"LEGAL AUTOPSY"/ANALYSIS OF THE MARCH 18, 2021 "OPINION AND ORDER" OF THE APPELLATE DIVISION, THIRD DEPARMENT

Delgado, et al. v. State of New York, et al.
AD3d #529556 – (Albany Co. #907537-18)

This analysis constitutes a "legal autopsy"[1] of the March 18, 2021 "Opinion and Order"[2] of a five-judge Appellate Division, Third Department panel, which affirmed, with a single modification only as to form, the June 7, 2019 "Decision/Judgment" of Albany County Supreme Court Justice Christina Ryba.

Such opinion and order is a judicial fraud, rendered by a panel that was duty-bound to have disclosed its financial and other interests in the appeal and the knowledge of four of its five justices that the December 27, 2018 "Memorandum and Order" in *Center for Judicial Accountability, et al. v. Cuomo, et al*, 167 AD3d 1406, on which Justice Ryba relied in upholding the constitutionality of Part HHH, Chapter 59 of the Laws of 2018, was a judicial fraud, rendered by a four-judge Appellate Division, Third Department panel that was without jurisdiction by reason of its direct financial and other interests, which it had refused to disclose, and whose actual bias, born of interests, was manifested by its obliterating ALL cognizable adjudicative, evidentiary, and ethical standards.

The five-judge *Delgado* panel, likewise, made no disclosure of its financial and other interests, divesting it of jurisdiction, and relied, just as Justice Ryba had, on the December 27, 2018 decision in *CJA v. Cuomo* to uphold the constitutionality of Part HHH. With respect to that first cause of action of the *Delgado* plaintiffs' verified amended complaint – and their other three causes of action – the panel obliterated the most basic adjudicative and evidentiary standards, replicating, on appeal, what Justice Ryba had done below.

As herein demonstrated based on record and other evidence,[3] both the Appellate Division's March 18, 2021 "Opinion and Order" and Justice Ryba's June 7, 2018 decision/judgment are "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause" of

---

[1] The term "legal autopsy" is taken from the law review article "*Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*", 73 Albany Law Review 1 (2009), by Gerald Caplan, recognizing that the legitimacy of judicial decisions can only be determined by comparison with the record ('…Performance assessment cannot occur without close examination of the trial record, briefs, oral argument and the like…' (p. 53)).

[2] There is no reference to the meaning of "Opinion" in the Practice Rules of the Appellate Divisions – §1250.16(a) entitled "Decisions, Orders and Judgments…", nor in the Appellate Division, Third Department's Rule §850.16, comparably titled.

[3] The evidence to which this "legal autopsy"/analysis refers is posted on the Center for Judicial Accountability's website, www.judgewatch.org, on a webpage accessible from the homepage, *via* its prominent center link "NY's 'Force of Law' Commissions – Unconstitutionality & Fraud IN PLAIN SIGHT". The direct link is here: http://www.judgewatch.org/web-pages/searching-nys/force-of-law-commissions/part-hhh-chapter59-laws-2018/delgado-analysis-4-25-21.htm.

the United States Constitution, *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961), *Thompson v. City of Louisville*, 362 U.S. 199 (1960) – and, comparably, under Article I, §6 of the New York State Constitution, "No person shall be deprived of life, liberty or property without due process of law". As such, they must be voided – and the threshold reason is because the panel's five justices were without jurisdiction to render it, pursuant to Judiciary Law §14, by reason of their financial and other interests in the case. A further threshold reason is the direct financial and other interests of New York State Attorney General Letitia James, who, consequently, should have been disqualified from representing the *Delgado* defendants, rather than, as she was, permitted to engage in litigation fraud obvious from the basic adjudicative principles governing the *Delgado* verified complaint, both original and amended, and its attached Exhibit A: the December 10, 2018 report of the Committee on Legislative and Executive Compensation.

