SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF LIVINGSTON

NEW YORKERS FOR CONSTITUTIONAL FREEDOMS; JASON J. MCGUIRE; DUANE R. MOTLEY; NATHANIEL S. LEITER,

Plaintiffs,

-against-

NEW YORK STATE SENATE, THE NEW YORK STATE DEPARTMENT OF HEALTH, and ERIC T. SCHNEIDERMAN, in his official capacity as THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendants.

Index No. 807-2011

Hon. Robert Wiggins
A.S.C.J.

Returnable October 17, 2011

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT PURSUANT TO CPLR 3211(a)(1) AND (7)

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PRELIMINARY STATEMENT

Plaintiffs, a not-for-profit organization and members of advocacy organizations, filed a legally unsupported summons and complaint[1] on or about July 25, 2011, alleging violations of certain New York State Senate procedures; Public Officers Law §103; Article III, §14 of the New York State Constitution; and the First and Fourteenth Amendments of the United States Constitution in the enactment of the Marriage Equality Act. See Chapter 95 and 96 of the Laws of 2011. They have named as defendants the New York State Senate ("Senate"), New York State Department of Health and Eric T. Schneiderman as the Attorney General of the State of New York who, on the pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) and (2), move to dismiss the complaint in its entirety. Based upon documentary evidence of which the Court must take judicial notice and the facts as alleged in the complaint, plaintiffs have failed to state a cause of action and the complaint must be dismissed.

In adopting the Marriage Equality Act, the New York State Legislature intended that same-sex and different-sex couples be treated the same under the law, providing same-sex couples the protections, responsibilities, rights, obligations, and benefits of civil marriage. Chapter 95, §2 of the Laws of 2011. In doing so, the State and the defendants did not cause plaintiffs any actionable injury whatsoever, which is essential for a viable justiciable complaint, or violate the Open Meetings Law or the State or Federal Constitutions. For the reasons discussed in detail below, the complaint must be dismissed in its entirety because (1) violations of Senate rules and procedures are not subject to judicial review; (2) the

[1] A copy of the complaint is provided as McGowan Ex. 1.

Governor's messages of necessity are not subject to judicial review; (3) the plaintiffs lack standing to bring a claim of a violation by the Senate of its own rules and procedures; (4) the complaint fails to allege a violation of the Open Meetings Law; (5) the complaint fails to allege any cognizable constitutional claim; and (6) Attorney General Schneiderman is not a proper party to this proceeding.

STATEMENT OF FACTS

The Domestic Relations Law was amended on June 24, 2011 by the enactment of the Marriage Equality Act (Chapters 95 and 96 of the Laws of 2011), which extended the right to marry to all New York State couples regardless of gender. See Dom. Rel. Law §§10-a, 10-b, 11(1), 13. The Governor certified messages of necessity for the legislation pursuant to Article III, §14 of the New York State Constitution, permitting the Legislature to vote on the Marriage Equality Act without waiting for the bills to be on legislators' desks in final form for at least three legislative days. See Complaint ¶ 55.[2] Final votes on the bills were held in the Senate on June 24, 2011, and they passed. See id. at ¶ 65.

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[2] All facts are derived from the complaint and taken as true, as the court must when ruling on a motion to dismiss pursuant to CPLR 3211(a)(7), except where they are flatly contradicted by documentary evidence. See CPLR 3211(a)(1). For example, insofar as plaintiffs seem to suggest there was only one message of necessity issued by the Governor in their complaint, defendants ask the Court to take judicial notice of the messages of necessity issued by the Governor on June 15 and 24, 2011. McGowan Ex. 2. To any extent that plaintiffs seem to allege that the vote taken by the Senate on June 24 was not open to the public, defendants ask that the Court take judicial notice of the certified copy of the relevant portions of the Senate Session from that date, which repeatedly notes the presence of the public in the Gallery. McGowan Ex. 3, see, e.g., p. 6095, p. 6096, p. 6112, p. 6134, p. 6135. The court may dismiss a cause of action pursuant to CPLR 3211(a)(l) on the ground that "a defense is founded upon documentary evidence" where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). This Court may, in general, take judicial notice of matters of public record. In re Winona Pl, 86 A.D.3d 542 (2011) (citing cases).

