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April 20, 2013

TO: Assembly Committee on Governmental Employees:
Chair – Peter Abbate, Jr.
Members – Jeffrion Aubry, Alec Brook-Krasny, William Colton, Michael Cusick, Michael DenDekker, Phillip Goldfeder, Al Graf, Mark Johns, Nicole Malliotakis, Joseph Saladino, Angelo Santabarbara, Michaelle Solages, Kenneth Zebrowski

FROM: Elena Ruth Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: (1) Constitutional, statutory, & other infirmities of A.246 establishing "a special commission on compensation for state employees designated managerial or confidential, and providing for its powers and duties";
(2) Request that the Assembly Committee on Governmental Employees hold a hearing on A.246 as to its purported "Justification", as set forth in its sponsor memo, and to secure expert testimony on its constitutionality

This follows my brief phone conversation on Wednesday morning, April 17, 2013 with Chairman Abbate's legislative director, Joe Brady, alerting him to constitutional, statutory, and other infirmities of A.246 establishing "a special commission on compensation for state employees designated as managerial or confidential, and providing for its powers and duties". I sufficed to outline for Mr. Brady only a portion of what is set forth below as Mr. Brady told me he would have to call me back. However, I received no subsequent call from him. Nor was I notified that A.246 was being calendared for the agenda of the Committee's meeting on Tuesday morning, April 23, 2013.

I learned of such calendaring on Friday morning, April 19, 2013, when – having received no return call from Mr. Brady – I telephoned Chairman Abbate's office. Upon being told that Mr. Brady was not then in, I asked when the Committee's next meeting was and whether A.246 was on the agenda. I was told, only tentatively, that it was. This was confirmed for me, thereafter, by various staff of Committee members with whom I spoke late Friday afternoon, upon calling to obtain e-mail addresses of the members' legislative directors and/or chiefs of staff for purposes of furnishing them with the below presentation.

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* **Center for Judicial Accountability, Inc.** (CJA) is a national, non-partisan, non-profit citizens' organization, working to ensure that the processes of judicial selection and discipline are effective and meaningful.

Constitutional, Statutory, & Other Infirmities of A.246

A.246, sponsored by Assembly Ways and Means Committee Chairman Herman Farrell, Jr. and Assemblyman J. Gary Pretlow, was "prefiled" on January 9, 2013, and referred to the Assembly Committee on Governmental Employees.

The identical Senate version S.2953, sponsored by Senate Finance Committee Chairman John DeFrancisco and introduced on January 25, 2013, was referred to the Senate Finance Committee, from which it was voted out on Tuesday, April 16, 2013 with such carelessness that none of the Senators questioned how, pursuant to §1(a), the first special commission could be established on "April 1, 2013", and, especially, as §§1(h) and (i) required that it be dissolved "not later than one hundred fifty days" thereafter. Although the official record of the Senate Finance Committee vote is 29 ayes, 6 ayes without recommendation, and 1 Senator excused, the number of Senators actually present at the Committee's 11-minute, 22-second meeting, as seen in its video, appears to be no more than 11.[1] The total time spent on A.246 was less than two minutes – a substantial portion of which was given over to "facetious" comment about how it would be "horrible", "a very bad thing", and "probably corrupt" to use the special commission format to address legislative pay.[2]

A.246/S.2953 is modeled on – and is largely *verbatim* identical to – Chapter 567 of the Laws of 2010, establishing a special commission on judicial compensation. Reflecting this is the memo accompanying A.246/S.2953. In a section entitled "Existing Law", it states, in pertinent part:

> "Similar legislation to the measure proposed here has been passed and/or enacted for the Judiciary and State Legislature in 2008 and 2011."

The referred-to "similar legislation" relating to the judiciary is Chapter 567 of the Laws of 2010, whose first special commission on judicial compensation was statutorily-required to be established on April 1, 2011.

As should already be known by all members of the Assembly and Senate, Chapter 567 of the Laws of 2010 is the subject of a serious and substantial legal challenge:

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[1] The 29 Senators voting recorded as voting "aye" are Senators DeFrancisco, Bonacic, Farley, Flanagan, Fuschillo, Golden, Grisanti, Lanza, Larkin, Little Marcellino, Nozzolio, O'Mara, Ranzenhofer, Robach, Savino, Seward, Young, Krueger, Diaz, Dilan, Rivera, Breslin, Montgomery, Parker, Perkins, Stavisky, Espaillat, Sampson. The 6 ayes (without recommendation) are recorded as Senators Griffo, LaValle, Gianaris, Peralta, Squadron, and Kennedy. And the 1 senator that was excused was Senator Hanon.