The five-judge *Delgado* panel consisted of Appellate Division, Third Department Presiding Justice Elizabeth Garry – who was also the panel's presiding justice – and Associate Justices Michael Lynch, Sharon Aarons, Stan Pritzker, and Molly Reynolds Fitzgerald. Their financial and other interests in the *Delgado* appeal arose from the fact, recognized at page 5 of their opinion, that Part HHH, Chapter 59 of the Laws of 2018, by which New York's state legislators, statewide elected executive officers, and Executive Law §169 officers have gotten salary increases, is "nearly identical" to Part E, Chapter 60 of the Laws of 2015, by which New York's judges have gotten salary increases, upheld by "our decision in Center for Jud. Accountability, Inc. v. Cuomo (167 AD3d at 1409-1412)". As a consequence, the *Delgado* panel could not strike down Part HHH's delegation of legislative power to the Committee on Legislative and Executive Compensation to make "force of law" salary raise recommendations for legislative and executive officers without impacting on, if not explicitly reversing, the "nearly identical" Part E's delegation of legislative power to the Commission on Legislative, Judicial and Executive Compensation to make "force of law" salary increase recommendations for judges – a state of affairs the *Delgado* panel recognized at the February 5, 2021 oral argument.

The four *Delgado* justices who additionally knew the facts behind the December 27, 2018 *CJA v. Cuomo* decision were Presiding Justice Garry and Associate Justices Pritzker, Lynch and Aarons – and this knowledge arose from their involvement in *CJA v. Cuomo* when it was at the Appellate Division. By reason thereof, all four knew that Part HHH [R.72-74] was unconstitutional, *as written*, for a multitude of reasons beyond what was alleged in the *Delgado* verified amended complaint [R.23-177]. As illustrative, from the sixth cause of action of the *CJA v. Cuomo* verified complaint [*CJA*-R.109-112 (189-213)], they knew that the size and composition of the committee that Part HHH established was too small and homogenous for a constitutional delegation of legislative power [*CJA*-R.192-193] – and that Part HHH was further unconstitutional, *by its enactment*, through the budget [*CJA*-R.187-189, 194-201] – the product of "three-men-in-a-room, behind-closed doors budget deal-making" whose violation of Article VII, §§1-7 and Article III, §10 of the New York State Constitution was further particularized by the ninth cause of action of the *CJA v. Cuomo* complaint [*CJA*-R.115 (214-219)].

These four justices also knew – from the seventh and eighth causes of action of the *CJA v. Cuomo* complaint [*CJA*-R.112-114 (201-212) and *CJA*-R.114 (212-213)] – that the *Delgado* plaintiffs had a meritorious claim as to the unconstitutionality and unlawfulness of Part HHH, *as applied* – and that they could not find for the *Delgado* plaintiffs with respect to the Committee's violation of its

statutory charge to examine "compensation and non-salary benefits", such as health benefits and pensions, contained within their second cause of action [R.35, R.39], without repercussions to *CJA v. Cuomo's* eighth cause of action challenge to Part E, *as applied*, based on the Commission's violation of its statutory charge to examine compensation and non-salary benefits, such as health benefits and pensions [CJA-R.114 (212)].

The specifics of the direct knowledge of, and involvement in, *CJA v. Cuomo* by these four Appellate Division, Third Department justices are, as follows:

- Presiding Justice Garry was the presiding justice of the four-judge panel that included Associate Justice Pritzker, which, by an August 7, 2018 decision/order, denied, without reasons, the *CJA* plaintiffs' July 24, 2018 order to show cause, with preliminary injunction – and then, by an October 23, 2018 decision/order, denied, without reasons, the *CJA* plaintiffs' September 10, 2018 order to show cause to disqualify the Appellate Division, Third Department for demonstrated actual bias and other relief, which she had signed.

