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NEW YORK STATE  
COURT OF APPEALS

Via Hand Delivery

John P. Asiello  
Chief Clerk and  
Legal Counsel to the Court  
State of New York  
Court of Appeals  
20 Eagle Street  
Albany, New York 12207-1095

SSD

Re: **Delgado v. State of New York**

Dear Mr. Asiello:

I am writing regarding your examination of the Court's subject matter jurisdiction with respect to whether a direct appeal lies with the Court under CPLR 5601(b)(2).

As the enclosed papers filed with the Supreme Court indicate, the Plaintiffs raised an issue regarding the constitutionality of Part HHH, Chapter 59 of the Laws of 2018. Specifically, that law provided that an unelected committee ("2018 Compensation Committee") established to determine legislative, executive, and statewide elected official compensation would make determinations that "supersede, where appropriate, inconsistent provisions of section 169 of the executive law, and sections 5 and 5-a of the legislative law." L. 2018, ch. 59, Part HHH, § 4.2.

**New York Constitution**

Article III, Section 1 of the New York State Constitution states that the legislative power "shall be vested in the Senate and Assembly." A non-elected committee cannot be delegated legislative power to enact

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recommendations “with the force of law” that can “supersede” inconsistent provisions of law. Administrative agencies, commissions, and committees may only work within the framework of existing law enacted by the Legislature.

Article III, Section 13 provides that “no law shall be enacted except by a bill.” On January 1, 2019, the Compensation Committee recommendations would take effect “with the force of law” and superseded existing laws without the Legislature considering a bill modifying or superseding the existing law.

Article III, Section 9 establishes that “a majority of each house shall constitute a quorum to do business.” The Compensation Committee determinations due by December 10, 2018 would take effect on January 1, 2019 “unless modified or abrogated by statute.” In other words, the Legislature had three weeks to convene at a time of year when it traditionally is not present in Albany (Complaint, ¶¶ 14, 32), meaning that the Committee’s recommendations could become law if less than a majority of Assembly members (75 of 150) failed to show up.

Article III, Section 14 states that no bill shall be passed “or become law” except by the vote of a majority of the members elected to each branch of the Legislature. The Compensation Committee determinations would take effect “with the force of law” and supersede existing statutes without the Legislature voting.

Finally, Article IV, Section 7 of the Constitution gives the Governor the authority to veto any bill. The Compensation Committee determinations would take effect “with the force of law” and supersede existing statutes without the check and balance of the Governor’s veto power.

Despite the Constitution’s directions and prohibitions, the 2018 Compensation Committee stated that the Legislature and the Governor granted it the power to re-write the statutes reserved exclusively to the Legislature: “This Committee has been empowered to take any action with respect to compensation that a statute could effectuate.” Committee on Legislative and Executive Compensation, December 10, 2018; Complaint, Ex. A, p. 19.

### **Supreme Court Decision and Order**

In its Decision and Order, the Supreme Court found Part HHH, Chapter 59 of the Laws of 2018 to be constitutional. Significantly, in quoting the wording of the law and the Compensation Committee’s recommendations having the force of law, the Supreme Court omitted

in ellipsis “and shall supersede, where appropriate, inconsistent provisions of section 169 of the executive law, and sections 5 and 5-a of the legislative law” from Section 4.2. Decision and Order at 5.

After this litigation began, the Third Department Appellate Division decided *Center for Jud. Accountability, Inc. v. Cuomo*, 167 A.D.3d 1406 (3d Dept 2018). In *Center for Jud. Accountability* the Appellate Division determined that a similar commission created in 2015 to adjust judicial pay was constitutional.

The Appellate Division in *Center for Jud. Accountability*, however, did not address a critical provision in the law creating the 2015 commission that requires this Court to exercise its jurisdiction. Specifically, the Appellate Division did not address language in that law stating that, in addition to having the force of law, the commission’s determinations would “supersede, where appropriate, inconsistent provisions of article 7-B of the judiciary law.” L. 2015, ch. 60, Part E, § 7 (“2015 Law”). Similar to the Supreme Court here, the Appellate Division paraphrased the law and left out a key provision of the law that made that commission a law-making body and not a body administering laws promulgated by the Legislature. *Center for Jud. Accountability*, 167 A.D.3d at 1410.

