

At the Special Election Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10<sup>th</sup> day of December, 2020.

P R E S E N T:

HON. EDGAR G. WALKER,  
Justice.

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DAVID STEIN, JORGE MUNIZ-REYES,  
ERNESTINA MONTEIRO, AARON OUYANG,  
NAOMI RABEEYA, DAVID GOLDBERG, ERIC  
KUN, ELANA EHRENBURG, WILLIAM VEGA,  
PHYLLIS ELLINGTON, JANICE HENDERSON

Plaintiffs,

- against -

Index No. 524201/20

KINGS COUNTY DEMOCRATIC COUNTY  
COMMITTEE,

Defendants.

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The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

1-7, 15-19  
\_\_\_\_\_  
\_\_\_\_\_

Plaintiffs David Stein, Jorge Muniz-Reyes, Ernestina Monteiro, Arron Ouyang, Naomi Rabeeya, David Goldberg, Eric Kun, Elana Ehrenberg, William Vega, Phyllis Ellington and Janice Henderson (collectively plaintiffs) move, by way of an order to show cause and verified complaint, for an order, (1) pursuant to CPLR 3001, declaring the newly proposed amendment to the Rules of the Government of the Kings County Democratic Committee

Article II § 3a in violation of the Election Law and null and void, and declaring any appointments made by the Executive Committee to the County Committee prior to the required organizational County Committee meeting null and void and in violation of the Election Law § 2-118, and (2) pursuant to CPLR 6301, granting plaintiff's request for a preliminary injunction prohibiting and enjoining the defendant Kings County Democratic County Committee ("KCDCC" or "defendant") from adopting its proposed amendment to its Rules, specifically the proposed amendment to Article II of the Rules of Government of the KCDCC by adding a new § 3a.

***Factual Background***

Plaintiffs are members of the KCDCC<sup>1</sup>, having been elected at the Democratic Primary Election held on June 23, 2020. Pursuant to Election Law § 2-112 (1)(b), after the primary election, KCDCC was required to hold an organizational County Committee meeting, at the earliest, on September 17, 2020, but no later than October 6, 2020. The meeting did not take place, and on September 29, 2020, seven days before the statutory deadline to hold a meeting, the Executive Committee amended Article III of the KCDCC Rules to add a new section (§7) which prohibited conducting any meetings via video teleconferencing or telephone conference, which effectively postponed holding an organizational meeting of the County Committee indefinitely. By decision and order dated

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<sup>1</sup>. The KCDCC is comprised of members elected biennially, in even numbered years, from each Election District within Kings County, and is responsible for conducting all affairs of the Democratic Party organization of Kings County.

October 27, 2020, this Court held that the amendment violated Election Law § 2-112 and directed that KCDCC conduct an organizational meeting of the County Committee, via virtual means, within 45 days of service of a copy of the court’s order with notice of entry (see *Ellington v Kings Cty. Democratic Cty. Comm.*, No. 518630/20, 2020 WL 6326345, at \*6 [N.Y. Sup. Ct. Oct. 27, 2020]). Inasmuch as such service occurred on October 30, 2020, KCDCC is required to hold its organizational meeting of the County Committee no later than December 14, 2020.<sup>2</sup>

On November 29, 2020, the KCDCC Executive Committee adopted a rule amendment (the “new amendment”) adding a new § 3a and § 5 to Article II of the Rules for the Government of the KCDCC. The proposed § 5 provision sought to create at large positions (four per Assembly District ) to be filled as vacancies by individuals without regard to how they identify on the gender spectrum and who are not required to declare a male or female sex designation (nonbinary). The proposed new amendment reads as follows:

(1) Article II [The County Committee: Membership] of the Rules for the Government of the Kings County Democratic County Committee is amended by adding the following § 5 to read as follows:

§5. (a) Notwithstanding anything herein to the contrary in these Rules or in the Election Law, in addition to members

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<sup>2</sup>Pursuant to Article 3 § 2(b) of the Rules for The Government of The Kings County Democratic County Committee, as amended on September 29, 2020, KCDCC must send notice of the biennial organizing meeting “at least five days before such meetings.” Plaintiffs maintain that no notice of a meeting of the Kings County Democratic County Committee has been sent subsequent to the June 23rd, 2020 primary election.

representing Election Districts, there shall be four members at large of the County Committee for each Assembly District. Said members at large shall be enrolled Democrats residing within the Assembly District for which they are elected, without regard to how they identify on the gender spectrum and who need not have to declare a male or female sex designation. Such membership positions shall be treated as vacancies as of the date that this section is enacted.