- Associate Justice Aarons, without reasons, declined to sign the *CJA* plaintiffs' October 22, 2018 order to show cause to strike the Attorney General's respondents' brief as a fraud on the court, to declare the Attorney General's representation of the defendant-respondents unlawful, and for other relief.

- Associate Justice Lynch was the fifth judge of the appeal panel assigned to the *CJA v. Cuomo* appeal who, without explanation, did not sit with his four fellow justices at the November 13, 2018 oral argument of the appeal, taking his seat immediately following oral argument of the first appeal on the calendar – *CJA v. Cuomo* – that he may be presumed to have heard. Immediately prior to the November 13, 2018 oral argument, his four fellow panelists, by a November 13, 2018 decision/order, denied, without reasons, the *CJA* plaintiffs' October 23, 2018 motion to strike the Attorney General's respondents' brief as a fraud on the court, to declare the Attorney General's representation of defendant-respondents unlawful and for other relief – this being the same motion as Associate Justice Aarons had declined to sign when presented as an order to show cause. These same four fellow panelists then denied, without reasons, by a December 19, 2018 decision/order, the *CJA* plaintiffs' November 27, 2018 order to show cause to disqualify the appeal panel for demonstrated actual bias and other relief. Eight days later, they would render the December 27, 2018 "Memorandum and Order" on the appeal.

Following the December 27, 2018 "Memorandum and Order", purporting to "affirm" the November 28, 2017 decision and judgment of Albany County Acting Supreme Court Justice/Court of Claims Judge Denise Hartman [*CJA* R.31-41], the *CJA* plaintiffs appealed to the Court of Appeals for the appeals of right and by leave to which they were constitutionally entitled. Their March 26, 2019 letter to the Court of Appeals in support of their appeal of right gave an overview of the unconstitutional, lawless, and jurisdictionally-void conduct of the Appellate Division's justices, culminating in the December 27, 2018 decision, with the particulars laid out by an accompanying "legal autopsy"/analysis detailing its fraudulence and the fraudulence of the four

without-reasons appellate decision/orders that preceded it. Attorney General James, representing the *CJA* defendant-respondents, did not contest the accuracy of either. Nor did the Court of Appeals. Both the letter and "legal autopsy"/analysis are incorporated herein by reference.

Suffice to here note that Justice Lynch, who is purported to be the author of the March 18, 2021 "Opinion and Order" (at p. 2), to which "Garry, P.J., Aarons, Pritzker and Reynolds Fitzgerald, JJ., concur" (at p. 9), had implicitly recused himself from the *CJA v. Cuomo* appeal – presumably because he had already demonstrated his actual bias, born of interest, in March 2014, when he was an Albany County Supreme Court justice, as recounted by the *CJA* plaintiffs' July 24, 2018 order to show cause seeking his disqualification from the appeal (at ¶¶7-10). His duty – and that of Justices Garry, Pritzker, and Aarons—was to have stepped down from the *Delgado* appeal.

A table of contents follows:

TABLE OF CONTENTS

* * *

The Counsel Appearing on the Appeal

The first page of the March 18, 2021 "Opinion and Order" lists the counsel participating on the appeal. The participation of Attorney General Letitia James as counsel for the defendant-respondents should have elicited a threshold inquiry by any impartial tribunal, in light of her direct financial interest in the appeal – being one of the statewide elected officers whose salary had been raised through Part HHH and the Committee's "force of law" December 10, 2018 report.