The plaintiffs allege that Republican Senators met privately with New York City Mayor Bloomberg, a registered Independent, at the Capitol on June 16, 2011. It is alleged that, during this meeting, the Marriage Equality Act was discussed. See id. at ¶¶ 23-26. The complaint further alleges that, shortly before June 24, 2011, Republican Senators met privately with the Governor, a registered Democrat who was actively involved in ensuring the Marriage Equality Act was passed, at the Executive Mansion, where the Marriage Equality Act was discussed. See id., ¶¶ 32-37.

The plaintiffs also allege that lobbyists and advocates were denied access to the Senate lobby on June 21 and 24, 2011, allegedly interfering with the ability of lobbyists and activists to perform "their duties." See id., ¶¶ 40-49. Despite plaintiffs' claims alleging a violation of the State constitutional mandate in Article III, § 10 that the "doors of each of the houses shall be kept open, except when the public welfare shall require secrecy," documentary evidence demonstrates that the votes on the Marriage Equality Act were made when the public was present in the Senate Chamber on June 24, 2011. See certified Senate Transcript excerpt, set forth as McGowan Ex. 2. See, also, http://www.nysenate.gov/event/2011/jun/24/senate-session (archived video footage of Senate Session June 24, 2011).

Finally, plaintiffs allege that during the Senate voting process on the Marriage Equality Act on June 24, 2011, the Senate leadership altered "normal Senate procedures and rules," (see Complaint ¶ 61 et seq.) by: (1) permitting Executive staff members to be "actively" on the floor of the Senate (see id. ¶ 56); (2) not sending an amendment to the Act to any committee before a full Senate vote (see id. at 66); (3) not permitting the plaintiffs and the public the opportunity to view an amendment to the Act before a vote

(see id. ¶ 67); (4) denying a Democratic Senator's motion to "lay aside the bill to permit debate" (see id. ¶ 60); and (5) only permitting four Senators "the opportunity to make a two minute statement" prior to their vote. See id. ¶¶ 58-59; 63-64.

ARGUMENT

Far from meeting their burden to establish unconstitutionality beyond reasonable doubt, plaintiffs' complaint fails to meet even the threshold requirements of establishing a cognizable injury that would entitle them to relief. Without a real injury, there is no case or controversy. Compounding the deficiencies of their complaint, plaintiffs fail to state, as a matter of law, any violations of law. Accordingly, the complaint should be dismissed.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Morone v. Morone, 50 N.Y.2d 481, 484; Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634). Additionally, the court may dismiss a cause of action pursuant to CPLR 3211(a)(l) on the ground that "a defense is founded upon documentary evidence" where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). For the reasons set forth below, the complaint must be dismissed in its entirety for failure to state a cause of action and in light of the documentary evidence provided. CPLR 3211(a)(1) & (7).

POINT I

TO THE EXTENT PLAINTIFFS COMPLAIN ABOUT SENATE PROCEDURES THIS CASE IS NON-JUSTICIABLE.

The verified complaint fails to allege a specific cause of action relating to plaintiffs' allegations concerning the Senate's alleged suspension of and failure to follow, its own procedures[3] (see Complaint pp. 11-13). Such a claim is insufficient as a matter of law. The verified complaint alleges that during the Senate voting process on the Marriage Equality Act on June 24, 2011, the Senate leadership altered "normal Senate procedures and rules" (see Complaint ¶¶ 61, 62) by (1) permitting Executive staff members to be "actively" on the floor of the Senate (see id. ¶ 56); (2) not sending an amendment to the Act to any committee before a full Senate vote (see id. at 66); (3) not permitting the plaintiffs and the public the opportunity to view an amendment to the Act before a vote (see id. ¶ 67); (4) denying a Democratic Senator's motion to "lay aside the bill to permit debate" (see id. ¶ 60); and (5) only permitting four Senators "the opportunity to make a two minute statement" prior to their vote. See id. ¶¶ 58-59; 63-64. Even assuming these allegations are true, they do not create a justiciable claim.

