STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

ROCHESTER CITY SCHOOL DISTRICT, and the BOARD OF EDUCATION OF THE ROCHESTER CITY SCHOOL DISTRICT,

Petitioners,

-vs-

CITY OF ROCHESTER, LOVELY A. WARREN as Mayor of the City of Rochester, COUNCIL OF THE CITY OF ROCHESTER, and the MONROE COUNTY BOARD OF ELECTIONS,

Respondents.

Index #: E2019007046

Court Date
August 1, 2019

APPEARANCES

Alison K.L. Moyer, Esq.
Attorney for Petitioners

Patrick Beath, Esq. and
Timothy R. Curtin, Esq.
Attorneys for the City Respondents

DECISION, ORDER, AND JUDGMENT

Odorisi, J.

Pending before this Court is a hybrid Civil Practice Law and Rules ("CPLR") Article 78 and declaratory judgment special proceeding, accompanied by a permanent injunction request.

Based upon a review of: the Verified Petition [NYSCEF Docket # 1], the Attorney Affirmation of Alison K.L. Moyer, Esq., with exhibits [Docket # 4-11], and the Order to Show Cause [Docket # 27/28] - all submitted in support of the proceeding; the City Respondents' Answer [Docket # 19]; the Attorney Affirmation of Patrick Beath, Esq., with exhibits [Docket

20-25] - both submitted in opposition; the Notice of Appearance for Respondent Monroe County Board of Elections [Docket # 33] - which took no position as to the merits; the Amended Petition [Docket # 30], and Ms. Moyer's Reply Attorney Affirmation, with an exhibit [Docket #'s 34-35] - submitted in further support of the application; and, the City Respondents' Answer to the Amended Petition with Counterclaim [Docket # 38] - submitted in further opposition; Petitioners' Reply [Docket # 39] - submitted in further support; as well as upon oral argument, this Court hereby **GRANTS** the Verified Petition and **DENIES** the City Respondents' counterclaim - both for the reasons set forth hereinafter.

LEGAL DISCUSSION

The Court is compelled to begin by acknowledging the great challenges facing the Rochester City School District, and the utmost importance a sound education is in the lives of our children. The City Respondents' proactive proposals for remedying the situation are admirable, but not legally permissible, as will be explained hereinafter.

Petitioners' Legitimate Standing

A threshold matter to tackle is the City Respondents' standing defense, which falters. See e.g. Elefante v. Hanna, 54 AD2d 822, 823 (4th Dept 1976) (the petitioner had standing to attack, by means of Article 78, administrative action done pursuant to an invalid law, and was entitled to seek declaratory relief with respect to the impending submission of the proposed new city charter to the Utica electorate), mod on other grounds, 40 NY2d 908 (1976) (dismissed due to laches, not lack of standing). As in Elefante, the present Petitioners also have standing to assail the impending Referendum seeking to negate the Board of Education positions and those members' salaries.

The City Respondents' interpretation of the standing principle is too narrow. As the appellate courts have articulated:

> In [a] matter of **significant municipal concern** to the citizens . . . involving the actions of municipal officials . . . [a] petitioner has standing to bring [an] article 78 proceeding **even though he does not show a personal grievance or a personal interest in the outcome . . .**

Andrews v. Nagourney, 41 AD2d 778 (2d Dept 1973), aff'd, 32 NY2d 784. See also Julian v. LaSalle, 22 AD3d 1033, 1034 (4th Dept 2005) (a petitioner's standing is afforded where "the case involves a 'matter of significant municipal concern'" citing Andrews).

This broad standing rule has been applied in the education context to permit Boards of Education to sue under Article 78 "as part of the school board's duty and responsibility to provide a system of public education." Bd. of Educ. of Roosevelt Union Free School Dist. v. Bd. of Trustees of State Univ. of New York, 282 AD2d 166, 171 (3d Dept 2001); Bd. of Ed. of Liverpool Cent. School Dist. v. Ambach, 108 Misc 2d 632, 633-634 (Albany Co Sup Ct 1981) (rejecting the respondent's standing objection).