As for the four justices knowledgeable of what had gone on in *CJA v. Cuomo*, they might have reasonably recognized that litigation standards were going to go "out the window" with Senior Assistant Solicitor General Victor Paladino[4] appearing "of counsel" to Attorney General James in the *Delgado* appeal, inasmuch as he had been "of counsel" to then Attorney General/Now Solicitor General Barbara Underwood in the *CJA v. Cuomo* appeal at the Appellate Division, where, by litigation fraud, he and his surrogate/underling Assistant Solicitor General Frederick Brodie had procured the December 27, 2018 decision on which, six months later, Justice Ryba would rely, at the urging of Assistant Attorney General Helena Lynch and *amicus curiae* Assembly Speaker Carl Heastie.[5] As a consequence, he knew that the December 27, 2018 decision was fraudulent and further knew, because thereafter he would be "of counsel" to Attorney General James in opposing the *CJA* plaintiffs' appeals by right and by leave at the Court of Appeals, that there, too, he and Assistant Solicitor General Brodie had corrupted the appellate process by litigation fraud and had been rewarded by fraudulent decisions – the same as he would cite and rely on in his September 14, 2020 respondents' brief on the *Delgado* appeal in stating:

> "plaintiffs' unlawful delegation claim is foreclosed by this Court's decision in *Ctr. for Judicial Accountability, Inc. v. Cuomo*, which upheld as a lawful delegation of legislative authority a nearly identical statute insofar as it empowered a commission to recommend salary increases for judges. 167 A.D.3d 1406, 1410-11 (3d Dep't 2018), appeal dismissed, 33 N.Y.3d 993, reconsid. & lv. denied, 34 N.Y.3d 960-61 (2019), rearg. denied, 34 N.Y.3d 1147 (2020)." (at p. 3)
>
> "The plaintiffs in *Ctr. for Judicial Accountability* attempted to appeal as of right to the Court of Appeals from this Court's decision, arguing that it wrongly decided

---

[4] It appears that the "Senior" was added to Assistant Solicitor General Paladino's title during the summer of 2019. As the title is somewhat cumbersome, the references to him in this "legal autopsy"/analysis have dropped the Senior.

[5] *See*: (1) Assistant Attorney General Lynch's January 7, 2019 opposition to *Delgado* plaintiffs' December 21, 2018 OSC for a preliminary injunction – pp. 2, 6, 13-15 of memorandum of law; (2) Assembly Speaker Heastie's January 7, 2019 *amicus* brief in opposition to preliminary injunction – at pp. 1, 10, 12; (3) VIDEO of January 11, 2019 oral argument of preliminary injunction motion, before Justice Ryba; (4) Assistant Attorney General Lynch's January 28, 2019 motion to dismiss plaintiffs' complaint – at pp. 1-2, 12-17 of memorandum of law; (5) Assembly Speaker Heastie's March 4, 2019 *amicus* brief in support of dismissal motion – at pp. 1, 5-6, 7, 9 [R.288, 291-293, 294, 296]; (6) Assistant Attorney General Lynch's May 5, 2019 motion to dismiss plaintiffs' amended complaint – memorandum of law [R.187-188; 197-202]; (7) Assistant Attorney General Lynch's May 22, 2019 reply memorandum of law [R.351-354].

> the delegation-of-authority claim. Although this Court had squarely addressed that claim, the Court of Appeals summarily dismissed the appeal because 'no substantial constitutional question [was] directly involved.' *Ctr. for Judicial Accountability, Inc. v. Cuomo*, 33 N.Y.3d 993, 993-94 (2019). Plaintiffs' unlawful delegation claim here is likewise insubstantial." (at p. 25).

As for the *amicus curiae* participation in *Delgado* of the three law firms appearing for Governor Andrew Cuomo, Senate Majority Leader Andrea Stewart-Cousins, and Assembly Speaker Heastie[6] – all of whom would identically assert that Part HHH was constitutional for all the reasons that the Appellate Division had held Part E to be constitutional by its *CJA v. Cuomo* decision, an impartial tribunal might reasonably have questioned why their identical self-interested legal positions were not consolidated and incorporated in Assistant Solicitor General Paladino's respondents' brief and, in any event, why *amicus* counsel were not required to remove from their separate *amicus* briefs factual assertions therein made unless they could substantiate them by specific citations to the record, *to wit*,

