CENTER for JUDICIAL ACCOUNTABILITY, INC.

Post Office Box 8101
White Plains, New York 10602

Tel. (914)421-1200

E-Mail: mail@judgewatch.org
Website: www.judgewatch.org

Elena Ruth Sassower, Director

BY EXPRESS MAIL

March 26, 2019

New York Court of Appeals
Clerk's Office
20 Eagle Street
Albany, New York 12207-1095

ATT: Chief Clerk John P. Asiello

RE: In Support of Appeal of Right: NYS Constitution Article VI, §3(b)(1); CPLR §5601(b)(1)
Center for Judicial Accountability, et al. v. Cuomo, ...DiFiore – Citizen-Taxpayer Action
APL-2019-00029

Dear Chief Clerk Asiello:

This responds to the March 4, 2019 letter of Deputy Clerk Heather Davis, affording appellants in this citizen-taxpayer action appeal – acting on their own behalf and on behalf of the People of the State of New York and the Public Interest – the opportunity to reinforce:

(1) that the appealed-from December 27, 2018 Memorandum and Order of the Appellate Division, Third Department presents "a substantial constitutional question...directly involved to support an appeal as of right"; and

(2) that the Appellate Division's underlying December 19, 2018, November 13, 2018, October 23, 2018, and August 7, 2018 orders are brought up for review as part thereof because they directly and necessarily affect its December 27, 2018 Memorandum and Order as to the core constitutional question of due process and whether, pursuant to Judiciary Law §14 and this Court's own bedrock decision, *Oakley v. Aspinwall*, 3 N.Y. 547 (1850), the Appellate Division justices even had jurisdiction to sit, where, additionally, they refused to make disclosure of their financial and other interests in the appeal and refused to confront whether they could invoke "rule of necessity", and, in any event, did not invoke it in rendering the December 27, 2018 Memorandum and Order – or any of the four predecessor orders.

Ex C-1

Hospital appellants had appeals to which they were entitled, by right.[4] And appellants herein have an entitlement that is not only identical, but, as their sixth cause of action makes clear, *a fortiori* with respect to sub-causes A and B for reasons including that the legislative delegation at issue involves the construction of additional provisions of the New York State Constitution, Article III, §6, Article VI, §25, Article XIII, §7 pertaining to the compensation of constitutional officers. Consequently, and because this Court no longer has the *McKinney* and *St. Joseph Hospital* appeal papers, appellants are furnishing a copy of as much of the record as they thus far have been able to obtain, in support of their appeal of right on their sub-causes A and B.[5]

The Precedent Now Set by the Appellate Division Memorandum & the Misrepresentations that it Fits within "Settled Law" Reinforce the Importance of Appellants' Appeal of Right

Reinforcing the importance of appellants' appeal of right – and of this Court's confronting what precedent, if any, exists for the delegation of legislative power that the Appellate Division has here held constitutional with respect to Chapter 60, Part E, of the Laws of 2015 [R.1080-1082] – is that, pursuant to Chapter 60, Part E, of the Laws of 2015 (§2.1), another Commission on Legislative, Judicial and Executive Compensation is scheduled to be established on June 1, 2019. On top of that, unfolding NOW in Supreme Court/Albany County is a lawsuit challenging Chapter 59, Part HHH, of the Laws of 2018, which established a one-time Compensation Committee to raise legislative and executive salaries. That statute is materially identical to Chapter 60, Part E, of the Laws of 2015, except that among the "appropriate factors" the Compensation Committee was required to "take into account" were "the parties' performance and timely fulfillment of their statutory and Constitutional

---

[4] As no fair and impartial tribunal, charged with the duties that this Court is, could have turned its back on the *McKinney* and *St. Joseph Hospital* appellants – and on then Justice Fahey's dissent in *St. Joseph Hospital* (Exhibit A) – it may be reasonably surmised that the Court was influenced by the fact that by 2007, the then Chief Judge and the Unified Court System were already advocating for a commission that would provide for pay raises for judicial, legislative, and executive officers – whose recommendations would have the "force of law". Such a commission, for judicial salary raises, ultimately emerged: the Commission on Judicial Compensation, established by Chapter 567 of the Laws of 2010, with "force of law" powers. Its enactment was propelled by the Court's February 23, 2010 decision in *Maron v. Silver*, 14 N.Y.3d 230, a consolidation of three cases, including the Chief Judge's own, finding a separation-of-powers constitutional violation in the Legislature's failure to raise judicial salaries. Ironically, Judge Smith, writing in dissent, would have thrown out the judges' pay raise claims, on evidentiary grounds. This was a week after having penned his February 16, 2010 dissent in *Kachalsky*.

