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OFFICE OF THE ATTORNEY GENERAL

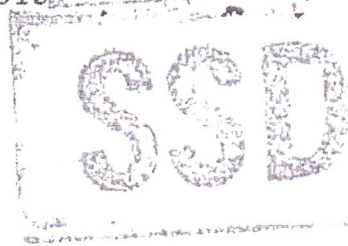
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September 9, 2019

Hon. John P. Asiello
Chief Clerk
State of New York
Court of Appeals
20 Eagle St.
Albany, New York 12207-1095



Re: *Delgado v. State of New York*

Dear Mr. Asiello:

Respondents the State of New York and Thomas P. DiNapoli, Comptroller of the State of New York, submit this letter in response to the Court's August 30, 2019 letter requesting the parties' comments on whether the Court has subject matter jurisdiction over plaintiffs' direct appeal under C.P.L.R. 5601(b)(2). Because no direct appeal lies and because cross-appeals are pending in this case in the Appellate Division, plaintiffs' direct appeal should be dismissed.

Background

In 2018, the New York State Legislature enacted a statute (L. 2018, ch. 59, part HHH) that created the Committee on Legislative and Executive Compensation and tasked it with examining the pay levels of legislators, statewide elected officials, and commissioners of executive agencies, and determining whether they "warranted an increase." After

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holding four public hearings, the Committee issued a report recommending pay increases for these public officials; for legislators, the Committee also recommended restrictions on certain activities and limitations on outside earned income. Under the terms of the 2018 statute, the Committee's recommendations acquired the force of law when the Legislature did not reject or modify them within a specified time.

Plaintiffs—three New York residents and one member of the New York Assembly—brought this action for declaratory and injunctive relief challenging the constitutionality of the 2018 statute as well as the Committee's recommendations. They claim that (1) the 2018 law unconstitutionally delegated the Legislature's law-making authority to the Committee; (2) the Committee's recommendations exceeded its authority; and (3) the Committee violated the Open Meetings Law and the State Administrative Procedure Act (SAPA) in performing its official duties.

In a judgment entered in Albany County on June 7, 2019, Supreme Court (Ryba, J.) converted defendants' motion to dismiss to a motion for summary judgment and granted that motion in part and denied it in part. Supreme Court rejected plaintiffs' unlawful delegation, Open Meetings Law, and SAPA claims, and upheld the salary increases for statewide elected officials and commissioners, as well as the 2019 salary increase for legislators. The court, however, declared that the Committee exceeded its authority when it made recommendations to prohibit certain activities by legislators and impose limitations on legislators' outside earned income. It accordingly declared invalid those recommendations together with the associated legislative salary increases for 2020 and 2021.

Defendants have taken an appeal to the Appellate Division, Third Department, from Supreme Court's judgment (Exhibit A). Plaintiffs cross-appealed to the Appellate Division (Exhibit B) and simultaneously appealed directly to this Court.

No Direct Appeal Lies Under C.P.L.R. 5601(b)(2)

Plaintiffs' direct appeal should be dismissed for any one of three reasons.

First, for a direct appeal to lie under C.P.L.R. 5601(b)(2), the only question involved must be the constitutionality of a statutory provision. Where the appeal presents other issues that this Court must resolve in addition to the constitutional question, the appeal is transferred to the Appellate Division. See Karger, *The Powers of the New York Court of Appeals*, § 7:11 at 243-44 (rev. 3d ed.); see, e.g., *Jetro Cash and Carry Enters., Inc. v. State of New York Dept. of Taxation and Fin.*, 81 N.Y.2d 776 (1992).

This appeal presents issues beyond the constitutionality of the state statute creating the Committee. Before reaching the constitutionality of the Committee's enabling legislation, Supreme Court addressed the threshold issue of whether plaintiffs have standing – an issue this Court may have to decide before determining whether the statute validly delegated legislative authority to the Committee. Unlike *Schulz v. State*, 81 N.Y.2d 336 (1993), the standing issue is not so closely interrelated with the question of the constitutionality of the enabling statute that the standing issue is itself a constitutional question. Rather, the standing issue presents the distinct question of whether plaintiffs have citizen-taxpayer standing under State Finance Law article 7-a. In addition, plaintiffs not only challenged the constitutionality of the Committee's enabling legislation, they also asserted that the Committee exceeded its authority under that statute in making certain recommendations, and further that the Committee violated SAPA and the Open Meetings Law. These are issues other than the constitutionality of a state statute.