It is well-settled that such procedural matters are "wholly internal" to the Legislature and thus beyond judicial review under the separation of powers. Heimbach v. State, 59 N.Y.2d 891, 893 (1983), app. dismissed 464 U.S. 956 (1983)(determining whether a legislative roll call was incorrectly registered is a legislative matter beyond judicial review); Urban Justice Ctr. v. Pataki, 38 A.D.3d 20, 27 (2006), lv. denied 8

[3] Article III, §9 of the New York State Constitution grants each house of the Legislature the power to determine its own rules and procedures.

N.Y.3d 958 (2007) (not the province of the courts to direct the Legislature on how to do its work, particularly where the internal practices of the Legislature are involved). The independence of the Legislature and Judiciary compels that each must be "confined to its own functions and can neither encroach upon nor be made subordinate to" each other. Matter of Davies, 168 N.Y. 89, 101 (1901); Urban Justice Ctr., 38 A.D.3d at 27. To this end, the branches must "be free from interference, in the discharge of its own functions and particular duties, by either of the others." Matter of Gottlieb v. Duryea, 38 A.D.2d 634, 635 (1971), aff'd 30 N.Y.2d 807 (1972), cert. denied 409 U.S. 1008 (1972); see People ex rel. Burby v. Howland, 155 N.Y. 270, 282 (1898). Simply put, "it is not the province of the courts to direct the [L]egislature how to do its work." Heimbach, 59 N.Y.2d at 893, quoting N.Y. Public Interest Research Group v. Steingut, 40 N.Y.2d 250, 257 (1976); People ex rel. Hatch v. Reardon, 184 N.Y. 431 (1906). Any other result would foist this Court into an "improvident intrusion into the internal workings of a coequal branch of government." Smith v. Espada, Index No. 4912-09 (Sup. Ct., Albany Co., June 16, 2009). As plaintiffs' action would achieve precisely this impermissible result, this action should be dismissed.

POINT II

THE PLAINTIFFS LACK STANDING TO CHALLENGE AN ALLEGED VIOLATION OF SENATE RULES AND PROCEDURES

The plaintiffs lack standing to bring any claims relating to the Senate's alleged violations of its own rules and procedures because they cannot allege an injury "distinct from that suffered by the public at large." Urban Justice Center v. Silver, 66 A.D.3d 567,

567 (1st Dept 2009). In Urban Justice Center, the organizational plaintiff challenged certain rules and practices adopted by the Senate and the Assembly. Id. The court held that the plaintiff lacked standing because it "failed to allege a personally concrete and demonstrable injury distinct from that suffered by the public at large." Id. at 568.

In this case, the plaintiffs allege that the Senate leadership altered Senate procedures and rules, thereby preventing both elected officials and advocates from taking part "in the deliberative process of the Act." See Complaint ¶¶ 61-62. The complaint fails to allege any demonstrable injury flowing from an alleged violation of any Senate procedural rule in any event. Therefore, the plaintiffs lack standing to bring claims relating to any alleged violation of the Senate's own rules and procedures.[4] Urban Justice Center, 66 A.D.3d at 568.

POINT III

THE COMPLAINT FAILS TO STATE A CLAIM THAT THE MARRIAGE EQUALITY ACT WAS ENACTED IN VIOLATION OF ARTICLE III, §14

The complaint alleges that the Marriage Equality Act was unconstitutionally enacted because it was voted on in violation of Article III, §14 of the New York State Constitution. Plaintiffs allege that a message of necessity certified by the Governor on June 24, 2011 was allegedly improper because "there was no need for an immediate vote." See

[4] Plaintiff New Yorkers for Constitutional Freedoms also lacks third-party standing to challenge the alleged violation of Senate rules and procedures on behalf of its members. The complaint fails to allege that the violation of Senate rules and procedures created an added burden to its resources or that its need to litigate the violation of those rules and procedures is such a "central concern to our society" that it should be given standing despite not alleging an injury-in fact. Urban Justice Center v. Silver, 66 A.D.3d 567 (1st Dept 2009).

Complaint ¶¶55, 84. The complaint alleges, essentially, that the Legislature should have ignored the message of necessity certified by the Governor and waited to vote on the Marriage Equality Act until the bill had been on the legislators' desks in final form for at least three days. See id. at ¶¶85-86.