Chapter 567 of the Laws of 2010 was repealed by §1 of Chapter 60, Part E, of the Laws of 2015, establishing, in its stead, the Commission on Legislative, Judicial, and Executive Compensation [R.1080], herein challenged.

[5] The record of the appeal of right and motion for leave to appeal of the *St. Joseph Hospital* appellants appears complete. As for *McKinney*, the following remain to be recovered: (1) the entire record of the appeal of right; and (2) the Attorney General's opposition to the motion for leave to appeal and to the New York City Bar *amicus* brief, as well as any replies thereto from the *McKinney* appellants and from the *amicus*.

responsibilities".

The lawsuit challenging Chapter 59, Part HHH, of the Laws of 2018 is *Delgado v. State of New York*, (#907537-18)[6] – and, like here, the defendants are represented by the Attorney General, who is a direct beneficiary of the Compensation Committee's "force of law" salary increase recommendations. The Attorney General is there arguing[7] that the Appellate Division's December 27, 2018 Memorandum herein is not only dispositive that Chapter 59, Part HHH, of the Laws of 2018 is constitutional, but is part of "settled law" and a "long line of cases". Illustrative of these arguments, since January 9, 2019 and at the January 11, 2019 hearing on the *Delgado* plaintiffs' order to show cause for a preliminary injunction, is the Attorney General's January 28, 2019 motion to dismiss their December 14, 2018 verified complaint[8]. Her memorandum of law there asserts:

> "Plaintiffs fail to state a claim. First, Part HHH was, pursuant to settled law, a permissible exercise of the Legislature's authority to delegate administrative functions. Indeed, a nearly identical statute –which, in 2015, created the commission on legislative, judicial, and executive compensation–was recently affirmed as constitutional by the Appellate Division, Third Department. *See Ctr. for Judicial Accountability, Inc. v. Cuomo*, No. 527081, 2018 WL6797292, at *3 (N.Y. App. Div. 3d Dep't Dec. 27, 2018). *Center for Judicial Accountability* is part of a long line of cases upholding the constitutionality of the delegation by the Legislature of administrative tasks, and it refutes Plaintiffs' legal theory that the Legislature may not delegate the task of making recommendations regarding compensation for state officials." (at pp. 1-2).
>
> "Plaintiffs' novel legal theory that the Legislature may not delegate administrative tasks related to compensation of State officials fails as a matter of law and was

---

[6] The record in *Delgado* is available from the Unified Court System's electronic docket. Not there included, however, is the VIDEO of the January 11, 2019 oral argument of the order to show cause brought by the *Delgado* plaintiffs for a preliminary injunction, which CJA applied to have videoed – an application which was granted. CJA's webpage for the *Delgado* case, from which the electronic docket can be accessed, ALSO posts the VIDEO. The direct link to the webpage is here: http://www.judgewatch.org/web-pages/searching-nys/2018-legislature/hhh-compensation-committee/delgado-v-state.htm. The VIDEO reflects significant discussion of the Appellate Division's December 27, 2018 Memorandum, led off by the judge's queries about it.

[7] Appearing for the Attorney General in *Delgado* is the same assistant attorney general who had been briefly parachuted into this case in March 2017 – and whose litigation misconduct, including her fraud as to appellants' sixth cause of action, by her opposition to appellants' March 29, 2019 order to show cause for summary judgment on the sixth cause of action [R.636, R.639-640] is chronicled by the record and recounted in appellants' brief (at pp. 25-36, 51-52).