As framed by the City Respondents, the present issue is of paramount public concern, and that is precisely why they seek the public's input to chart a course of action. That proffered course is the temporary removal of the Board of Education and the elimination or reduction of those members' salaries. With that overtly articulated objective in mind, saying that the Board of Education, and the directly impacted School District, have no voice to complain is simply untenable. Further, the City Respondents' conceded salary removal/reduction effort, all on its own, serves as an adequate injury to the Board of Education members to afford standing to contest the Referendum as that is a concrete

financial harm. Contrary to the City Respondents' suggestion, Petitioners' standing does not rise and fall on the ultimate success of their advisory referendum contention, but rather the real effects should they lose. Stated differently, a party need not be right on the law to gain access to the courthouse. See Colella v. Bd. of Assessors of County of Nassau, 95 NY2d 401, 410 (2000) ("the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny . . .").

In all, Petitioners have the right to prosecute this proceeding.[1]

Article 78 and Declaratory Judgment Standards

To begin, Article 78 "is an appropriate method of collaterally attacking an administrative action threatened or taken pursuant to an allegedly invalid law." Belle v. Town Bd. of Town of Onondaga, 61 AD2d 352, 355 (4th Dept 1978). As clarified at oral argument, Petitioners seek varied forms of Article 78 relief - two of which this Court deems meritorious.

First, a writ of prohibition restrains an official who acts without, or in excess of, his or her jurisdiction. See CPLR 7803 (2); Van Wie v. Kirk, 244 AD2d 13, 24 (4th Dept 1998). The granting of prohibition relief is appropriate when a petitioner shows a clear legal right thereto. See Town of Huntington v. New York State Div. of Human Rights, 82 NY2d 783, 786 (1993); Rush v. Mordue, 68 NY2d 348, 352 (1986); Niagara Frontier Transp. Auth. v. Nevins, 295 AD2d 887 (4th Dept 2002). A writ of prohibition may be issued "in the sound discretion of the court." Soares v. Herrick, 20 NY3d 139, 145 (2012).

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[1] As this Court finds that the original Petitioners have standing, there is no need to address the reply submission seeking to add new Petitioners. In the alternative, the amended pleadings adding in Mr. Van White and Ms. Elliott – Board of Education members and City residents – is not unfounded. Courts are to be generous in regard to amending pleadings (see Fahey v. Ontario County, 44 NY2d 934, 935 (1978)), and the CPLR even affords amendments as of right in this exact scenario. See CPLR 3025 (a).

Second, mandamus to review relief is set forth in CPLR 7803 (3) which permits determinations to be set aside if "made in violation of lawful procedure [or] was affected by an error of law . . . ." See also New York City Health and Hospitals Corp. v. McBarnette, 84 NY2d 194, 205 (1994) (an alleged error of law most often involves an allegation that the agency improperly interpreted or applied a statute or regulation).

Besides Article 78 relief, and separate and distinct therefrom, Petitioners - and also the City Respondents - seek the issuance of a favorable declaratory judgment. Declaratory judgment relief is set forth in CPLR 3001, which provides that:

> The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.

CPLR 3001 (emphasis added). See also CPLR 3017 (b).

"[A] declaratory judgment is a remedy *sui generis* and escapes both the substantive objections and procedural limitations of special writs and extraordinary remedies." Morgenthau v. Erlbaum, 59 NY2d 143, 147 (1983). It is available in a wider range of circumstances than CPLR Article 78 relief. See Morgenthau v. Roberts, 65 NY2d 749 (1985). As the Court of Appeals has decreed about declaratory judgments:

> The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and necessary. The discretion must be exercised judicially and with care . . . It is usually unnecessary where a full and adequate remedy is already provided by another well-known form of action. The general purpose of the declaratory judgment is to **serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.**

James v. Alderton Dock Yards, 256 NY 298, 305 (1931) (emphasis added and internal citation omitted).