(b) Each member at large of the County Committee shall be entitled to cast one vote at any meeting of the County Committee, at any meeting of the Assembly District Committee of the Assembly District which such member at large represents, and at any meeting of County Committee members provided for in Article VIII, Section 5, Subdivision (b) of these Rules when the Assembly District which said member at large represents contains at least one Election District within the respective political subdivision.

(c) This section shall expire, and the terms of office of the members at large provided for herein shall terminate, at the commencement of the organizational meeting of the County Committee members elected in the year 2022.

More importantly, the proposed § 3a amendment, which is specifically challenged herein by plaintiffs, authorized KCDCC's Executive Committee to directly appoint and fill all vacancies in the membership of the County Committee existing prior to the time at which an organizational meeting is held. That provision reads as follows:

(2) Article II [The County Committee: Membership] of the Rules for the Government of the Kings County Democratic County Committee is amended by adding the following §3a to read as follows:

§3a. (a) Notwithstanding anything herein to the contrary in these Rules or in the Election Law, vacancies in the membership of

the County Committee existing prior to the time of the organizational meeting of the County Committee shall be filled for the unexpired term by the Executive Committee. Nominations to fill such vacancies shall be made in writing by either of the following methods: (I) upon a majority vote of the Assembly District Committee in and for the Assembly District wherein such vacancy occurs, upon certification by the Chairperson and Secretary of the said Assembly District Committee, (ii) upon the written nomination of five members of the County Committee elected from Election Districts within the Assembly District wherein such vacancy occurs, or (iii) upon the written nomination of a State Committee member elected from the Assembly District wherein such vacancy occurs. Said written nominations shall be submitted to a person at a location and address, by a date and time certain, designated by the Chair of the Executive Committee.

(b) This section shall expire at the commencement of the organizational meeting of the County Committee members elected in the year 2022.

On November 30, 2020, the Kings County Democratic Chair, Rodnyse Bichotte, issued a meeting notice to KCDCC's Executive Committee for a meeting to be held on December 2, 2020, for the purpose of filling vacancies in KCDCC's membership existing prior to the time of the County Committee's organizational meeting. At said meeting, the Executive Committee appointed approximately 2,400 Democrats to fill vacancies in the County Committee membership, which included the nonbinary individuals to fill the newly created at large County Committee positions pursuant to the new amendment (Article II, § 5), as well as other individuals to fill the vacant Election District positions.

On December 3, 2020, a certificate of nominations to fill vacancies was filed with the New York City Board of Elections. On that same day, the plaintiffs commenced the within action seeking declaratory and injunctive relief pursuant to CPLR 3001 and CPLR 6301, enjoining the adoption of the new amendment Article II § 3a, declaring said amendment is in violation of the Election Law, and that the newly filled vacancies of the County Committee members by the Executive Committee is unlawful and in violation of the Election Law. The court notes that KCDCC has submitted a motion to dismiss plaintiffs’ verified complaint pursuant to CPLR 3211 (2), (3), (7), (8) and (10). However, KCDCC’s motion was not properly brought before the court pursuant to the CPLR. As such, KCDCC’s motion papers will be treated herein only as opposition to plaintiffs’ motion. In addition, non-parties Lambda Independent Democrats of Brooklyn and other individuals consisting of nine non-binary members of KCDCC’s County Committee (collectively, Amici) sought leave to file an amici curae brief regarding plaintiffs’ motion, which was granted by the court.

### ***Discussion***

As a preliminary matter, the court addresses defendant’s argument that this action is jurisdictionally defective inasmuch as plaintiffs commenced by filing and serving an order to show cause and verified complaint as opposed to a summons and verified complaint. It is well-settled that “courts are empowered and indeed directed to convert a civil judicial proceeding not brought in proper form into one which would be in proper form, rather than to grant dismissal” (*Hodges v Beattie*, 68 AD3d 1597, 1598 [2009]; CPLR 103 [c]). Given

this authority, courts may deem an order to show cause to be a summons rather than dismiss a matter on jurisdictional grounds. Accordingly, inasmuch as the instant issue is one of improper form only, the court deems the order to show cause to be a summons (*Matter of the Application of State of New York*, 152 AD3d 1169, 1171 [2017]; *Hodges*, 68 AD3d at 1598).

