EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NIAGARA

LINDA HURLEY, et al.,

Plaintiffs,

v.

PUBLIC CAMPAIGN FINANCING AND ELECTION COMMISSION OF THE STATE OF NEW YORK, et al.,

Defendants.

Index No. E169547/2019

JOSEPH JASTRZEMSKI, et al.,

Plaintiffs,

v.

THE PUBLIC CAMPAIGN FINANCING AND ELECTION COMMISSION OF THE STATE OF NEW YORK, et al.,

Defendants.

Index No. E169561/2019

BRIEF OF PROPOSED *AMICUS CURIAE* GOVERNMENT JUSTICE CENTER

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INTEREST OF AMICUS CURIAE

The Government Justice Center ("GJC") is a public interest law firm that provides pro bono legal representation to protect the rights of New Yorkers against improper action by state and local governments. GJC promotes the rule of law and its implication that all New Yorkers, including lawmakers, are subject to the law established by the people in the New York Constitution.

GJC is interested in this case because: (1) the Legislature unconstitutionally delegated its lawmaking power to an unelected commission; and (2) the Legislature empowered the commission to address fusion voting and encroach on a constitutional right that New Yorkers have enjoyed for hundreds of years.

When the Legislature finds itself unable to do the hard, political work of negotiating, drafting, and passing laws, it creates commissions or committees to do its work. "Recommendations" become law without any action by the Legislature. No bill. No vote. This is unconstitutional. As is tasking a commission with altering a constitutional right to fusion voting that can only be changed by an amendment approved and ratified by the people of New York.

These constitutional issues go to the heart of the rule of law. The Legislature took a politically charged law-making task and unlawfully delegated it to a commission. By doing so, the Legislature turned its back on its responsibility to the people to implement policy decisions in properly passed laws. Indeed, the Legislature made no major policy decisions here. Instead, it gave an unelected group an annual spending limit and some areas for new laws. That group must now make its own laws, redesigning campaign finance under the Election Law.

Only the Legislature by enacting legislation, subject to the Governor's veto power, as required under the New York Constitution, has the power to make such policy decisions. The Constitution provides that no law should be enacted except by bill. And each bill must state that the people of the state of New York, represented in the Senate and Assembly, enact the law. The people are not represented by an unelected commission. Such a commission scheme defies the state Constitution. The rule of law can have no future where the supreme law of the state is defied and disregarded. As such, GJC respectfully submits this Amicus Brief in support of Plaintiffs.

ARGUMENT

I. Plaintiffs assert a justiciable issue that is ripe.

Plaintiffs are voters, elected officials, and political parties affected by a statute that they challenge as unconstitutional on its face. A facial challenge requires this Court to look only at the text of the statute itself, and not how it applies to individual circumstances.[1] "Facial challenges 'are generally ripe the moment the challenged regulation or ordinance is passed.'"[2]

Here, Part XXX of the Laws of 2019, Chapter 59 ("Part XXX") empowers a commission to write a report containing recommendations that supersede inconsistent provisions of the Election Law.[3] No contingencies exist. The commission must report its "recommendations" by December 1, 2019.[4] Those recommendations become laws that supersede the Election Law three weeks

[1] *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174–175 (2d Cir. 2006).
[2] *Real Estate Bd. of New York, Inc. v. City of New York*, 165 A.D.3d 1, 9 (1st Dept. 2018) (*quoting Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n. 10 (1997)).
[3] L. 2019, ch. 59, Part XXX, § 1(a).
[4] *See id.* at § 5.

later.[5] Only the Legislature, however, can pass laws that supersede existing laws.[6] And only final bills may become law.[7]

Thus, the commission is either: (1) writing and passing into law the equivalent of a new bill, which only the Legislature may introduce and pass into law; or (2) amending and supplementing Part XXX through its report and recommendations. Under any circumstances, Part XXX is unconstitutional on its face.

II. The Legislature unconstitutionally delegated its lawmaking power.

The people of New York vested legislative power in the Senate and Assembly.[8] Only the Legislature may pass new laws or modify existing laws. The Constitution is specific that "no law shall be enacted except by bill."[9] And "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." The Legislature may only pass final bills. No bill may be amended after its final reading.[10]

Part XXX created the Public Campaign Financing and Election Commission ("Commission"). Each member of the Commission serves via appointment—no one is elected. The Commission shall issue "recommendations" to the Governor and Legislature regarding myriad issues relating to a public campaign financing system by December 1, 2019.[11] Unless abrogated or modified by the Legislature prior to December 22, 2019, the Commission's recommendations become law and supersede inconsistent provisions of the Election Law.[12] In

[5] *See id.*
[6] N.Y. Const. Art. III, Section 1.
[7] N.Y. Const., Art. III, Section 13.
[8] N.Y. Const. Art. III, Section 1.
[9] *Id.* at Art. III, Section 13.
[10] *Id.* at Art. III, Section 14.
[11] L. 2019, ch. 59, Part XXX, § 1(a).
[12] L. 2019, ch. 59, Part XXX, § 5.

other words, the Commission will make new law without the Legislature voting on a final bill.