[2] The Senate Finance Committee's video of its April 16, 2013 meeting is on its website: http://www.nysenate.gov/committee/finance . A transcription of the less than two minutes devoted to A.246 appears at pp. 9-10, *infra*.

CENTER FOR JUDICIAL ACCOUNTABILITY, INC. and ELENA RUTH SASSOWER, individually and as Director of the Center for Judicial Accountability, Inc, acting on their own behalf and on behalf of the People of the State of New York & the Public Interest,

-against-

ANDREW M. CUOMO, in his official capacity as Governor of the State of New York, ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, THOMAS DiNAPOLI, in his official capacity as Comptroller of the State of New York, DEAN SKELOS, in his official capacity as Temporary President of the New York State Senate, THE NEW YORK STATE SENATE, SHELDON SILVER, in his official capacity as Speaker of the New York State Assembly, THE NEW YORK STATE ASSEMBLY, JONATHAN LIPPMAN, in his official capacity as Chief Judge of the State of New York, the UNIFIED COURT SYSTEM, and THE STATE OF NEW YORK.

Four copies of the verified complaint were served on the Legislature on April 5, 2012 – one copy for Assembly Speaker Silver, one copy for Temporary Senate President Skelos, one copy for the Assembly, and one copy for the Senate, each named defendants. On February 6, 2013, a fifth copy was furnished to the Legislature, indeed, directly to Senate Finance Committee Chairman DeFrancisco, who was presiding at the joint Senate and Assembly budget hearing on "public protection", at which I testified about the significance of the verified complaint in establishing the Legislature's duty to override the judicial salary increases recommended by the first Special Commission on Judicial Compensation. As I had been relegated to testifying last by the Senate Finance Committee which organized the hearing, Assembly Ways and Means Chairman Farrell was not present for my testimony – 7-1/2 hours after the hearing began. Nevertheless, he and all other Assembly members and Senators were, thereafter, repeatedly given notice that the video of my testimony was posted on CJA's website, www.judgewatch.org, accessible *via* the top panel "Latest News", on a webpage entitled "Securing Legislative Oversight & Override of the 2nd and 3rd phases of the judicial pay raises scheduled to take effect April 1, 2013 and April 1, 2014" – and that also posted on that webpage was the substantiating documentation I had handed up at the February 6, 2013 budget hearing: the *CJA v. Cuomo* verified complaint and all its exhibits thereto, including its most important: CJA's October 27, 2011 Opposition Report to the Special Commission on Judicial Compensation's August 27, 2011 "Final Report".

The facts recited by the verified complaint's second cause of action (at ¶¶145-154) as to the unconstitutionality of provisions of Chapter 567 of the Laws of 2010, *as written*, are dispositive of the unconstitutionality of the same or comparable provisions and features of A.246/S.2953, *as written*.

Similarly, the facts recited by the verified complaint's third and fourth causes of action (¶¶155-166; ¶¶167-172) as to the first Special Commission on Judicial Compensation's flagrant violation of the most basic ethical, evidentiary, and legal standards, and of express preconditions specified by Chapter 567 of the Laws of 2010 for salary increase recommendations, are dispositive of the ease with which a special commission established under A.246/S.2953 can, with impunity, recommend whatever pay raises its self-interested and actually biased commissioners might choose – with no oversight by our highest constitutional officers and no protection of the public purse – a state of affairs further underscoring the unconstitutionality of A.246/S.2953, *as written*.

The express basis of ¶¶145-154 of the verified complaint's second cause of action, appearing beneath the title heading "Chapter 567 of the Laws of 2010 Unconstitutionally Delegates Legislative Power Without Safeguarding Provisions and Guidance", is the 2007 decision of Bronx Supreme Court Justice Mary Ann Brigantti-Hughes in *Mary McKinney, et al. v. Commissioner of the New York State Department of Health, et al.*, 15 Misc.3d 743 (2007).[3] At issue in *McKinney* was a statute which allowed recommendations of a special commission to become law, without affirmative legislative action. Judge Brigantti-Hughes upheld the statute – Chapter 63 (Part E) of the Laws of 2005 – only because it contained safeguarding provisions. Such safeguarding provisions, however, are absent from Chapter 567 of the Laws of 2010 and from A.246/S.2953 – each also allowing commission recommendations to become law, without affirmative legislative action.