Defendant also argues that this action is jurisdictionally defective due to plaintiffs' failure to name and serve the KCDCC Executive Committee as well as the approximately 2,400 individuals selected to fill County Committee vacancies. Regarding the failure to name and serve the members of the KCDCC Executive Committee, in the related action of *Ellington v Kings County Democratic County Comm.* ( \_\_N.Y.S.3d \_\_, 2020 NY Slip Op 20281 [Sup Ct, Kings County 2020]), defendant raised this identical argument, which the court found to be without merit. In particular, the court ruled that, under the rules of the KCDCC, the Executive Committee is an arm of the KCDCC and the interests of the Executive Committee were adequately represented by joining the KCDCC (*id.*). In the instant case, defendant has failed to point to any facts which would warrant a different determination regarding the adequacy of the KCDCC representation of the Executive Committee's interests.

Also without merit is defendant's contention that plaintiffs' failure to name and serve the approximately 2,400 individuals selected to fill County Committee vacancies renders this action jurisdictionally defective. In particular, although defendant sets forth the names and addresses of these individuals in the certificate of nomination filed with the Board of

Elections, at the time of the filing this action had already been commenced. Thus, “[g]iven the impracticability, if not impossibility, of properly identifying and joining all of such individuals, particularly given the brief time limits applicable to Election Law cases” the court finds that these individuals were not necessary parties (*Matter of Auerbach v Suffolk County Comm. of the Conservative Party*, 171 AD3d 731, 734 [2019]). In any event, to require the plaintiffs to name and serve some 2,400 individuals who were selected to fill the vacancies “would be to impose an impossible, unrealistic and insurmountable burden upon the [plaintiffs]” (*Matter of Brayman v Stevens*, 54 Misc.2d 974, 978-979 [1967] *affd* 28 AD2d 1090 [1967], *affd* 20 NY2d 868 [1967]).

Finally, there is no merit to defendant’s argument that the instant action is time-barred. Election Law § 16-102 (2) states that a “proceeding with respect to . . . [the] meeting of a party committee . . . shall be instituted within ten days after the holding of such primary or convention or the filing of certificate of nominations made at such caucus or meeting of a party committee.”<sup>3</sup> Here, the actions being challenged were taken at the Executive Committee meetings held on November 29, 2020 and December 2, 2020, as well as the filing of the certificate of nominations to fill vacancies with the Board of Elections that occurred

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<sup>3</sup>Although a certificate of nominations was filed with the Board of Elections with respect to the individuals selected to fill vacancies, these nominations were not made at the County Committee meeting. In any event, the filing occurred on December 3, 2020, the same day that plaintiffs filed the instant complaint.



on December 3, 2020. The instant action was commenced on December 3, 2020, well within the 10 day statutory period. Thus, the statute of limitations could not have expired.

Turning to the merits, plaintiffs contend that the action of the KCDCC, acting through the Executive Committee, violated plaintiffs' rights under Election Law §§ 2-112 and 2-118 and Article 2 § 3 of the KCDCC's rules in amending its rules to create additional County Committee positions and filling vacancies on the County Committee prior to the organizational meeting for the County Committee elected in the June 2020 primaries. In considering the issues, the court notes that "[I]t is firmly established that except where expressly governed by legislation, the internal organization and authority of a political party is governed by the party rules" (*Matter of Donnelly v Curcio*, 284 AD2d 460, 460 [2d Dept 2001]; see *In the Matter of Independence Party State Committee of the State of New York, v Berman*, 28 AD3d 556, 558 [2d Dept 2006]; *Matter of Bachmann v DeFronzo*, 164 AD2d 926, 928 [2d Dept 1990]; Election Law § 2-114). However, while political parties are afforded wide latitude in adopting rules for party governance, such rules cannot conflict with statutory directives (see *Matter of Kahler v McNab*, 48 NY2d 625, 626 [1979]; *Matter of Independence Party State Comm. of the State of New York*, 28 AD3d at 558; *Keukelaar v Monroe County Bd. of Elections*, 307 AD2d 1073, 1074 [4th Dept 2003]; *Matter of Bachmann v DeFronzo*, 164 AD2d at 928]).