The foregoing legal standards will next be applied to each side's claims before this Court.

Purely Advisory Referendum

Petitioner is entitled to all forms of CPLR relief to invalidate the proposed Referendum (see e.g. Doorley v. DeMarco, 106 AD3d 27 (4th Dept 2013) (granting both Article 78 prohibition relief, as well as a declaratory judgment)), as well as the corresponding permanent injunction. See CPLR 7806 (in awarding Article 78 relief, a court may "prohibit specified action by the respondent.").

In "the absence of express statutory authority, an advisory referendum by a city is not authorized." Kupferman v. Katz, 19 AD2d 824 (1st Dept 1963), aff'd, 13 NY2d 932. See also Brucia v Suffolk County, 90 AD2d 762 (2d Dept 1982). This is so because a municipality cannot "avoid governmental responsibility and shift the burden of decision [regarding police services] to a public poll." Woodburn v. Vil. of Owego, 151 AD3d 1216, 1220 (3d Dept 2017); Silberman v. Katz, 54 Misc 2d 956, 959 (NY Co Sup Ct 1967) (a vote on public policy issues is infirm), aff'd, 28 AD2d 992 (1st Dept 1967). An impermissible advisory popular vote is one which has "no legal effect or consequences." Mills v. Sweeney, 219 NY 213, 217 (1916).

One way that a referendum vote would be inconsequential is if it would be preempted by a higher law, such as a state law. See generally Brucia v. Suffolk County, 90 AD2d 762, 762-63 (2d Dept 1982). On the preemption doctrine, the Court of Appeals has decreed that:

> [It] represents a fundamental limitation on home rule power . . . While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies 'the untrammeled primacy of the Legislature to act * * * with respect to matters of State concern.' . . . Preemption applies both in cases of express conflict between local and State law and in cases where the ***State has evidenced its intent to occupy the field.***
>
> Where the State has preempted the field, a local law regulating the same subject matter is **deemed inconsistent** with the State's transcendent interest, **whether or not the terms of the local law actually conflict** with a State-wide statute. Such local laws, 'were they permitted to operate in a field preempted by State law, would **tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns**.' . . . Moreover, the Legislature need not express its intent to preempt . . . That intent may be implied from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area . . . **A comprehensive, detailed statutory scheme, for example, may evidence an intent to preempt.**

Albany Area Builders Ass'n v. Town of Guilderland, 74 NY2d 372, 377 (1989) (deciding that local legislation was preempted) (emphasis added and internal citations omitted). See also Eric M. Berman, P.C. v. City of New York, 25 NY3d 684, 693 (2015); Haskell v. Pattison, 2001 NY Slip Op 40134(U) (Rensselear Co Sup Ct 9-7-01).

Here, and contrary to the City Respondents' position at oral argument, this Court finds that the State unequivocally occupies the entire field of public education; therefore, a direct conflict between laws is unnecessary to trigger preemption. Even silence of the City Charter by removal of certain provisions, as the City Respondents advocate, is fatal in the face of an already occupied field.

The guiding legal instrument to start the Court's preemption analysis must be the State Constitution which provides that:

> (a) Except as expressly provided, nothing in this article shall restrict or impair any power of the **legislature** in relation to:
>
> (1) The maintenance, support or administration of the **public school system**, as required or provided by article XI of this constitution . . .

NY Const art. IX, § 3 (emphasis added).

> The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

NY Const art. XI, § 1.