[8] The December 14, 2018 verified complaint in *Delgado* is part of the record herein, annexed as Exhibit J to my December 15, 2018 reply affidavit in further support of appellant' order to show cause #4. The record of that 4th order to show cause – and of appellants' three predecessor orders to show cause – was transmitted to the Court, with an inventory, by appellants' March 18, 2019 coverletter.

rejected in *Center for Judicial Accountability*. Plaintiffs acknowledge that agencies may be 'tasked with filling in the details, or interstices, of policies in laws passed by the Legislature.' Compl. ¶ 30. Plaintiffs then inexplicably assert that the Legislature may not delegate administrative tasks related to compensation of state officials, Compl. ¶¶ 27, 28, 31, but they provide no support for their novel assertion that an exception exists for state officials' compensation. In any event, Plaintiffs' proposed theory is easily disposed of by *Center for Judicial Accountability*, the Third Department's recent decision affirming the constitutionality of Part E of Chapter 60 of the Laws of 2015, the statute that created the 2015 Commission.

The 2015 Commission's and the Committee's mandates are nearly identical. *See* Compl. ¶ 48 (emphasizing that the 2015 enabling statute for the 2015 Commission is remarkably similar to Part HHH). The 2015 enabling statute directed the 2015 Commission to examine legislative, judicial, and certain executive salaries and make recommendations regarding the adequacy of compensation based on a list of numerous factors specified by the Legislature. *See* Compl. ¶ 45. The Committee was instructed to consider the identical list, plus an additional factor, namely legislators' and executive officials' compliance with their constitutional and statutory mandates. Compl. Ex. A at 28, §2.3. The 2015 Commission's enabling statute similarly directed that each of its recommendations "shall have the force of law, and shall supersede, where appropriate, inconsistent provisions of article 7-B of the judiciary law, section 169 of the executive law, and sections 5 and 5-a of the legislative law, unless modified or abrogated by statute." L. 2015, Ch. 60, Part E at §7. The Third Department affirmed the constitutionality of the 2015 Commission's enabling statute, holding:

> In the 2015 enabling statute at issue here, the Legislature made the determination that judicial salaries must be appropriate and adequate. The Legislature directed the [2015] Commission to examine judicial salaries and make recommendations regarding the adequacy of judicial compensation based on numerous factors specified by the Legislature. . . . The factors established by the Legislature provide adequate standards and guidance for the exercise of discretion by the [2015] Commission. Moreover, the enabling statute contains the safeguard of requiring that the [2105] Commission report its recommendations directly to the Legislature so that it would have sufficient time to exercise its prerogative to reject any [2105] Commission recommendations before they become effective. Thus, we conclude that the statute does not unconstitutionally delegate legislative power to the [2015] Commission.

Ctr. for Judicial Accountability, Inc., 2018 WL 6797292, at *3.

> The Third Department's holding is squarely on point here. The respective policies are identical, i.e., adequate compensation – for the judiciary in *Center for Judicial Accountability* and for legislators and certain executive branch officials in the instant matter.[fn3] The standards and guidelines (the factors that Part HHH directs the Committee to consider) are nearly identical to the standards and guidelines affirmed as constitutionally adequate by the Third Department, with Part HHH containing one additional guideline. Finally, the 2015 Commission's enabling statute and Part HHH have the identical safeguards, i.e., that the recommendations of the respective bodies must be reported directly to the Legislature, and the Legislature decides whether to allow the recommendations to become law. The Third Department's affirmance of the 2015 Commission's enabling statute is fatal to any claim that Part HHH is an unconstitutional delegation of legislative authority.[fn4]
>
> Plaintiffs fail to state a claim that Part HHH is an unconstitutional delegation of legislative authority, and this claim must be dismissed." (at pp. 14-17, underlining added).[9]

So, too, does the Attorney General invoke *McKinney* for the proposition that Chapter 63, Part E, of the Laws of 2005 is "another example of proper delegation" (at p. 15).