- the factual assertions in Governor Cuomo's *amicus* brief (at pp. 1-2, 5) that Part HHH was "duly enacted" by the Legislature "Pursuant to Article III, Section 1 of the New York State Constitution and, thereafter "presented to the Governor" "Pursuant to Article IV, Section 7 of the Constitution", as if the Governor had had nothing to do with it before then and that it had not been "submitted by the Governor pursuant to article seven of the Constitution", as part of his revenue budget bill, following "three-men-in-a-room, behind-closed-doors budget deal-making";

- the factual assertions in Senate Majority Leader Stewart-Cousins' *amicus* brief (at p. 4) that the Committee on Legislative and Executive Compensation established pursuant to Part HHH; "faithfully followed" its mandate and the eight specified factors it was required to consider, "thoroughly analyzing" them; and that the Legislature had thereafter reviewed the report and deemed it in conformity so that:

  > "There is no failure of accountability here. The Committee did exactly what the Legislature and the Governor directed it to do. The Committee faithfully applied the specific principles that were prescribed in the statute and drew reasoned conclusions about appropriate outcomes. The Legislature reserved the right to review and, if necessary, abrogate what the Committee did; the Legislature reviewed what the Committee did; and the Legislature concluded that no action was necessary because the Committee acted appropriately." (at p. 5);
  >
  > "…The Legislature reviewed the Committee's work and found no reason to reject what the Committee did. This is an example of good government

[6] These *amici curiae* counsel are: for Governor Cuomo – Holwell Shuster & Goldberg LLP; for Senate Majority Leader Stewart-Cousins – Cuti Hecker Wang LLP; and for Assembly Speaker Heastie – Orrick, Herrington & Sutcliffe LLP.

> working effectively, not the kind of lawlessness that could justify the extraordinary relief Plaintiffs-Appellants seek." (at p. 7).

- The factual assertion in Assembly Speaker Heastie's *amicus* brief that:

> "The legislative pay increase that took effect on January 1, 2019, was entirely independent from the recommendations for 2020 and beyond. Indeed, the outside income restrictions did not take effect until a year after the 2019 raise, demonstrating that the 2019 raise was in no way conditioned on or connected to the outside income limitations." (at p. 29).

These factual assertions, which were material and false, and the material omissions, distortions, and mischaracterizations pervading all three *amicus* briefs, if presented by the Governor, Senate Majority Leader, and Assembly Speaker in affidavits, would properly subject them to the penalties of perjury, based on the evidence contained within the *Delgado* record. Even more so based on evidence outside the *Delgado* record which Governor Cuomo, Senate Majority Leader Stewart-Cousins, and Assembly Speaker Heastie were duty-bound to have furnished the three separate counsel they had retained, at taxpayer expense,[7] for *amicus curiae* purposes in *Delgado* – and which Attorney General James herself had. That evidence is CJA's July 15, 2019 written analysis of the Committee's December 10, 2018 report, particularizing its multitudinous deceits and violations of Part HHH, Chapter 59 of the Laws of 2018, sent to Governor Cuomo, Senate Majority Leader Stewart-Cousins, Assembly Speaker Heastie, and Attorney General James – with written NOTICE of their duty to take steps to VOID the December 10, 2018 report by reason of its demonstrated statutory violations and fraud. None denied or disputed the accuracy of the analysis and accompanying NOTICE – and these are incorporated herein by reference.

In any event, the *amici* lawyers did not need the benefit of CJA's July 15, 2019 analysis, highlighting:

> (1) that the Committee's violations of its statutory charge were established facially from its December 10, 2018 report; and
>
> (2) that CJA's testimony before the Committee at its November 30, 2018 hearing was "dispositive" that the Committee had "nowhere to go" with pay raise recommendations, *inter alia*, because, as proven by the record of *CJA v. Cuomo*, it could not meet the first "appropriate factor" that it was required "to take into account", *to wit*, "the parties' performance and timely fulfilment of their statutory and Constitutional responsibilities",