Per the Constitution, the state legislature has exclusive authority to oversee the educational scheme in New York. In an exercise of that power, the Education Law was enacted to create and manage the Boards of Education as "separate corporate bodies **representing the state**." Divisich v. Marshall, 281 NY 170, 173 (1939) (emphasis added). See also Education Law §§ 2551 & 2553 (effective 1974); Bd. of Ed. of City of Buffalo v. City of Buffalo, 32 AD2d 98, 100 (4th Dept 1969) ("the State has reserved unto itself the control over and the authority to regulate *all* school matters" {emphasis in original}). The City of Rochester's Charter has long expressly acknowledged Section 2553's governance [Docket # 25 – Section 2-1, n. 3].[2]

Besides the foregoing constitution, statute, and charter, the State's primary responsibility for public schools is also documented in case-law.

[2] At oral argument, the City Respondents were constrained to yield the point that their efforts could be fruitless as the Board of Education must continue to exist via the Education Law, but without salaries.

As the Court of Appeals has decreed:

> . . . it has long been settled that the administration of public education is a State function **to be kept separate and apart from all other local or municipal functions** . . . Although members of a Board of Education in a city perform tasks generally regarded as connected with local government, they are officers of an **independent** corporation separate and distinct from the city, **created by the State for the purpose of carrying out a purely State function** and are not city officers within the compass of the Constitution's home rule provisions. . . . 'If there be one public policy well-established in this State' . . . "it is that ***public education shall be beyond control by municipalities and politics*** . . .'

Lanza v. Wagner, 11 NY2d 317, 326 (1962) (emphasis added and internal citations omitted). See also Bd. of Ed. of City School Dist. of City of New York v. City of New York, 41 NY2d 535 (1977); Bd. of Ed. of City of Syracuse v. King, 280 AD 458, 463 (4th Dept 1952) ("The policy of the state has been to place public education beyond the control of municipalities;" therefore, "[a] board of education is not a department of a city but is an independent corporate body.").

Lanza and Bd. of Ed. of City of Syracuse could not be more clear in their resounding condemnation of local interference with Boards of Education, and the corresponding inviolate independence of those entities from municipal control under the guise of the Municipal Home Rule Law ("MHRL") - the proffered legal predicate for the subject referendum. See also Application of Bd. of Educ., Yonkers City School Dist., 136 Misc 2d 636, 640 (Westchester Sup Ct 1987), aff'd as mod sub nom. Bd. of Educ., Yonkers City School Dist. v. DeSantis, 133 AD2d 402 (2d Dept 1987). To this precise point, the Fourth Department has recognized that the Petitioner Rochester City School District "is a separate legal entity from the . . . City [of Rochester]." Hedman v. City of Rochester, 64 AD2d 817,

818 (4th Dept 1978), aff'd, 47 NY2d 933 (1979). See also Bd. of Ed. of Union Free School Dist. No. 4 of Town of Greece v. Bd. of Ed. of City of Rochester, 43 Misc 2d 803, 806 (Monroe Co Sup Ct 1964), aff'd sub nom., Swarts v. Bd. of Educ. of City School Dist. of City of Rochester, 23 AD2d 806 (4th Dept 1965), lv denied, 15 NY2d 488. It is this separation and independence that exempts Boards of Education from the MHRL. See Lanza, 11 NY2d at 326.

Without the MHRL the crux of the City Respondents' whole Referendum justification falls apart. More specifically, MHRL § 23 (2) (e) provision covering the removal of an elected official, or the adjustment of their pay, is inapplicable as the Board of Education, *i.e.*, the Commissioners of Schools, is not a traditional City official contemplated by that Section, but rather a state agent. See Ithaca City School Dist. v. City of Ithaca, 82 AD3d 1316, 1317-1318 (3d Dept 2011); Fossella v. Dinkins, 130 Misc 2d 52, 60 (Richmond Co Sup Ct 1985) (ruling that the proposed amendment was not subject to mandatory referendum as defined in Section 23). As explained in Fossella, a "court cannot presume a construction of the referendum that would impute to the electorate a desire to promulgate ultimately meaningless legislation." Id. at 58. By removing Section 23 (2) (e), the advisory referendum loses statutory support, and in turn, fails.[3] See Astwood v. Cohen, 291 NY 484, 491 (1944). This is by every definition meaningless, and thus gives rise to an improper advisory referendum. See e.g. In Matter of Citizens for an Orderly Energy Policy v. County of Suffolk, 90 AD2d 522 (2d Dept 1982) (adjudicating that the county legislature