Although this Court has permitted private parties to eliminate nonconstitutional issues from the case by waiving their rights in that regard, see *Sheehan v. Suffolk County*, 67 N.Y.2d 52, 57 (1986), here plaintiffs have not sought to waive all claims except for their

constitutional challenge to the Committee's enabling statute. To the contrary, plaintiffs have simultaneously appealed to the Appellate Division to preserve their right to pursue their other claims.

Second, plaintiffs' unlawful delegation claim is insubstantial. The law on the delegation of legislative authority is well settled. Although the Legislature cannot delegate its lawmaking function to other bodies, there is no constitutional prohibition against the delegation of power to an agency or commission to enact rules acquiring the force of law if the Legislature set the over-arching policy and provided adequate standards and safeguards. See *Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976); *Big Apple Food v. Street Vendor Review Panel*, 90 N.Y.2d 402, 407 (1997).

Here, in rejecting plaintiffs' unlawful delegation claim, Supreme Court relied on *Ctr. for Judicial Accountability, Inc. v. Cuomo*, 167 A.D.3d 1406 (3d Dep't 2018), *appeal dismissed*, 33 N.Y.3d 993 (2019), in which the Third Department squarely rejected an unlawful delegation challenge to legislation (L. 2015, ch. 60, part E) that created the Commission on Legislative, Judicial and Executive Compensation. Like the statute at issue here, the challenged statute in *Ctr. for Judicial Accountability* tasked the Commission with making recommendations regarding adequate levels of compensation for members of the legislature, judges, statewide elected officials, and certain state officers. The Commission's enabling legislation set forth factors that are nearly identical to the factors the statute at issue here directed the Committee to consider. The Appellate Division, in upholding the Commission's enabling legislation, found that the 2015 statute (1) set the over-arching policy (wages should be adequate), (2) contained sufficient standards (the enumerated factors), and (3) contained adequate safeguards (the opportunity for the Legislature to modify or reject the recommendations) to pass constitutional muster.

Significantly, the plaintiffs in *Ctr. for Judicial Accountability* attempted to appeal as of right to this Court based on their unlawful delegation claim. This Court dismissed the appeal on the ground that no

substantial constitutional question was directly involved. 33 N.Y.3d 993. Having deemed the unlawful delegation claim in *Ctr. for Judicial Accountability* to be insubstantial, this Court should reach a similar conclusion with respect to the essentially identical unlawful delegation claim here.

Third, plaintiffs' direct appeal should be dismissed because cross-appeals from Supreme Court's judgment are pending in the Appellate Division. It is well settled that simultaneous appeals do not lie to both the Appellate Division and the Court of Appeals. *See Parker v. Rogerson*, 35 N.Y.2d 751, 753 (1974); *Knudsen v. New Dorp Coal Corp.*, 20 N.Y.2d 875, 877 (1967). There is a very narrow exception, where this Court has permitted a simultaneous appeal to "preserve equality of remedy" because two groups of defendants in the same action pursued separate routes of appeal involving the same principal substantive issue. That exception, however, does not apply here. *See Parker v. Rogerson*, 35 N.Y.2d at 753 (explaining *Harry R. Delfer Corp. v. Kleeman*, 18 N.Y.2d 797 [1966]).

Typically, when an appellant has taken simultaneous appeals and a direct appeal to this Court would be available but for the pending appeal in the Appellate Division, this Court will order that the direct appeal be dismissed unless the party promptly abandons his appeal to the Appellate Division. *See Karger, The Powers of the New York Court of Appeals*, § 9:4 at 294; *Stefaniak v. NFN Zulkharain*, 30 N.Y.3d 1033 (2017). This Court, however, should not issue such a conditional order here but should instead dismiss plaintiffs' appeal outright, for two reasons. First, a direct appeal is not available under C.P.L.R. 5601(b)(2) for the two reasons discussed above. Second, even if plaintiffs abandoned their appeal to the Appellate Division, *defendants'* appeal to the Appellate Division would remain pending. Consequently, the proper disposition is to dismiss plaintiffs' direct appeal outright.

Respectfully submitted,

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cc:

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