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March 26, 2019

Heather Davis, Esq.
Deputy Clerk
New York Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Center for Judicial Accountability, Inc. v. Cuomo,*
Appellate Division, Third Dep't Docket No. 527081

Dear Ms. Davis:

This letter is submitted on behalf of defendants-respondents in response to the Court's letter dated March 4, 2019, advising the parties of the Court's *sua sponte* examination of its subject matter jurisdiction over plaintiffs' putative appeal as of right in the above matter.

Enclosed herewith are respondents' brief and supplemental record filed in the Appellate Division, Third Department. These are submitted at plaintiffs' request, as reflected in their letter to the Court Attorney dated March 11, 2019.

As explained below, the Court should dismiss this putative appeal because no substantial constitutional question is directly involved.

Factual Background

In 2010, this Court declared that an ongoing, multi-year freeze on judicial salaries violated the separation-of-powers doctrine. *Matter of Maron v. Silver,* 14 N.Y.3d 230, 244, 261 (2010). This Court left to the Legislature the task of readjusting judicial compensation. *Id.* at 261, 263. To resolve the continuing crisis, the Legislature created a Commission Judicial Compensation, *see* L. 2010, ch. 567, which recommended that state judges receive phased-in salary increases over three years.

In 2015, the Legislature repealed the enabling legislation from 2010 and created a new Commission on Legislative, Judicial and Executive Compensation (the Commission). L. 2015, ch. 60, § E. Among other things, the Commission was directed to examine "the prevailing adequacy" of State judges' compensation and "determine whether any of such pay levels warrant adjustment" or "warrant an increase" based on "all appropriate factors," including a list of fiscal and economic considerations. (Record on Appeal [R] at 1080-1081.) The recommendations of a majority of the Commission would "have the force of law" unless the recommendations were "modified or abrogated by statute" prior to taking effect. (R1082.)

The Commission issued a report on December 24, 2015, recommending that State Supreme Court Justice salaries be made commensurate with the salary of federal district court judges by 2018. (R1084-1085, 1090.) The adjustment was intended to yield "equitable, appropriate and competitive judicial salary levels that will attract highly-qualified lawyers to the New York State bench, retain those judges and ensure the strong and independent judicial system that all New Yorkers need and deserve." (R1085.)

Procedural Background

In two lawsuits, plaintiffs advanced multiple challenges to the Commission's determination. Two Supreme Court Justices and a unanimous panel of the Third Department concluded that plaintiffs' causes of action were meritless.

In a predecessor to the instant lawsuit, Supreme Court, Albany County (McDonough, J.) ruled against plaintiffs on many of the claims advanced in this appeal. (*See* R326-334, 335-337, 315-325.) After receiving an adverse judgment in that proceeding, plaintiffs did not perfect an appeal. Instead, they abandoned the first lawsuit and brought a new one that reiterated their defeated claims. The new lawsuit gave rise to a series of decisions by Supreme Court, Albany County (Hartman, J.), which likewise culminated in a judgment for defendants on the merits. (*See* R52-60, 49-51, 68-79, 31-41.)

Rather than reciting here the detailed procedural history in Supreme Court, we respectfully refer the Court to pages 6-13 of respondents' brief in the Appellate Division ("R.Br.").

On appeal to the Appellate Division, Third Department, plaintiffs filed four successive motions seeking various items of relief. By order dated August 7, 2018, the Third Department granted plaintiffs' initial motion for a preliminary injunction, but only to the extent of setting the appeal for the November 2018 term. The court denied plaintiffs' three subsequent motions in all respects, by orders dated October 23, November 13, and December 19, 2018.

The Appellate Division unanimously affirmed Supreme Court's judgment on December 27, 2018. *Center for Judicial Accountability, Inc. v. Cuomo*, 167 A.D.3d 1406 (3d Dep't 2018) (*CJA*).

I. The Appeal Does Not Directly Present a Substantial Constitutional Question

Plaintiffs' putative appeal as of right should be dismissed because it does not directly present a substantial constitutional question supporting the Court's subject matter jurisdiction under C.P.L.R. § 5601(b)(1).

A. A Constitutional Issue is Not Directly Involved Because Plaintiffs' Appeal is Procedurally Barred

This case does not directly present a constitutional question because fundamental procedural defects preclude consideration of plaintiffs' constitutional claims.

First, as a corporation, the Center for Judicial Accountability, Inc. cannot appear in this Court without an attorney. *See* C.P.L.R. § 321(a). Because the corporate entity purports to appear *pro se*, its appeal must be dismissed. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Croyle Enters., Inc.*, 10 N.Y.3d 800, 800 (2008); *Matter of Naroor v. Gondal*, 5 N.Y.3d 757, 757 (2005), *recon. denied*, 5 N.Y.3d 198 (2005); *see also CJA*, 167 A.D.3d at 1409. (*See* R.Br. at 13-14.)