Here, the parties' arguments primarily turn on the application of Election Law §§ 2-112<sup>4</sup> and 2-118.<sup>5</sup> The KCDCC notes that, based on its rules, the Executive Committee of the KCDCC<sup>6</sup> is empowered to act in the stead of the County Committee on all matters for which the County Committee is authorized to act when the County Committee is not in session, unless the statutory delegation of authority provides that such act may only be

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<sup>4</sup> Specifically, Election Law § 2-112 (1) (b) provides that: "[e]very county committee shall meet no earlier than September seventeenth and no later than October sixth following the June primary. Until such organization meeting, the existing county committee shall exercise all legal authority. Upon the conclusion of such organization meeting, the new county committee shall assume all legal authority vested in the previously organized county committee." (Election Law § 2-112 [1] [b], as amended by L 2019 ch 42).

<sup>5</sup> Election Law § 2-118 (1) provides that: "In the case of the death, declination, enrollment in another party, removal from the unit or removal from office of a member of a committee, or the failure to nominate or elect a member, the vacancy created thereby shall be filled by the remaining members of the committee by the selection of an enrolled voter of the party qualified for election from the unit of representation in which such vacancy shall have occurred. When a state committee fills a vacancy pursuant to this subdivision, the chairman or secretary of such committee shall, within ten days after such vacancy is filled, file a certificate with the state board of elections setting forth the name, address, and unit of representation of the person so selected." Section 2-118 (3) provides that: "The county committee, upon its organization after the election of its members, or at any time thereafter, may determine that a vacancy or vacancies in such committee exists by reason of an increase in the number of election districts within the county occasioned by a change of the boundaries of one or more election districts, taking effect after such election, and may determine the districts that the elected members shall represent until the next election at which members of such committee are elected. A vacancy so determined to exist shall be filled as provided in subdivision one." The court notes that section 2-118 (2) does not involve vacancies on County Committees.

<sup>6</sup> Under the KCDCC's rules, the Executive Committee is a standing committee of the County Committee and is "composed of the members of the State Committee from the county of Kings, the Chairperson, Secretary, Treasurer and Assistant Treasurer of the County Committee." However, only the members of the State Committee are authorized to vote (KCDCC Rules, Art. V, § 1).

performed by the County Committee.<sup>7</sup> As such, the KCDCC argues that under the 2019 amendments to Election Law § 2-112 (1) that extended the authority of the existing County Committee to act until the organizational meeting for the newly elected County Committee, the Executive Committee had the authority to pass the amendments to the KCDCC's rules and fill vacancies, including the vacancies relating to the newly created positions.

The KCDCC concedes that, under case law that predated the June 2019 amendment to Election Law § 2-112 (1), it could not have so acted, as such prior case law held that the outgoing County Committee, and by extension, the outgoing executive committee, had no further official authority and could not perform functions on any substantial matter (*see e.g. Matter of Auerbach v Suffolk County Comm. of the Conservative Party of N.Y. State*, 159 AD3d 695, 697 [2d Dept 2018]; *Matter of Brocato v Tinari*, 157 AD3d 782, 784-785 [2d Dept 2018]; *Matter of Mazur v Kelly*, 170 AD3d 1037, 1038 [4th Dept 1991]; *see also Matter of Torchin v Cohen*, 286 NY 544 [1944]). The KCDCC, however, asserts that these cases have been effectively overruled by the amendment rendering the outgoing County Committee fully functional until the organizational meeting.

Notwithstanding the extension of authority provided by the amendment to Election Law § 2-112 (1) (b) and the Executive Committee's authority under the KCDCC's rules,

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<sup>7</sup> KCDCC Rules Art. V, § 7 provides that "The Executive Committee, at all times when the County Committee is not in actual session, shall have, possess, exercise and enjoy, without any limitation whatsoever, all the rights, privileges, powers and duties which are not by statute vested in or imposed upon said County Committee exclusively and may not be delegated to the Executive Committee."

