

# Fate of Ethics Panel And Cuomo Book Deal Probe Is in Top Court's Hands as January Arguments Approach

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said.

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### Body

NEW YORK'S highest court will have an opportunity to get its say on whether the state's revamped, 11-member ethics watchdog is a constitutional body.

After two lower courts invalidated the watchdog's statutory authority for having violated the state's bedrock separation-of-powers doctrine in that it answers to a group of 15 unelected law deans, rather than the governor arguments are set for Jan. 7 in the Court of Appeals.

Its answer will determine whether the watchdog, the Commission on Ethics and Lobbying in Government, may continue to investigate former Gov. Andrew Cuomo's \$5.1 million book deal about his handling of the pandemic.

Assistant Solicitor General Dustin J. Brockner will argue for the state, while Holwell Shuster & Goldberg partner Gregory J. Dubinsky will argue for Cuomo, who has successfully moved to have COELIG's authority invalidated.

New York City attorney Frederick P. Schaffer wrote an amicus brief on behalf of the New York City Bar Association and six good-government groups urging the Court of Appeals to validate the watchdog, which was created in July 2022 after Gov. Kathy Hochul signed the Ethics Commission Reform Act into law in April 2022.

It replaced the former Joint Commission on Public Ethics, whose history was marred by conflict of interests and information leaks, backers of the reform

In a reply brief filed Friday, Brockner accused Cuomo of misconstruing the separation-of-powers doctrine, which the state attorney said warrants a pliable, case-specific inquiry.

Brockner said the state constitution affords the governor and Legislature flexibility to come up with a method to regulate their affairs and promote the public's trust in government.

"They exercised that authority here by creating an ethics commission that is not unduly beholden to the very officials it monitors," Brockner wrote.

The two sides are also at odds over whether the commission's authority to administer the ethics laws against a former governor conflicts with the Legislature's impeachment power.

Dubinsky's brief called the reform act "a poster child for a statute that cuts at the heart of the structural protections inherent in the New York Constitution safeguarding the rights and liberties of the People."

Cuomo's counsel said the act is unprecedented in that it creates a state entity "with sweeping executive law-enforcement powers, and yet utterly insulates the agency from any oversight by or accountability to the executive branch."

Dubinsky credited the Appellate Division's "thorough and well-reasoned decision," which explained that the act impermissibly "creates an agency with executive power" with "the authority to investigate and impose penalties for the violation of the ethics laws, while being entirely outside the control of the executive branch."

Brockner's brief pointed to a 44-year-old Court of Appeals decision in Rapp v. Carey, 44 N.Y.2d 157 (1978), which highlighted the various state departments and independent agencies and public authorities over which a governor has no general control or powers of supervision or operation.

Schaffer's friend-of-the-court brief noted how many of his client organizations have testified before legislative

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committees about the need for a new **ethics** structure.

The "Amici have argued that it is problematic to give exclusive appointment power to the Governor and Legislative leaders because they may in fact, and certainly in public perception, lack the incentive to appoint independently-minded members ready and willing to act without fear or favor," Schaffer wrote.

Although the advocates were unsuccessful in convincing lawmakers to create an **ethics** body where public officials appoint a selection committee which in turn appoints the members, they were actively involved in discussions which led to COELIG's creation, and believe it's an improvement on JCOPE, though they conceded that the process for appointing COELIG's commissioners is in need of much further improvement.

"When the Governor and the Legislature agreed on the statute creating COELIG they were not operating on a clean slate. For decades New York had been suffering from an epidemic of corruption and misconduct, including multiple investigations into harassment and discrimination, which led to the resignations and/or indictment of two Governors, a Lieutenant Governor, an Attorney General, a Comptroller, an Assembly Speaker and two Senate Majority Leaders," Schaffer wrote.

Previously, JCOPE had approved **Cuomo's** book deal, but renounced it in 2021, ordering him to forfeit the proceeds because the watchdog said it was approved under false pretenses. **Cuomo** also denied **commission** charges that he used state resources to write the book. He said staffers of his former administration volunteered their time.

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## **New York Law Journal**

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### **Body**

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