These allegations simply do not state a claim. Where a plaintiff asserts that a statute is unconstitutional, the court must be mindful that enactments of the Legislature -- a coequal branch of government -- may not casually be set aside by the judiciary. The applicable legal principles for finding invalidity are firmly embedded in the law: statutes are presumed constitutional; while the presumption is rebuttable, invalidity must be demonstrated beyond a reasonable doubt. McGee v. Korman, 70 N.Y.2d 225, 230-231 (1987) citing Wiggins v. Town of Somers, 4 N.Y.2d 215, 218-219 (1958). Insofar as plaintiffs fail to plead facts which could demonstrate that the Marriage Equality Act is unconstitutional beyond reasonable doubt, they cannot and do not meet their burden.

Article III, §14 of the New York State Constitution states, in relevant part:

> No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor . . . shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon . . . .

The Court of Appeals has expressly held that a message of necessity is not subject to judicial review. Maybee v. State of New York, 4 N.Y.3d 415, 418 (2005). In reaching this conclusion, the Court stated, "The Constitution on its face makes the Governor's judgment of the facts determinative; he or she is to state facts that 'in his or her opinion' necessitate prompt action. Whether a court's opinion is or is not the same as the Governor's does not matter." Id. at 419.

The messages of necessity certified by the Governor for Bills A8354 and A8520 (McGowan Ex. 2) satisfied the requirements of Article III, §14. In his message of necessity to the Senate in connection with the vote on A8354, for example, the Governor stated as follows:

> This bill would amend the domestic relations law to grant same-sex couples the long overdue right to enter into civil marriages in New York. The continued delay of the passage of this bill would deny over 50, 000 same-sex couples in New York critical protections currently afforded to different-sex couples, including hospital visitations, inheritance and pension benefits.
>
> Because the bill has not been on your desks in final form for three calendar legislative days, the Senate has requested this message to permit the immediate consideration of this bill.

McGowan Ex 2, p. 3. Plaintiffs' argument in support of their position that the message of necessity was improperly certified is identical to that made before, and rejected by, the Court in Maybee. See 4 N.Y.3d at 417. See also Complaint ¶¶ 55, 84. Therefore, plaintiffs' second cause of action herein must be dismissed.

POINT IV

THE COMPLAINT FAILS TO STATE A CLAIM OF A VIOLATION OF THE OPEN MEETINGS LAW

The plaintiffs claim a violation of the Open Meetings Law, but fail to give one, single instance where the Open Meetings Law was violated during the genesis of the Marriage Equality Act. The complaint states that the Open Meetings Law was violated when the public, including lobbyists and advocates, were allegedly denied access to (1) the Senate Lobby on June 21, 2011; (2) a hall on the Republican side of the Senate Chamber on June 24, 2011; and (3) a meeting with the Mayor on June 16, 2011 and a

gathering with the Governor at the Mansion. See, Complaint, ¶¶ 40-46. These facts, even if true, do not support any violation of law.

Specifically, Public Officers Law §103 requires that every meeting of a public body, which is defined as "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state" (see Pub. Off. Law §102[2]), be open to the public. Moreover, case law has determined that in absence of a quorum, one cannot establish a violation of the Open Meetings Law. See e.g., Matter of Halperin v. City of New Rochelle, 24 A.D.3d 768, 777 (2005) (and cases cited). There are no allegations in the complaint, however, that a quorum of the Senate met at any time while the Senate lobby or a hallway on the Republican side of the Senate Chamber were allegedly closed on June 21 and 24. Accordingly, even assuming the truth of Plaintiffs' allegations, the Open Meetings Law could not have been violated.[5] Id.

Moreover, even assuming they had alleged those facts, Public Officers Law § 108 explicitly exempts "deliberations of political committees, conferences and caucuses" from the general rule that every meeting of a public body is to be open to the public. See, Pub. Off. Law, §108. The remaining allegations regarding violations of the Open Meetings Law fall squarely within this exemption.