[3] As Petitioners emphasized at oral argument, the Local Law highlights its contingent nature by referencing the need for "the enactment of appropriate enabling amendments to the Education Law" for the School District control to shift [Docket # 9, p. 4, § 5]. Therefore, a state take over is still several steps away.

was without authority to place the proposed referendum on the general election ballot).

In sum and substance, and what the whole preceding legal discussion boils down to, is that the City Respondents' actions – although unquestionably well intended – are matters reserved for state consideration. It is the State Legislature's prerogative to entertain and commence the appropriate mechanisms to gain direct control over the City School District, as was done in Lanza - a case the City Respondents acknowledged was "relevant."[4] This critical decision must be made from the top down, and after which the revised Education Law will usurp - by simple operation of law - any non-compliant, and stale, City Charter provisions. See Aetna Cas. and Sur. Co. v. County of Nassau, 221 AD2d 107, 118 (2d Dept 1996) (preemption prevent conversion of charter).[5]

In all, Petitioners are awarded the totality of their requested relief concerning the Referendum. See e.g. Green v. DeMarco, 87 AD3d 15, 20 (4th Dept 2011) (concluding that both prohibition and declaratory judgment relief were warranted).

Flawed Advocacy Letter

Petitioners' final argument surrounds the propriety of the City's July mailing. As with Petitioners' other assertions, their claim against the letter likewise succeeds. See e.g. Phillips v. Maurer, 67 NY2d 672, 674 (1986) (school budget advertisement exceeded the

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[4] This Court pauses to clarify the facts of Lanza because the City Respondents indicated at oral argument that Lanza was a mayoral control case. This is not entirely accurate. As laid out in the decision's first paragraph, the school district take over was initiated by the Governor convening an Extraordinary Session of the Legislature at which that body passed a statute reorganizing the Board of Education of the City of New York. See Lanza, 11 NY2d at 322. Only after the state-sponsored oversight was in place did the City's mayor then have a role in forming the new Board as permitted by state directive. Lanza reflects the right means by which to achieve new school district management, and that reason is highly "relevant" to the outcome this Court reaches.

[5] The City Respondents' speculation about the possibility of protracted litigation if the Charter is not amended before the Education Law is revised [if that ever occurs], simply will not come to fruition, and puts the proverbial cart before the horse.

publication of information "reasonably necessary" to educate the public); Schulz v. McCall, 220 AD2d 984, 985 (3d Dept 1995) (news article struck down). Per Phillips and Schulz, the instant letter must also be deemed improper.

As cautioned by the Court of Appeals, a political faction cannot:

> disseminate information, at the taxpayers' expense, **patently designed to exhort the electorate to cast their ballots in support of a particular position** . . . It has been stated in a different context that "[t]o educate, to inform, to advocate or to promote voting on any issue may be undertaken, provided it is not to persuade nor to **convey favoritism, partisanship, partiality, approval or disapproval** by [the] agency of any issue, worthy as it may be"

Phillips, 67 NY2d at 674 (emphasis added and internal citation omitted).