That Chapter 63 (Part E) of the Laws of 2005 should have been stricken as unconstitutional may be seen from the *amicus curiae* brief that the New York City Bar Association filed with the Court of Appeals, in support of the motion of the *McKinney* plaintiffs for leave to appeal.[4] The *amicus* brief described the statute delegating legislative power to a commission, without requiring the legislature to affirmatively vote on its recommendations before they would become law, as:

> "a process of lawmaking never before seen in the State of New York" (at p. 24);
>
> a "novel form of legislation…in direct conflict with representative democracy [that] cannot stand constitutional scrutiny (at p. 24)";
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> a "gross violation of the State Constitution's separation-of-powers and…the centuries-old constitutional mandate that the Legislature, and no other entity, make New York State's laws" (at p. 25);
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> "most unusual [in its]…self-executing mechanism by which recommendations

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[3] Justice Brigantti-Hughes' decision, the subsequent Appellate Division and Court of Appeals decisions, as well as such parts of the record as we could locate are posted on a webpage of CJA's website pertaining to the *McKinney* case, accessible from the *CJA v. Cuomo* webpage. Here's the direct link: http://www.judgewatch.org/web-pages/judicial-compensation/mckinney-etc.htm.

[4] The City Bar's *amicus* brief in *McKinney* is posted on the *McKinney* webpage of our website – whose direct link is in footnote 3, *supra*.

> formulated by an unelected commission automatically become law...without any legislative action" (at p. 28);
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> unlike "any other known law" (at p. 29);
>
> "a dangerous precedent" (at p. 11) that
>
> "will set the stage for the arbitrary handling of public resources under the guise of future temporary commissions that are not subject to any public scrutiny or accountability" (at p. 36).

Indeed, Appellate Division, Fourth Department Justice Eugene Fahey deemed the statute unconstitutional, violating due process, the presentment clause, and separation of powers, in his dissenting opinion in *St. Joseph Hospital, et al. v. Novello*, 43 A.D.3d 139 (2007) – another case challenging Chapter 63 (Part E) of the Laws of 2005, which came up to the Court of Appeals in the same period as *McKinney*.

The Court of Appeals' response to these two important cases, simultaneously before it, was in keeping with its corrupt, politicized conduct chronicled by the *CJA v. Cuomo* verified complaint. It dismissed both the *McKinney* and *St. Joseph Hospital* appeals of right, "*sua sponte*", on its standard boilerplate, "no substantial constitutional question is directly involved", thereafter denying leave to appeal without reasons.

These were not the only challenges generated by Chapter 63 (Part E) of the Laws of 2005. There are five others identified by the New York City Bar Association's May 2007 report "*Supporting Legislative Rules Reform: The Fundamentals*" (at pp. 9-10), whose discussion of the statute was in the context of describing it as the product of New York's dysfunctional Legislature, whose rules vest disproportionate power in the leadership, leaving committees, which should be the locus for developing legislation and discharging oversight responsibilities, as nothing more than shells.[5]

A functioning legislature, with functioning committees, should have been made aware of the constitutional challenges to Chapter 63 (Part E) of the Laws of 2005 – and to the constitutional challenge to Chapter 567 of the Laws of 2010, presented by the *CJA v. Cuomo* verified complaint. Certainly, we did everything in our power to ensure this would happen. In the month preceding the January 9, 2013 start of the legislative session, we took steps to alert all Senate and Assembly members to the *CJA v. Cuomo* verified complaint because of its relevance to their responsibilities to vote on new leadership and new legislative rules. We sent virtually every Senate and Assembly member e-mails on the subject in the weeks leading up to the opening session on January 9, 2013[6] –

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[5] The City Bar's report "*Supporting Legislative Rules Reform: The Fundamentals*" is posted on the *McKinney* webpage of our website – whose direct link is in footnote 3, *supra*.

[6] This correspondence to Senate and Assembly members in the month preceding January 9, 2013 is posted on our website, on our webpage entitled "CJA's Championing of Appropriate Rules and Leadership for

the day on which, according to A.246, Assemblyman Farrell "prefiled" it.

The next day, January 10, 2013 – even before the dates of the Senate and Assembly budget hearings were publicly announced – I was directly phoning Assemblyman Farrell's office and Senator DeFrancisco's office, requesting to testify against the Judiciary's request for funding for the second phase of the judicial salary increases, recommended by the first Commission on Judicial Compensation. In so doing, I requested that the Senate Finance Committee and Assembly Ways and Means Committee, as likewise the Senate and Assembly Judiciary Committees, each review, in advance of the February 6, 2013 budget hearing on "public protection", the *CJA v. Cuomo* verified complaint – and its most important exhibit CJA's October 27, 2011 Opposition Report. Unbeknownst to me, Senator DeFrancisco would be introducing S.2953 on January 25, 2013.