Indeed, while the plaintiffs claim that the Open Meetings Law was violated during "a five-hour period [on June 24, 2011] where only the Republican Senators met,

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[5] Additionally, and importantly, there are no allegations in the complaint that the June 24, 2011 Senate vote was not "open to the general public" as required by the Open Meetings Law. Indeed, the Senate Chamber was open to the public during the voting on the Marriage Equality Act. See excerpt of Transcript of Senate proceedings on June 24, 2011, set forth as McGowan Ex. 3.

excluding all staff and public" (see Complaint ¶ 49), such a meeting is a deliberation of a political conference and is clearly permitted to remain closed to the public under Public Officers Law § 108.

The two additional alleged Open Meetings Law violations, first, on June 16, 2001 when the Senate Majority Caucus held a closed door conference with New York City Mayor Bloomberg (see Complaint ¶25) and, second, a closed gathering at the Governor's mansion, with the Senate Republicans and Governor Cuomo also fall under this exemption. See id. ¶¶ 34-36.

A. The Alleged Meetings Are Exempt from the Open Meetings Law

The alleged June 16, 2011 meeting and the alleged gathering at the Governor's Mansion are specifically exempt by law from any notification to the public. Public Officers Law §108 expressly states that the requirements of §103 do not apply to "deliberations of political committees, conferences and caucuses". See, Pub. Off. Law §108(2)(a) and (b)(iii). The statute further permits such a political body to "invite . . .guests to participate in their deliberations." See, id. The pertinent part of the statute is outlined below:

> Nothing contained in this article shall be construed as extending the provisions hereof to:
>
> * * *
>
> 2. a. deliberations of political committees, conferences and caucuses.
>
> b. for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority

> status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations; and
>
> * * *.

Upon enacting the Open Meetings Law in 1976, the Legislature intended that the deliberations and candid discussions among such political groups be exempt from the requirements of the Open Meetings Law. See L.1985, c. 136. §1. However, after its enactment, a line of judicial decisions interpreted the exemption of "deliberations of political committees, conferences and caucuses" as applying only to discussions of "political business," thereby requiring that legislators not be permitted to have private discussions with members of their own parties without complying with the Open Meetings Law. See id. To correct the judicial misperception of the Legislature's original intent, the Legislature amended the Open Meetings Law to reflect the "original intent of the legislature." See L.1985, c. 136. §1. In doing to, the Legislature explained that the exemption of §108(2)

> was enacted in furtherance of the legislature's recognition that the public interest is well served by the political party system in legislative bodies because such parties serve as mediating institutions between disparate interest groups and government and promote continuity, stability and orderliness in government. The performance of this function requires the private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies.

See L. 1985, c. 136. §1.

Since then, courts have made clear that a meeting of the members of a legislative body, where all the members of the legislative body are of one political party, is exempted from the Open Meetings Law. Matter of Oneonta Star, Div. of Ottaway Newpapers, Inc.

v. Schoharie County, 112 A.D.2d 622 (1985); Urban Justice Ctr. v. Pataki, 38 A.D.3d 20, 32, lv. denied 8 N.Y.3d 958 supra.

Moreover, in clarifying its original intent, the Legislature could not have been clearer with respect to the irrelevance of who else attended the meeting of the members of Senate or Assembly as the exemption applies "without regard to . . . . (iii) whether such political committees, conferences and caucuses **invite staff or guests** to participate in their deliberations." See, Pub. Off. Law §108(2)(b) (emphasis added). In other words, where as here, plaintiffs contend that the Senators who were gathering were all members of the same party, then the Legislature has expressly declared that the presence of guests is irrelevant and the Open Meetings Law does not apply to that private gathering. Thus, for purposes of the Open Meetings Law, whether the Governor or Mayor were present is expressly irrelevant - The Court must consider the meeting of the Senators "without regard to . . . guests."

When interpreting a statute, a court must give "effect to the plain meaning" of the language used. See Majewski v. Broadalbin-Perth Cent. School District, 91 N.Y.2d 577, 583 (1998). Specifically,

> [i]n construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add or take away from that meaning.