Assembly Speaker Heastie, a named defendant herein, is appearing as *amicus curiae* in *Delgado* His attorney echoes the Attorney General. Thus, his March 4, 2019 memorandum of law in support of the Attorney General's dismissal motion gives passing citation to *McKinney* (at p. 7), focusing on the Appellate Division's Memorandum herein, describing it as "controlling" (at p. 6) and having "binding force" (at p. 7), further stating, in comparing this case with *Delgado*:

> "There is no daylight between these cases. If the Legislature can delegate its authority to set judicial salaries, and the enabling statute in *Center for Judicial Accountability* was an acceptable way to do so, then Part HHH—which is almost identical with regard to legislative salary increases—must be an effective delegation of pay-setting authority as well." (at p. 5).

---

[9] The Attorney General has continued in the same vein in her February 13, 2019 reply memorandum of law, as for instance, at page 1:

> "As Defendants demonstrated in their opening memorandum of law, Part HHH of Chapter 59 of the Laws of 2018 ('Part HHH') is, pursuant to well settled law, a permissible exercise of the Legislature's authority to delegate tasks.... In response, Plaintiffs rely primarily on their novel and unsupported legal theory that the Legislature may not delegate tasks related to legislative and executive compensation." (underlining added).

The Budget is "OFF THE CONSTITUTIONAL RAILS" – & its Capstone, Driving the Unconstitutionality, is its Culminating "Three-Men-in-a-Room", Behind-Closed Doors, Budget Deal-Making, Amending & Generating Budget Bills

There are a multitude of respects in which "There is no daylight" between this case and *Delgado*. And one of the most important respects is that both Chapter 60, Part E, of the Laws of 2015 and Chapter 59, Part HHH, of the Laws of 2018 are products of a corrupted budget "process" that has been willfully and deliberately driven "OFF THE CONSTITUTIONAL RAILS" by the respondents herein, in collusion with each other. Its culminating feature is the behind-closed-doors, "three men in a room" budget deal-making that takes place between the Governor, Temporary Senate President and Assembly Speaker – and this is how Part E and Part HHH were each popped into the budget, each unconstitutional riders, violative of Article VII, §6.

This Court has stated, repeatedly, including in the context of the state budget, that

> "The courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government", *Saxton v. Carey*, 44 NY2d 545, 551 (1978); *New York State Bankers Association v. Wetzler*, 81 N.Y.2d 98, 102 (1993); *Pataki v. NYS Assembly/Silver v. Pataki*, 4 NY3d 75, 96 (2004).

Excepting appellants' seventh and eighth causes of action, relating to the constitutionality of Chapter 60, Part E, of the Laws of 2015, as applied [R.112-114 (R.201-213)], the other eight pertain to the budget and the "authority which the New York Constitution has granted to the other branches of government". The most spectacular of these involve the whole of the state budget: appellants' fourth, fifth, and ninth causes of action.

The ninth cause of action [R.115 (R.214-219)] seeks a declaration that three-men-in-a-room, budget dealing-making is unconstitutional, "*As Unwritten* and *As Applied*". It is based, explicitly, on this Court's decision in *King v. Cuomo*, 81 N.Y.2d 247 (1993), and identifies that "the multitude of reasons" that decision particularizes for striking down the Legislature's practice of recalling, from the Governor, bills it had passed, mandates the striking down of three-men-in-a-room, budget deal-making. Indeed, the ninth cause of action asserts that the text of *King v. Cuomo*, with but minor alterations, is ready-made for the declaration as to the unconstitutionality of three-men-in-a-room budget-making – and supplies the altered text to prove it [R.215-217]. So that the Court can see this, for itself, the ninth cause of action is annexed hereto as Exhibit B.[10]

---

10 "Three-men-in-a-room" style governance and the complete collapse of a constitutionally-functioning Legislature, enacting legislation consistent with the most basic legislative due process – committee hearings, discussion, mark-ups, amending of bills, then moving to the full chambers, with debate, further amending, and votes – followed by reconciliation of disparate bills by Senate-Assembly conference committees, then passed to the Governor and, if vetoed, returned to the Legislature for overriding votes – a Legislature that discharges the most basic oversight of legislation it has enacted and governmental operations – ALSO underlies Chapter 63, Part E, of the Laws of 2005, establishing the Commission on Health Care Facilities in the 21st Century, as well as Chapter 567 of the Laws of 2010, establishing the Commission on Judicial Compensation. Indeed, the