Even if the Legislature votes, the Commission's recommendations can become law if 75 of 150 Assembly members vote "nay" on a bill to modify or abrogate the Commission's "recommendations." Contrary to *all* Constituional proscriptions, a minority of just *one* house can ensure the Commission's "recommendations" become new law by voting no. And they alternatively can do so by simply not showing up and denying a quorum.[13] Further, Part XXX removes the Governor's constitutional authority to veto any bill.[14] The Commission's determinations will take effect "with the force of law" and supersede existing Election Law without the check and balance of the Governor's veto power.

The Legislature, however, may not cede its lawmaking responsibility under the Constitution.[15] While it may delegate some authority to administer its laws, the Legislature did not even pretend to be granting the Commission rulemaking or adjudicatory powers to administer and execute Part XXX.[16] The statute provides "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 [10] areas*" (emphasis added).[17] Later, the statute provides "Each recommendation made to implement a determination pursuant to this

[13] N.Y. Const. Art. III, Section 9 ("A majority of each house shall constitute a quorum to do business.")
[14] N.Y. Const. Art. IV, Section 7.
[15] *Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976
[16] *Id.* ("The delegation of power to make the law, which necessarily involves a discretion as to what it shall be, cannot be done, but there is no valid objection to the conferring of authority or discretion as to a law's execution, to be exercised under and in pursuance of it.")
[17] L. 2019, ch. 59, Part XXX, § 2.

act shall have the force of law, and shall supersede, where appropriate, inconsistent provisions of the election law ..."[18] On its face, Part XXX unconstitutionally delegates the Legislature's lawmaking authority.[19]

III. Fusion voting is a constitutional right.

Under the New York Constitution, "Every citizen shall be entitled to vote at every election for all officers elected by the people…"[20] The State Constitution has been amended numerous times since adoption in 1777 by the Fourth New York Provincial Congress, especially with regards to suffrage. For example, the 1777 Constitution established property requirements in order to enable all individuals to vote in state (not local) elections.[21]

To the state's credit, New York's Constitution no longer includes such requirements. The Constitution's suffrage clauses have been amended numerous times over the years. However, one element of the Constitution has remained—the right to vote for whomever one wants, and the right to choose one's representative on election ballots. Those rights derive from the Constitution's express language: "Every citizen shall be entitled to vote at every election for all officers elected by the people…"[22] Now, however, the Legislature has tasked the Commission with modifying constitutional rights that New Yorkers have enjoyed for almost 250 years.

[18] L. 2019, ch. 59, Part XXX, § 5.
[19] The Court need not analyze or apply the factors in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987) here. Defendants cannot contend that the Commission is engaged in rulemaking or any other act associated with an agency administering a law duly passed by the Legislature where a *Boreali* analysis would apply.
[20] NY Const. Art II, Section 1.
[21] These requirements were so onerous that "the right of suffrage was so restricted that as late as 1790 only 1,303 of the 13,330 male residents of New York City possessed sufficient property to entitle them to vote for governor." 1 De Alva Stanwood Alexander, *A Political History of the State of New York* 15 (1906).
[22] NY Const. Art II, Section 1.

Over a century ago the Court of Appeals cited the operative words from Article 2, Section 1 of the Constitution and explicitly ruled unconstitutional a statute where "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...."[23] The next year in *Hopper v. Britt* the Court of Appeals held that "the legislature could not constitutionally prevent the nomination of *fusion* or combination candidates."[24]

To be sure, in the time between the adoption of New York's first Constitution in 1777 and the *Callahan* decision in 1910, New York conducted *six* constitutional conventions. However, not once did New Yorkers vote to remove the constitutional provision establishing the right to fusion voting cited by the court in *Callahan*, even when amending language around it.

The Court of Appeals next dealt with the issue of fusion voting in *Devane v. Touhy* in 1973. Once again, the Court found that fusion voting is a constitutional right:

> There can be no doubt about the authority of the Legislature to enact reasonable laws and regulations for the conduct of primary and general elections. Such laws, of course, may control the manner of preparation of the ballot, so long as they do not prevent a qualified elector from exercising his constitutional right to vote for a candidate and party of his choice. On the other hand, it is equally also well "settled law from the earliest period in the history of our state that (the Legislature) cannot enact arbitrary exclusions from office."[25]

[23] *See In Re Callahan*, 200 N.Y 59 (1910) (emphasis added).
[24] *Hopper v. Britt*, 203 N.Y. 144 (1911).
[25] *Devane v. Touhy*, 33 N.Y.2d 48 (1973) (*quoting Callahan*, 200 N.Y. at 61).

In the time between the *Callahan*/*Hopper* and *Devane* decisions, there were four more constitutional conventions in New York. Fusion voting remained unscathed.

The Court of Appeals decided *Callahan* over 100 years ago, and New Yorkers have had myriad opportunities to amend the state Constitution to be rid of fusion voting since then. Yet fusion voting remains. And the Court of Appeals' recognition of this right has not changed. Unless the Court of Appeals overturns its precedent, the Legislature may not alter fusion voting rights.

Here, the Legislature in Part XXX has tasked the Commission with altering a constitutional right. It is not, however, an unelected commission's place to read fusion voting out of the Constitution. If New Yorkers want to eliminate fusion voting, they can amend the Constitution. The Constitution and New York law guarantee fusion voting rights. Part XXX explicitly interferes with those rights and is unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motions to dismiss.

Dated: Albany, New York
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Respectfully submitted,

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