Second, plaintiffs' first four causes of action were found to be meritless in the predecessor lawsuit. (R321; *see also* R.Br. at 14-15.) *See CJA*, 167 A.D.3d at 1412. Plaintiffs never perfected an appeal in that case, and thus lost the right to challenge Justice McDonough's rulings. The same is true for plaintiffs' claims as to budget years 2014-2015 and 2015-2016, both of which were the subject of unappealed declaratory judgments in the predecessor action. (R323.) (*See* R.Br. at 14-16.)

Third, plaintiffs cannot attack the 2017-2018 budget year in this appeal, because Supreme Court denied their motion to supplement the complaint to include such claims. (*See* R69.) Supreme Court's exercise of case-management discretion not to expand the litigation to include additional claims (*see* R.Br. at 16-18) does not present a constitutional issue.

Fourth, to the extent plaintiffs challenge expenditures from the 2016-2017 budget year, their appeal is moot because the authority to spend funds pursuant to the 2016-2017 budget appropriations has lapsed. *See* State Finance Law § 40; N.Y. Const. Art. 7, § 7. (*See also* R.Br. at 18-19.)

In view of these procedural defects, plaintiffs' constitutional claims are not "directly involved" in their putative appeal within the meaning of C.P.L.R. § 5601(b)(1).

B. Plaintiffs' Claims on the Merits Do Not Present a Substantial Constitutional Issue

Even if this Court were to look beyond the fatal procedural defects detailed above, the merits of plaintiffs' case do not present a substantial constitutional issue. An appeal on constitutional grounds will be dismissed for want of substantiality where the position urged by the appellant is contrary to settled law. Arthur Karger, Powers of the New York Court of Appeals § 7:5 at 227 (3d ed. 2005). That is the case here.

The law of this Court has been settled for more than 40 years that the Constitution permits "the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature." *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976).

Here, the enabling statute specified the operative standard, namely, that judicial compensation must be "adequate." (R1080.) The statute set forth six non-exclusive factors to consider in determining whether judicial salaries "warrant an increase." (R1080-1081.) The "basic policy decision[]" that judges should receive "adequate" compensation, as determined by relevant factors, was thus "made and articulated by the Legislature." *Matter of N.Y. State Health Facilities Ass'n v. Axelrod,* 77 N.Y.2d 340, 348 (1991). *See CJA,* 167 A.D.3d at 1410-11. (*See also* R.Br. at 33-35.)

The statute also provided reasonable structural safeguards. The Legislature reserved to itself the right to "modif[y] or abrogate[]" the Commission's recommendations through the ordinary process of passing a statute. (R1082.) The Commission was required to send its recommendations to the Legislature by December 31. (R1081.) The recommendations would become law only if the Legislature declined to act by April 1, more than three months later. (R1082.) *See CJA,* 167 A.D.3d at 1411. (*See also* R.Br. at 36.)

A similarly-structured commission, created to address excess hospital capacity, was held constitutional by two Departments of the Appellate Division. *See McKinney v. Comm'r, N.Y. State Dep't of Health,*

41 A.D.3d 252, 253 (1st Dep't), *lv. denied*, 9 N.Y.3d 815 (2007); *St. Joseph Hosp. v. Novello*, 43 A.D.3d 139 (4th Dep't), *app. dismissed*, 9 N.Y.3d 988 (2007), *lv. denied*, 10 N.Y.3d 702 (2008). And Supreme Court, Nassau County, has upheld the constitutionality of this very Commission. *Coll v. N.Y.S. Commission on Legislative, Judicial and Executive Compensation*, Index No. 2598-2016 (Sup. Ct. Nassau Cty. Sept. 1, 2016) (reproduced at R428).

No court has held that such a commission would violate the Constitution. Thus, the Third Department's decision comported with a uniform line of precedent. *See CJA*, 167 A.D.3d at 1409-11. Further, no court has held, as plaintiffs appear to contend, that increasing judicial salaries during a judge's term of office is unconstitutional in itself. *See id.* at 1411. (*See also* R.Br. at 38-40.)

The fact that the enabling law was contained in a budget statute did not render it invalid. The enabling legislation "relate[d] specifically to some particular appropriation in the bill" as required by N.Y. Const. art. VII, § 6. A measure in an appropriations bill violates that provision when it is "essentially nonbudgetary." *Pataki v. N.Y. State Assembly*, 4 N.Y.3d 75, 99 (2004). A budgetary measure is one "designed to allocate the State's resources." *Id.* at 97. Here, the budget bill stated that the Commission was intended to "provide periodic salary increases to state officers" (Supplemental Record on Appeal at 366; *see* R.Br. at 42), thus providing for increased resource allocation to the state judiciary. *See CJA*, 167 A.D.3d at 1411-12.

Finally, the record shows that the Commission properly carried out its mandate. The Commission held public hearings. (R1084, 1092.) It reviewed written submissions. (R1084-1085.) It examined every one of the factors identified in the enabling statute. (R1084, 1093-1100; *see* R.Br. at 46-49.) *See CJA*, 167 A.D.3d at 1412. Even if plaintiffs could show that the Commission failed to consider a particular factor (and they cannot), that would present an issue under C.P.L.R. article 78 – not the New York Constitution.