That Assemblyman Farrell and Senator DeFrancisco introduced A.246/S.2953 modeled on Chapter 567 of the Law of 2010 imposed upon them a duty to examine and alert their fellow legislators as to the constitutional and statutory challenge presented by *CJA v. Cuomo*. Instead, they not only ignored the verified complaint and the testimony I presented at the February 6, 2013 hearing based thereon, but Senator DeFrancisco apparently sought to clandestinely secure passage of his S.2953 by importing its text into appropriations bill S.2605, as "Part X".

We noted this "Part X" in our March 24, 2013 letter to all Senators entitled "Why You Must Reject S.2601: The Appropriations Bill for the Judiciary" and in our essentially identical March 26, 2013 letter to all Assembly Members entitled "Why You Must Reject A.3001: The Appropriations Bill for the Judiciary" as underscoring the necessity that legislators examine the *CJA v. Cuomo* verified complaint. Each letter stated:

> "Particularly <u>essential</u> is examination of ¶¶145-154 of the complaint's second cause of action, challenging the constitutionality of Chapter 567 of the Laws of 2010, *as written*, based on its <u>delegation</u> of 'Legislative Power Without Safeguarding Provisions and Guidance'. This is because budget bill S.2605-C contained legislation 'necessary to implement the public protection-general government budget for the 2013-2014 state fiscal year' in a Part X creating 'a commission on managerial or confidential state employee compensation to examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits for managerial or confidential state employees'. Its material language and provisions were *verbatim* <u>identical</u> to the constitutionally-infirm language and provisions of Chapter 567 of the Laws of 2010. This Part X appears to have been removed from what is now S.2605-D, but whether it has been imported to some other Senate or Assembly bill is unknown." (at page 10, underlining in the originals).

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the New York State Legislature", accessible *via* the top panel "Latest News". Our January 3, 2013 letter to all Assembly members (excepting the incoming freshmen) was entitled "Transforming the Assembly on Day 1 of its 236th Legislative Session by Appropriate Rules & Leadership".

"Part X" was removed from S-2605-C because it was not acceptable to Assembly leadership. In the words of Senate Finance Committee Chairman DeFrancisco at the Committee's April 16, 2013 meeting on S.2954: "We had this in our one-house budget bill and the Assembly would not go along." This, however, is not reflected by the sponsor memos, which should have been updated. The sponsor memo to A.246 simply identifies the "Legislative History as "A.9776 of 2012", with the sponsor memo for S.2953 more expansively identifying "S.6568/ A.9776 of 2012".[7]

Request for Committee Hearing on A.246

In the event you are unaware that properly functioning legislatures solicit expert and public opinion through committee hearings so that members can be properly informed as to both facts and law and enabled to appropriately revise and amend proposed bills, we ask that you read the landmark 2004, 2006, and 2008 reports of the Brennan Center for Justice on New York State legislative reform, which, together with the New York City Bar Association's 2007 report "*Supporting Legislative Rules Reform: The Fundamentals*", are posted on our website as part of a "Rules Reform Resource Page", also accessible *via* our top panel "Latest News".

For immediate purposes, here's a quote from the Brennan Center's 2008 report entitled "*Still Broken: New York State Legislative Reform*", which under the heading "Dysfunctional Standing Committees", states:

> "In many state legislatures and in the United States Congress, committees function as the locus of legislative activity.[fn10] In New York, they do not. The Speaker of the Assembly and Senate Majority Leader maintain complete control over the committee process, rendering committees unable to fulfill a primary legislative purpose.
>
> In truth, most standing committees exist only as a formality; they serve merely as a place to introduce legislation, not as a place to *consider, debate, and remake* legislation. The leadership prevents legislation with which they do not agree from ever achieving momentum through exploration in committee, limiting the need to apply the breaks (sic) on legislation that has gained force later in the process.
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> Ideally, committees should work as follows: a lawmaker identifies an issue and writes legislation in response. Once introduced, the draft bill (is) subject to public hearings and debate in committee. Before legislation reaches the floor, lawmakers explore its merits and shortcomings by hearing expert criticism from committee

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[7] A.9776 of 2012 was also Assemblyman Farrell's bill, introduced on April 2, 2012. It, too, was referred to the Assembly Committee on Governmental Employees, which apparently took no action upon it. The identical Senate bill was S.6568 of 2012, introduced by Senator DeFrancisco on February 28, 2012 and referred to the Senate Finance Committee. No votes are indicated by the legislative information website: http://public.leginfo.state.ny.us. Instead, the following subsequent events are identified: "05/15/12 1st report cal. 808; 05/16/12 2nd report cal; 05/21/12 advanced to third reading; and 06/21/12 committed to rules". The accompanying sponsor memos to the 2012 bills are essentially the sponsor memos used for the 2013 bills, except that under "Legislative History" are the words "New bill."