The Phillips Court cited Stern v. Kramarsky, 84 Misc 2d 447 (NY Co Sup Ct 1975) which had a much more exhaustive analysis as follows:

> The spectacle of . . . agencies campaigning for or against propositions . . . to be voted on by the public, albeit perhaps well-motivated, can only **demean the democratic process**. As [an] . . . agency supported by public funds they cannot advocate their favored position on any issue . . . they must maintain a position of neutrality and impartiality.
>
> It would be establishing a dangerous and untenable precedent to permit the government or any agency thereof, to use public funds to disseminate propaganda in favor of or against any issue or candidate. This may be done by totalitarian, dictatorial or autocratic governments but cannot be tolerated, directly or indirectly, in these democratic United States of America. This is true even if the position advocated is believed to be in the **best interests** of our country . . .
>
> Public funds are trust funds and as such are sacred and are to be used only for the operation of government. For government agencies to attempt to influence public opinion on such matters inhibits the democratic process through the misuse of government funds and prestige. Improper expenditure of

> funds, whether directly through promotional and advertising activities or indirectly through the use of government employees or facilities cannot be countenanced . . . People of all shades of opinion and belief contribute these funds from one source or another. No agency may misuse any such funds for promoting its own opinions, whims or beliefs, irrespective of the **high ideals or worthy cause it espouses, promotes or promulgates**.

Stern, 84 Misc 2d at 452-453 (NY Co Sup Ct 1975) (granting injunction restraining the defendants from campaigning to achieve the passage of an amendment) (emphasis added and internal citation omitted). See also Town of Roxbury v. Rodrigues, 277 AD2d 866, 867 (3d Dept 2000) (noting restrictions which prevent municipal governments from exhorting the electorate to vote for particular propositions which they support).

With the above rationale in mind, the Court carefully examined the July 12th letter and found that it runs afoul of the same [Docket # 10]. See e.g. Schulz v. State, 86 NY2d 225, 236 (1995) (deciding that subject newsletter went "well beyond simply conveying information on a political issue and urging voters to participate in the democratic process").

As stated at the start, this Court does not question the sincerity of the City Respondents' intentions to better the School District. However, that good faith does not salvage the letter from judicial critique. The letter's message is a loud and clear endorsement of the Referendum, and strongly suggests that the voter should be too. Although the letter does not squarely tell the residents what their vote should be, *i.e.*, yes or no, it nevertheless conveys that same recommendation. From the letter's phrasing, the author's position is evident. In fact, the letter's ending asks the reader to "join with me and vote." In isolation, this could appear innocuous, but construed with the entirety of the letter, it smacks of prohibited advocacy.

Moreover, the City Respondents' focus on the factual/statistical content of the letter does not salvage it given its overall implication. See Schulz, 86 NY2d at 235. As stated in Schulz, "[a]lthough the newsletter contained a substantial amount of factual information which would have been of assistance to the electorate in making an educated decision on whose position to support on that issue, the paper undisputably "'convey[ed] ... partisanship, partiality ... [and] disapproval by [an agency] of [an] issue.'" Id. See also Schulz, 220 AD2d at 986 ("the mere existence of some factual information 'that, standing alone, would be considered a proper attempt to educate the public' . . . will not rectify the constitutional violation."). As a consequence of this ruling, the taxpayer money should not have been spent. Despite the violation, Petitioners do not request any form of monetary penalty, so they are content with the moral victory.

The City Respondents' Counterclaim

The very last item for this Court's consideration is the counterclaim, which is properly before this Court (see CPLR 402 & 7804 (d)), but which cannot prevail.

In their counterclaim, which seemingly concedes the referendum issue, the City Respondents ask this Court to "blue-line" and convert, via a declaratory judgment, Local Law No. 4 from a legislative act intended for implementation via only a successful majority public vote [Docket # 9, p. 4, § 5], to one already in force and effect. Based upon the requested conversion, the City Respondents further seek disgorgement of the Board of Education members' salaries since July 8th.[6] This Court declines to do so. See e.g. City