See id. (quoting Tompkins v. Hunter, 149 NY 117, 122-23 [1896]). The Legislature, in granting itself the §108(2) exemption, and clarifying its original intent by amending §108, placed no restrictions on the subject matter of the discussion or the guests participating in the deliberations. See, §108(2)(b)(i) and (iii). Therefore, the plain meaning of §108(2)(b)

is that a meeting of Senators of the same political party may include an outside person at a meeting without losing its characterization as a political committee, conference or caucus. There is no requirement written into the statute that that guest be of the same political party as the members of the body privately meeting. As the members of the Senate participating in each of the two meetings were all of the same political party, it does not matter, as a matter of law, who the Senators' guests at either gathering included. As a result, both Mayor Bloomberg and the Governor were "guests" of the Republican Senators, and therefore the two "meetings" were exempt from the requirements of the Open Meetings Law by §108(2)(a).

In light of the explicit statutory language exempting from the Open Meetings Law private party meetings of members of the Senate or Assembly, and legal precedents which confirm that applicability of the Open Meetings Law depends on party membership of the particular legislative body meeting (see, e.g., Matter of Oneonta Star and Urban Justice Ctr.), plaintiffs' arguments here are baseless. To the extent plaintiffs seek to rely on the holding of Warren v. Giambra,12 Misc3d 650 (Erie Co. Sup. 2006), that case does not apply and should not be followed here. Warren, which is not controlling in any event, was wrongly decided insofar as the Court appears to indicate that the §108(2) exemption to the Open Meetings Law did not apply given the presence of the Republican County Executive at a private assembly of the Democratic majority of the County Legislature. See id., at 654. The court offered no further explanation or analysis. Further, the holding did not address the plain language of §108(2)(b), which -- as discussed above -- defines "political committees, conferences and caucuses" as "members of the senate or assembly of the state of New York, or the legislative body of a county, city, town or village, **who**

are members or adherents of the same political party" and excludes guests from consideration. See Pub. Off. Law §108(2)(b) (emphasis added). As the Legislature's exemption expressly applies to private meetings of members of a public body of the same party, regardless of the presence of a guest at the meeting, the decision provides no guidance. To read a limitation into the statute which requires investigation as to the affiliation of the guest would be inconsistent with the express language and purpose of the law, and in fact frustrate, public policy and the Legislature's intent that political groups be permitted to engage in the "private, candid exchange of ideas and points of view . . . concerning the public business to come before legislative bodies." See L. 1985, c. 136, §1.

In sum, plaintiffs' complaint fails to set forth facts which establish a violation of the Open Meetings Law, the Legislature having expressly exempted such gatherings of Senators as set forth in the complaint from the ambit of that law.

B. The Plaintiffs Are Not Entitled to Injunctive Relief

To obtain injunctive relief, plaintiffs must satisfy two basic prongs, which they do not and cannot do. First, plaintiffs must show that they are prejudiced by the alleged violation of the Open Meetings Law. Plaintiffs cannot and do not articulate anywhere in their complaint prejudice to any viable, legally protected interest. Second, plaintiffs must show that the relief they are seeking, i.e. voiding a statute, is appropriate. Numerous cases, some which are referenced below, show that even when there is an Open Meetings Law violation courts refused to annul a legislative action. As outlined more fully below, plaintiffs simply do not meet their burden for injunctive relief.

Even if, *arguendo*, the court finds that the verified complaint states a claim of a violation of the Open Meetings Law, the plaintiffs are not entitled to nullify and void the Marriage Equality Act. "Although courts are empowered 'in their discretion and upon good cause shown, to declare void any action taken by a public body in violation of the mandate of ...[the Open Meetings Law]' it is the challenger's burden to show good cause warranting judicial relief." Mobil Oil Corp. v. City of Syracuse Industrial Development Agency, 224 A.D.2d 15, 29-30 (4th Dept 1996). As a matter of law, the complaint fails to contain allegations warranting the drastic remedy of injunctive relief in the form of nullifying a piece of legislation. The enforcement provisions of the Public Officers Law are only triggered upon a showing of "good cause" by the plaintiff. Matter of New York University v. Whalen, 46 N.Y.2d 734, 735 (1978). Specifically, upon a showing of good cause, a court may "declare void any action taken by a public body in violation of the Open Meetings Law." Inner-City Press/Community on the Move v. New York State Banking Bd., 170 Misc2d 684, 693 (Sup. Ct. New York Co. 1996) (citing In re Roberts v. Town Bd. of Carmel, 207 A.D.2d 404 (2d Dept 1994). However, a "demonstration of prejudice from the Open Meetings Law violation . . . is required to constitute the requisite good cause to declare the action void." Inner-City Press/Community on the Move, 170 Misc2d at 693. The complaint fails to allege any prejudice stemming from any alleged violation of the Open Meetings Law. This is particularly true because the complaint **does not** allege that any action was taken by the Senate at either gathering, or that any decisions on any topic were made and, instead, alleges that when action was, in fact taken, on the Marriage Equality Act, it was done in the open Senate Chamber subject to public observation. See, McGowan Ex. 3, Complaint ¶¶ 56-67.

