Judgment on June 7, 2019, declaring the "outside income" restrictions about which Plaintiffs complain in this case "null and void" (*see* Ex. B, at 18), from which the parties have filed cross-appeals, and in *Barclay*, the court issued a Decision, Order & Judgment on August 28, 2019, declaring that the restrictions "on a legislator's ability to earn outside income and maintain outside employment are not entitled to the force or effect of law" (*see* Ex. C, at 23). In these circumstances, because abstention would avoid piecemeal litigation and the risks of potential inconsistent adjudications, abstention is proper.

K. At the Very Least, this Action Should Be Stayed Pending Further Developments in the State Courts.

As discussed above, two related cases are pending in state court, in both of which the courts have invalidated the very same outside income restrictions that plaintiffs seek to invalidate in this case. Cross-appeals have been filed in *Delgado*, and the *Barclay* respondents may file an appeal from the *Barclay* Judgment. Accordingly, the state courts' determinations could potentially render this action moot.[9] Therefore, in the interests of judicial economy, and to avoid the risk of inconsistent adjudications, a stay of this action is proper.

For all the above reasons, Defendants respectfully request a pre-motion conference with respect to their anticipated motion pursuant to Federal Rules 12(b)(1) and 12(b)(6), dismissing Plaintiffs' Amended Complaint in its entirety.

In accordance with Rule 3.A.(III) of Your Honor's Individual Practices, Defendants propose to serve their initial motion papers 30 days after any pre-motion conference scheduled by the Court.

Respectfully yours,

/s/ Mark E. Klein

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cc: Plaintiffs' counsel (by ECF)

[9] In their July 30, 2019 letter to the Court, Plaintiffs stated that they "would consent to an adjournment or stay of the proceedings for a period of three months." *See* ECF No. 21, at 2.