[6] This attack on salaries harkens back to the preliminary standing issue, and serves to reinforce the Board of Education's ability to sue concerning the same. Additionally, this Court finds legal trouble with a post-budget passing salary revocation. See Divisich, 281 NY at 173 ("while the municipality must make appropriations of money to run the schools, the expenditure of that money when once appropriated vested solely in the Educational Board"); Bd. of Educ., Yonkers City School Dist., 133 AD2d at 403

of New York v. Patrolmen's Benev. Ass'n of City of New York, Inc., 89 NY2d 380, 394 (1996) (rejecting alternative application to uphold only part of subject law); Haskell, 2001 NY Slip Op 40134(U) (local law not in need of a mandatory referendum would not be severed to allow it to stand without the offending provision); Noonan v. O'Leary, 206 Misc 175 (Monroe Co Sup Ct 1954) (concluding that the invalid portion of City of Rochester local law rendered the entire proposal invalid), aff'd, 284 AD 646 (4th Dept).

What is being sought of the Court is application of the severability doctrine. See generally Alaska Airlines, Inc. v. Brock, 480 US 678 (1987); Parker v. Town of Alexandria, 163 AD3d 55, 58 (4th Dept 2018). The Court of Appeals set forth the doctrine as follows:

> 'The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots'
>
> This exercise 'requires first an examination of the statute and its legislative history to determine the legislative intent and what the purposes of the new law were, and second, an evaluation of the courses of action available to the court in light of that history to decide which measure would have been enacted if partial invalidity of the statute had been foreseen'

CWM Chem. Services, L.L.C. v Roth, 6 NY3d 410, 423 (2006) (internal citations omitted).

In assessing severability, the Court of Appeals has warned against court actions that "invalidate the dog, while preserving the tail." Assn. of Surrogates and Supreme Ct. Reporters Within City of New York by O'Leary v. State, 79 NY2d 39, 48 (1992).

(same). As the City Respondents admitted at oral argument, the Board of Education remains in place until state action occurs; however, their salaries is the lone issue that other prospective legislative endeavors may be able to address in the interim.

In this case, there is inadequate evidence of legislative intent on which gleam the City Council's wishes in regard to an immediately effective local law, not contingent on a public vote. See e.g. Parker v. Town of Alexandria, 138 AD3d 1467, 1468 (4th Dept 2016) (refusing to adjudicate severability contentions in the absence of clear legislative intent); Mayor of the City of New York v. Council of the City of New York, 235 AD2d 230, 231 (1st Dept 1997) (declining to sever any portion of a local law without proof that the legislators wished a partial version to law to be enforced). The Local Law does not even have a severability clause, from which some legislative intent to save the remaining portions thereof could be inferred. Cf. St. Joseph Hosp. of Cheektowaga v. Novello, 43 AD3d 139, 146 (4th Dept 2007) (severability clause permitted valid portions of the law to still be upheld as it was a presumption of legislative intent to keep the legal parts in place).

More importantly, it is not for this Court to legislate – that would be a grave violation of the separation of powers between the co-equal branches of government. Rather, the legislative matter must go back before City Council for a new vote consistent with this Decision, Order, and Judgment. This is the legally mandated course of action, as well as the prudent one. The importance of this issue cannot be overstated, and as such, necessitates the City Council's meticulous re-evaluation.

CONCLUSION

Based upon all of the foregoing, it is:

ORDERED, ADJUDGED, AND DECREED, that the Verified Petition is **GRANTED** (see CPLR 7803 (2) & (3)); and it is further

ORDERED, ADJUDGED, AND DECREED, that a declaratory judgment is issued in Petitioners' favor indicating that Local Law No. 4 is invalid, and the ensuing Referendum is a void advisory referendum (see CPLR 3001 & 3017 (b)); and it is further

ORDERED, ADJUDGED, AND DECREED, that a permanent injunction is issued barring the advisory referendum from being included on the ballot for the November General Election (see CPLR 7806); and it is further

ORDERED, ADJUDGED, AND DECREED, that the City Respondents' counterclaim is **DENIED**, and a declaratory judgment is issued against implementing a materially revised version of Local Law No. 4.

Signed at Rochester, New York on August 2, 2019.

HONORABLE J. SCOTT ODORISI
Supreme Court Justice