Even when a public body has voted in secret, courts have declined to annul the vote. In Town of Moriah v. Cole-Layer-Trumble Co., the Town Board voted on a resolution during a private executive session. See 200 A.D.2d 879, 881 (3d Dept 1994). The court held that, even though that private vote violated the Open Meetings Law, the party challenging that vote failed to show good cause for the court to annul that vote because (1) the vote was subsequently ratified during a vote at a regular public meeting, and (2) the challenging party failed to show any "prejudice flowing from" the private vote. Id. See also MFY Legal Services, Inc. v. Toia, 93 Misc2d 147, 150 (Sup. Ct. New York Co. 1977) (finding that petitioner failed to show good cause by failing to show prejudice).

Similarly, in Malone Parachute Club, Inc. v. Town of Malone, the court held that the plaintiff failed to show good cause warranting the overturning of a Town resolution because, even though the Town Board may have violated the Open Meetings Law by privately meeting or discussing the proposed resolution, the resolution was "adopted at a regular, publicized meeting of the Town Board". See 197 A.D.2d 120, 124 (3d Dept 1994). Also, in Griswald v. Village of Pen Yan, the court held that, even though Open Meetings Law was violated, petitioner failed to show good cause warranting the voiding of the action taken by the Village because the resolution was passed at a regular open session of the Board. See 244 A.D.2d 950, 951 (4th Dept 1997)

Finally, the court in Concerned Citizens to Review the Jefferson Valley Mall v. Town Board of the Town of Yorktown cited "the ample opportunity provided for public comment" on the issue allegedly privately discussed in violation of the Open Meetings Law as a justification for its determination that petitioner failed to show good cause

warranting the drastic remedy of vacatur of the Town Board's action. See 83 A.D.2d 612, 613-14 (2d Dept 1981).

In light of the very public debate that took place over the Marriage Equality Act in the months and weeks leading up to the June 24, 2011 vote, and the plaintiffs' admission in the complaint that the Senate action on the Act was done in the open Senate Chamber, the plaintiffs cannot, as a matter of law, establish that the exclusion of the public from the two alleged meetings discussed above prevented them, and the rest of the public, from observing and participating in the legislative process. Indeed, the verified complaint fails to allege any prejudice specifically "flowing from" either alleged meeting. See Town of Moriah, 200 A.D.2d at 881. Rather plaintiffs allege that they were all very actively involved in the Marriage Equality debate. For instance, the verified complaint alleges that Torah for Jews for Decency, of which Plaintiff Leiter is the Executive Director, "was in Albany at least seven times, totaling more than two weeks advocating against the Act" in the two months leading up to the vote. See Complaint ¶ 8. Plaintiff Motley is alleged to have been "actively involved in lobbying state legislators to oppose the Marriage Equality Act." See id. ¶7. Similarly, plaintiff McGuire is alleged to be "an outspoken advocate for traditional marriage" who "actively opposed the Marriage Equality Act." See id. ¶6.

Finally, even in cases where serial or ongoing violations of the Open Meetings Law were found, courts have not invalidated decisions made at, or as a result of, the improperly closed meetings. For instance, even in Warren -- where the court found three violations of the Open Meetings Law spanning a period of three months -- the court held that the plaintiffs failed to show a prejudice or a "'persistent pattern of deliberate violation

of the letter and spirit of the Open Meetings Law'" and therefore refused to invalidate the actions taken at or as a result of those meetings because in "the absence of aggravating factors, the courts of New York do not routinely award injunctive relief and impose sanctions for nonprejudicial violations of the Open Meetings Law." See 12 Misc3d at 655. Therefore, even if, *arguendo*, the court finds violations of the Open Meetings Law with respect to the two June 2011 meetings discussed above, the plaintiffs are not entitled to sanctions as a matter of law. See, id.