there was no change to the language of Election Law § 2-118, which unambiguously provides that it is the County Committee that is authorized to fill vacancies in the County Committee. Nothing in this language suggests that this authority may be delegated to another committee under party rules. Indeed, such a finding is compelled by the holding in *Matter of Brocato v Tinari*, a case in which an outgoing executive committee filled vacancies on the County Committee after an election, but prior to the holding of the new County Committee organizational meeting (*Matter of Brocato*, 157 AD3d at 783-784). As a basis for its decision, although the court in *Matter of Brocato* relied, in part, on the cessation of the prior County Committee’s ability to function upon the election of the new committee, its holding is also clearly based on section 2-118’s requirement that vacancies be filled by the County Committee. In this regard, the court stated that:

“The party rules contain an exception that allows the Executive Committee to fill vacancies when the County Committee is ‘not in session.’ However, to allow the 2014 Executive Committee to rely on this exception so as to fill vacancies during the period after the primary election in 2016 and before the mandated organizational meeting *violates the express terms of Election Law § 2-118* (see *Matter of Donnelly v Curcio*, 284 AD2d 460, 460-461 [2001]), improperly allows the exception to swallow the general rule, *which only permits the remaining members of the County Committee to fill such vacancies, undermines the election results of the 2016 primary election*, and is inconsistent with case law limiting the authority of the 2014 Executive Committee during the period after the primary election and before the organizational meeting (see *Matter of Mazur v Kelly*, 170 AD2d at 1038)” (*Matter of Brocato*, 157 AD3d at 785 [emphasis added]).

Regardless of the effect of the language of Election Law § 2-118, the court notes that the amendment to Election Law § 2-112 (1) (b) only extends the authority of the prior County Committee to act until the new organizational meeting and makes no mention of other committees. As such, the amendment to § 2-112 (b) (1) only allows action by the prior County Committee, not the Executive Committee. Moreover, even if the Executive Committee may have had authority based on the amendment to Election Law § 2-112 (1) (b) to act until a County Committee organizational meeting is held, this court is hard pressed to see how this authority under § 2-112 (1) (b) can continue after the date on which an organizational meeting was required to be held, where, as this court held in *Matter of Ellington v Kings County Democratic Party* (\_\_\_ Misc 3d \_\_\_, 2020 NY Slip Op 20281, \*5-6 [Sup Ct, Kings County 2020]), the KCDCC has failed to provide a legal basis for not conducting such a meeting.

The court further finds that Election Law § 2-118 may not be used to fill the purported vacancies that exist as the result of the creation of the new or additional “at large” County Committee positions. Section 2-118 (1) only applies to the filling of vacancies “in the case of death, declination, enrollment in another party, removal of a member of a committee, or the failure to nominate or elect a member” and section 2-118 (3) only applies where there has been a vacancy resulting from an increase in the number of election districts taking place

after an election.<sup>8</sup> Thus, section 2-118 cannot be read to apply to newly created positions. As such, the newly created “at large” County Committee positions are not vacancies under the Election Law and, therefore, can only be filled prospectively at the next election involving the County Committee in 2022 (*see* Election Law § 2-106).

Finally, plaintiffs seek a preliminary injunction prohibiting and enjoining defendant from adopting its proposed amendment to its Rules, specifically the proposed amendment to Article II of the Rules of Government of the KCDCC by adding a new § 3a. However, inasmuch as the Executive Committee has already adopted this amendment, it is too late for injunctive relief at this point. Furthermore, to the extent that plaintiffs seek a preliminary injunction prohibiting and enjoining the 2,400 newly appointed County Committee members from participating in the upcoming organizational meeting, no injunctive relief is necessary. In particular, the court has already determined that the appointment of these individuals was in violation of Election Law § 2-118 and therefore, these individuals are not KCDCC members and may not function as such at the meeting.

### ***Conclusion***

Based upon the foregoing, it is hereby:

**ORDERED** that plaintiffs’ motion is granted to the extent that the court declares that the newly proposed amendment to the Rules of the Government of the Kings County Democratic Committee Article II § 3a is in violation of the Election Law and null and

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<sup>8</sup> As noted above, section 2-118 (2) does not apply to County Committee vacancies.

void, and it is further

**ORDERED** that plaintiffs' motion is granted to the extent that the court declares that any appointments made by the Executive Committee to the County Committee prior to the required organizational County Committee meeting are null and void and in violation of the Election Law§ 2-118.

This constitutes the decision, order and judgment of the court.

E N T E R F O R T H W I T H,



J. S. C.