C. Plaintiffs' Claims of Defects in the Judicial Process Do Not Present a Substantial Constitutional Issue

Plaintiffs' various claims that the judicial process was unfair or that respondents perpetrated a "fraud" do not present a substantial constitutional issue; instead, they are idiosyncratic complaints of an unsatisfied litigant that the Appellate Division properly rejected. *See CJA*, 167 A.D.3d at 1408-09.

First, the fact that the Supreme Court and Appellate Division Justices would benefit from judicial pay raises does not preclude them from deciding this case. Under the Rule of Necessity, judges must hear a case, even if they have an otherwise-conflicting interest, if no other tribunal has jurisdiction.[1] This Court has already applied the Rule of Necessity in this very context: a dispute over judicial salaries. *Matter of Maron v. Silver,* 14 N.Y.3d 230, 248-49 (2010).

Second, plaintiffs are not entitled to be represented by the Attorney General. (*See* R.Br. at 20-21.) The statute upon which they rely allows the Attorney General to "participate or join" in a proceeding "if in [her] opinion the interests of the state so warrant." Executive Law § 63(1). Nothing in that statute authorizes private parties in plaintiffs' position to compel the Attorney General to represent them. That is true with greater force where, as here, plaintiffs have sued every branch of the state government. The Third Department correctly recognized that the Attorney General "has a statutory duty to represent defendants in this action." *CJA,* 167 A.D.3d at 1409. And the extent of that duty is a statutory question, not a constitutional one. Consequently, it does not support an appeal as of right under C.P.L.R. § 5601(b)(1).

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[1] Of course, if individual judges believe the potential economic effect of a challenge to judicial salaries would render them unable to decide the matter fairly and impartially, they should recuse themselves as a "matter of conscience." *See People v. Smith,* 63 N.Y.2d 41, 68 (1984). Here, none of the Justices who heard this matter deemed recusal to be necessary or appropriate.

Third, to the extent plaintiffs complain that respondents' counsel somehow "concealed" their arguments and should have been sanctioned, whether to impose sanctions is a fact-based discretionary decision and the Appellate Division found no cause to do so. *See CJA*, 167 A.D.3d at 1408-09. Such discretionary determinations do not present a substantial constitutional issue. In any event, respondents' counsel did not mislead the lower courts. The full record was before each court. Nothing prevented the courts from reading plaintiffs' papers; to the contrary, respondents' counsel urged the Third Department to read them. (*See, e.g.*, R.Br. at 1 n.1.)

II. The Third Department's Four Orders on Plaintiffs' Motions Were Non-Final

The Court has also requested comment on "whether the Appellate Division, Third Department, orders of December 19, 2018; November 13, 2018; October 23, 2018; and August 7, 2018, finally determine the action within the meaning of the Constitution." (3/4/19 Letter at 1.)

Each of those four orders denied (or, in the case of the August 7, 2018 order, substantially denied) a motion filed by plaintiffs. Those motions sought various items of interlocutory relief, including a temporary restraining order, a preliminary injunction, disqualification, sanctions, having respondents' brief stricken, transferring the appeal to the Fourth Department, certifying questions to this Court, and referring three of the undersigned attorneys to "appropriate criminal authorities."

None of the four Appellate Division orders cited in the Court's letter finally determined the action. Rather, the four orders administered the course of litigation or disposed of requests for temporary or provisional relief. *See* New York Court of Appeals Civil Jurisdiction & Practice Outline at 28-29, *available at* https://www.nycourts.gov/ctapps/forms/civiloutline.pdf.

The action was finally determined on December 27, 2018, when the Appellate Division, Third Department, affirmed the Decision and Judgment of Supreme Court, Albany County.

Conclusion

The Court should dismiss this appeal, *sua sponte*, because no substantial constitutional question is directly involved.

Respectfully submitted,

LETITIA JAMES
Attorney General
BARBARA D. UNDERWOOD
Solicitor General
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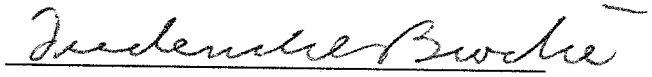

FREDERICK A. BRODIE
Assistant Solicitor General

Enclosures: Respondents' Brief and Supplemental Record

cc (by email and first-class mail) (without encls.):

Elena M. Sassower
Center for Judicial Accountability
10 Stewart Place, Apt. 2D-E
White Plains, NY 10603

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

William Sportman, being duly sworn, deposes and says:

I am over eighteen years of age and an employee in the office of LETITIA JAMES, Attorney General of the State of New York, attorney for Respondent(s) herein.

On the 26th day of March, 2019, I served a copy of the annexed **Letter** upon the individual named below by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a letter box of the Capitol Station Post Office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said individual at the address within the State and respectively designated by her for that purpose as follows:

Elena M. Sassower
Center for Judicial Accountability
10 Stewart Place, Apt. 2D-E
White Plains, New York 10603

Sworn to before me this
26th day of March, 2019.

Cristal R. Gazelone

NOTARY PUBLIC

CRISTAL R. GAZELONE
Notary Public, State of New York
Reg. No. 01GA6259001
Qualified in Rensselaer County
Commission Expires April 2, 2020