In addition to the utter failure to demonstrate any prejudice to plaintiffs arising from these meetings, plaintiffs fail to address the harm their proposed remedy, declaring the Marriage Equality Act void, would cause untold numbers of couples married in accordance with the statute. Insofar as equity can do no harm (see, e.g., Farnsworth v. Wood, 91 NY 308 [1883]), as a matter of law judicial discretion cannot weigh in favor of any such remedy here.

For all of these reasons, it must be found as a matter of law that, even if the meeting with Mayor Bloomberg, and/or the gathering with the Governor violated the Open Meetings Law, the plaintiffs cannot show good cause warranting the voiding of the Marriage Equality Act.

POINT V

THE COMPLAINT FAILS TO STATE ANY OTHER CONSTITUTIONAL CLAIM

The complaint alleges that the defendants allegedly violated plaintiffs' First and Fourteenth Amendment rights, see Complaint ¶89, by (1) allegedly denying plaintiffs access to the June 16, 2001 meeting between Mayor Bloomberg and the Republican

Senators discussed above, see Complaint ¶¶ 25-31, (2) allegedly denying the plaintiffs access to the Senate lobby on June 21 and 24, 2011, see id. ¶¶39-46, and (3) allegedly prohibiting the plaintiffs from communicating with Republican Senators on those days. See id. ¶¶ 47-48. The complaint fails to allege facts to support a finding that the Marriage Equality Act violates the First or Fourteenth Amendment beyond a reasonable doubt. McGee v. Korman, 70 N.Y.2d 225, 230-231 (1987)

The plaintiffs "have no constitutional right as members of the public to a government audience for their policy views." Minnesota State Board for Community Colleges v. Knight, 465 US 271, 286 (1984). While the "First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances," nothing in the First Amendment or Supreme Court case law "suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." Smith v. Arkansas Highway Employees, Local 1315, 441 US 463, 464-466 (1979). "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." Minnesota State Board for Community Colleges at 283. "Plainly, public bodies may confine their meetings to specified subject matter and may hold non-public sessions to transact business." City of Madison Joint School District v. Wisconsin Employment Relations Commission, 429 US 167, 175 n. 8 (1976). Therefore, plaintiffs' claims that they were allegedly prevented from speaking to Republican Senators must be rejected, and plaintiffs' First and Fourteenth Amendment claims must be dismissed.

POINT VI

THE ATTORNEY GENERAL IS AN IMPROPER PARTY

The complaint names Attorney General Schneiderman as a party because he "is the chief law enforcement officer of the [S]tate of New York, responsible for enforcing the laws of New York." See Complaint ¶11. This is an improper basis for naming the Attorney General as a party. In Urlich v. Mane, the plaintiff named the New York State Attorney General as a party because he was challenging the constitutionality of parts of the New York State Election Law. See 393 FSupp2d 405, 410 (EDNY 2005). The court held that the Attorney General was not a proper party because he had "no connection with the enforcement" of the statute being challenged. Specifically, the court stated that

> [w]hile the Attorney General is charged with defending the constitutionality of state law, this fact alone does not provide a basis for bringing an action against him. This is because, although the Attorney General has a duty to support the constitutionality of challenged state statutes, N.Y. Exec. Law §71, and to defend actions in which the state is "interested", N.Y. Exec. Law §63(1), the Attorney General does so not as an adverse party, but to represent the State's interest in asserting the validity of its statutes.

Id. (citing Mendez v. Heller, 530 F2d 457, 460 (2d Cir. 1976). Plaintiffs point to no specific enforcement responsibilities imposed upon the Attorney General in relation to the Marriage Equality Act. Therefore, he is not a proper party and the verified complaint should be dismissed as against him. See, id. See also Sobel v. Higgins, 151 Misc2d 876, 878 (Sup. Ct. New York Co. 1991) (citing Federal National Mortgage Association, 383 FSupp 1294, 1296 (SDNY 1974)).

CONCLUSION

For the reasons discussed above, the verified complaint should be dismissed in its entirety, with prejudice.

Dated: Albany, New York
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