The Appellate Division concluded that the 2015 commission was an administrative body and conducted its analysis accordingly. *Id.* Here, however, the State conceded that the 2018 committee was not empowered as an administrative body performing rulemaking or adjudicatory functions. Motion to Dismiss at 33. And the Appellate Division did not determine whether a body other than the Legislature can create laws that supersede, i.e., annul or replace, existing laws passed by the Legislature.

Like the Appellate Division, the Supreme Court here mistakenly analyzed the 2018 Compensation Committee’s mandate within the traditional bounds of administrative law, citing, for example, *Boreali v. Axelrod*, 71 N.Y.2d 1, 10 (1987) and *Matter of Retired Pub. Empls. Assn., Inc. v. Cuomo*, 123 A.D.3d 92, 97 (3d Dept. 2014). This case, however, is not about a question regarding the bounds of administrative law, i.e. an agency’s power to administer a law promulgated by the Legislature through rulemaking, adjudication, or enforcement. On its face, the statute provides for the 2018 Compensation Committee to make law that supersedes existing law. Neither the Supreme Court here, or the Appellate Division in *Center for Jud. Accountability* addressed the constitutionality of a committee making laws that supersede inconsistent provisions of existing laws.

### **The Constitutional Question Is Substantial**

None of the cases cited by the State to the Supreme Court in this matter or relied upon by the Supreme Court in its Decision and Order or the Appellate Division in *Center for Jud. Accountability* allow the Legislature to delegate its power to an unelected body to pass laws that supersede existing laws. In none of these three instances does a court or a party cite authority for the proposition that the Legislature may pass new laws superseding existing laws, without the Governor having an opportunity to exercise veto power, by doing nothing or having a minority not show up.

The constitutional question present here is significant. Challenges to Part HHH, Chapter 59 of the Laws of 2018 by Legislators have been filed in Albany County Supreme Court (*William Barclay et al v. New York State Committee on Legislative and Executive Compensation et al*, Index No. 901837-19) under the New York Constitution (arguing that delegating the power to enact laws to a hand-picked committee circumvents the rights of Legislators to vote on laws and the governor the ability to veto or approve of laws)(Petition, Dkt. No. 1, ¶¶ 80-87) and the United States District Court for the Southern District of New York (*Steck, et al. v. DiNapoli, et al.*, Case No. 1:19-cv-05015-PKC) under the United States Constitution (arguing that an unelected body passing laws that supersede existing laws denies a right to a republican form of government)(Complaint, Dkt No. 1, ¶¶ 119-129).

Earlier this year, the Legislature created the New York State Public Campaign Finance Commission using similar statutory language to empower an unelected commission to make recommendations that supersede the Election Law. L. 2019, ch. 59, Part XXX. "Each recommendation made to implement a determination pursuant to this act shall have the force of law, and *shall supersede, where appropriate, inconsistent provisions of the election law*, unless modified or abrogated by statute prior to December 22, 2019." *Id.*, § 1(5)(emphasis added).

Two different lawsuits pending in Niagara County are challenging the constitutionality of an unelected commission making recommendations that supersede inconsistent provisions of the Election Law. Individual plaintiffs and the Working Families Party in *Linda Hurley et al v. The Public Campaign Financing and Election Commission of the State of New York et al*, Index No. E169547/2019 assert two counts arguing that Public Campaign Finance Commission's powers are unconstitutional. Petition, Dkt. No. 2, ¶¶ 74-77. Similar claims have been made by individuals and the Conservative Party in *Joseph Jastrzemski et al v. The Public Campaign Financing and Election Commission of the State of New York et al*, Index No.

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E169561/2019. There, the plaintiffs similarly argue in two counts that the Public Campaign Finance Commission's powers are unconstitutional. (Verified Complaint, Dkt. No. 2, ¶¶ 56-67.

### Conclusion

The committee or commission mechanism the Legislature has deployed in the recent past to have unelected bodies enact legislation that supersedes laws passed by the Legislature does violence to the constitutional order put in place by the people of New York. The Legislature, for reasons unexplained to the people, has determined on several occasions to abdicate its responsibility to legislate. The Legislature having abdicated its responsibility, this Court must take up its role, exercise its jurisdiction over this appeal, and enforce the provisions of New York's Constitution to declare Part HHH, Chapter 59 of the Laws of 2018 unconstitutional.

Yours truly,



Cameron Macdonald

Encls.

cc: Hon. Letitia James (*via First Class Mail*)  
(w/o encls.)