> members and the public and make any necessary revisions.[fn.11] In many state legislatures and in Congress, the full chamber can vote to override a bill's referral to a particular committee; in many state legislatures, committees are required or must honor requests to hold a hearing on every bill.[fn.12] This is not the case in Albany – almost all aspects of this ideal process are inadequate or lacking in the New York State Legislature." (at p. 4, italics in the original).

We respectfully request that you schedule a hearing on A.246 – and on the purported "Justification" for such legislation. That "Justification", set forth in the sponsor memo for A.246 – identically to the sponsor memo for S.2953 and repeating the "Justification" of the sponsor memos for last year's bills – makes no sense without specificity, altogether lacking. For instance,

> (1) why were "[s]alary increases, pursuant to Chapter 10 of the Law of 2008, for managerial or confidential employees of the state...administratively withheld in 2009 and 2010"?;
>
> (2) what are the specifics of the unnamed "legal challenges" and their outcomes?;
>
> (3) is the "pay structure established in Article 8 of the civil service law" appropriate?
>
> (4) what are the particulars of the "non-negotiated pay schedules contained in the 2011-2016 PayBill, enacted at the end of the 2011 Legislative Session"?

Indeed, inasmuch as the "Existing Law" section of the A.246 sponsor memo starts out by saying: "Salary increases for managerial or confidential employees of the state are contained in 'pay bills' enacted by the Legislature", it would appear that the easiest solution to the problem resulting from the 2009 and 2010 administratively-withheld, but legislatively-approved, salary increases would be for the Legislature to enact a "pay bill" this year.

Certainly, the sponsor memo is incorrect in identifying as "Existing Law" "[s]imilar legislation…passed and/or enacted for the Judiciary and the State Legislature in 2008 and 2011" – implying that such could serve as precedent. This is false. There is no legal basis for treating compensation for "managerial and confidential employees" in the same way as for judges and legislators – as judges and legislators are not "employees", but constitutional officers of two separate government branches. Certainly, too, this "[s]imilar legislation" should be more particularly identified. What similar statute was "passed and/or enacted" except for Chapter 567of the Laws of 2010, which did not pertain to the Legislature?

Suffice to note Senator DeFrancisco's remarks about legislative pay in discussing S.2953 at the Senate Finance Committee's April 16, 2013 meeting:

[Senate video, at 08:48 – 10:38]

"Senate Bill 2953 by Senator DeFrancisco. An act in relation to establishing a special commission on compensation for state employees designated managerial or confidential, and providing for its powers and duties.

DeFrancisco: Questions? Senator Stavisky.

Stavisky: Is this because there's no collective bargaining unit?

DeFrancisco: Uh, this, uh, they are not covered by the collective bargaining negotiations. So, you can have, you end up having individuals who are supervising individuals who are making more money. Or people being acting commissioners because if they become commissioner they will be making less money. And it's just, it's sort of like legislators, you know. They haven't gotten a pay raise in about 13 years, but I wouldn't even think of, I wouldn't even think of, putting in a commission for legislators because that's horrible, it's a very bad thing. But we shouldn't penalize the managerial and confidential people that aren't able to get raises to make them be paid what they should be paid. We had this in our one-house budget bill and the Assembly would not go along. So, we want to keep trying.

Little: You're saying this does not include the legislators?

DeFrancisco: No. No. It does not. No, that would be horrible, horrible. It would probably be corrupt. Probably be corrupt. I don't want to do that.

Little: Is that your opinion, or –?

DeFrancisco: No, I'm just kidding. I'm being totally facetious. Totally facetious. Total facetious. Senator Fuschillo would like to move it to stop me talking about it.

Fuschillo: Yes.

Little: Seconded.

DeFrancisco: Seconded by Senator Little. All in favor. (Aye)

DeFrancisco: Opposed. (silence).

DeFrancisco: The bill is reported out."

S.2953 may now be headed for a Senate floor vote as early as this week, having been placed on a "first report" "floor calendar" for Wednesday, April 17, 2013 and on a "second report" "floor calendar" for Monday, April 22, 2013.

cc: Sponsors, Co-Sponsors, & Multi-Sponsors of A.246:
Sponsor: Assemblyman Farrell
Co-Sponsors: Assemblymen Pretlow & Steck
Multi-Sponsors: Assembly Members Cusick, Fahy, McDonald, & Stirpe

Sponsors & Co-Sponsors of S.2953:
Sponsor: Senator DeFrancisco
Co-Sponsors: Senators Maziarz & Ritchie
All Senators

The People & The Press