---

[7] September 14, 2020 affirmation of James McGuire, Esq., at ¶4: "Holwell Shuster & Goldberg's fees for the preparation and submissions of this brief will be paid with state funds"; September 14, 2020 affirmation of Eric Hecker, Esq., at ¶7: "my firm's fees for the preparation and submissions of this brief will be paid with state funds".

to know this to be true. Quite simply, these lawyers could not, ethically, have represented their clients before any court, let alone at taxpayer expense, without having compared the December 10, 2018 report with Part HHH and without having viewed the VIDEOS of the Committee's four meetings, from which it was obvious. The same was true of Assistant Solicitor General Paladino in his representation of the *Delgado* defendants on appeal – and, of course, Assistant Attorney General Lynch, who represented the *Delgado* defendants before Justice Ryba and whose litigation fraud before Judge Hartman in the *CJA v. Cuomo* case – because she had NO legitimate defense to ANY of its ten causes of action, including as to the unconstitutionality of Part E, *as written, by its enactment, as applied* – paved the way for Judge Hartman's fraudulent November 26, 2017 decision, "affirmed" by the Appellate Division's fraudulent December 27, 2018 decision – which Assistant Attorney General Lynch would then offer up in *Delgado*, to Justice Ryba, as establishing the constitutionality of Part HHH, *as written*.

Moreover, any examination by these lawyers of the *CJA v. Cuomo* briefs and three-volume record on appeal – which was their duty to examine, based on CJA's testimony at the Committee's November 30, 2018 hearing, handing up the briefs and record as "dispositive" that the Committee had "nowhere to go" with recommendations" – would have revealed that the December 27, 2018 *CJA v. Cuomo* decision was indefensible, without ANY basis in fact and law – and knowingly so. No need for CJA's "legal autopsy"/analysis to lay it out, although, presumably, in reviewing the *CJA v Cuomo* record on appeal and briefs, from CJA's website, they would have found it, readily, with the March 26, 2019 letter – and the record of the proceedings at the Court of Appeals.[8]

Certainly, an impartial tribunal would have reasonably questioned why, with the backing of these three seasoned *amici* counsel, the seasoned "of counsel" Assistant Solicitor General Paladino would not have moved to dismiss the *Delgado* plaintiffs' appeal, inasmuch as the so-called "Record on Appeal" filed by their counsel, Cameron MacDonald, was not what it purported to be and what his CPLR §5531 statement (at p. iv) asserted about the appeal, *to wit*, "perfected on the full record method"[9] – nor even acceptable as an appendix, inasmuch as such required Mr.

---

[8] Counsel for the *amicus* Senate Majority Leader and *amicus* Governor may be presumed to have examined the Court of Appeals record of *CJA v. Cuomo* a full year before their September 14, 2020 motions at the Appellate Division to file their *amicus* briefs in *Delgado* – as they were then representing, respectively, the Senate Majority Leader and the Public Campaign Financing and Election Commission in two lawsuits against them in Niagara County, challenging the constitutionality of the budget statute that had established the Public Campaign Financing and Election Commission, empowered to make "force of law" recommendations that would supersede existing law. Doubtless they would have read CJA's letter to the editor, published in the August 21, 2019 New York Law Journal, entitled "*A Call for Scholarship, Civic Engagement & Amicus Curiae Before the NYCOA*", highlighting the significance of *CJA v. Cuomo* to that challenge and to the challenge in *Delgado* – and identifying that the "shocking record of *CJA v. Cuomo* – including before the Court of Appeals" was accessible from CJA's website.

[9] §1250.7(d) of the Practice Rules of the Appellate Division, entitled " Form and Content of Records and Appendices; Exhibits". A "full record" would have contained the documents that had been filed in Supreme Court/Albany County, accessible from the electronic docket for *Delgado*, here:

MacDonald to have filed with the Appellate Division's clerk "one copy of the complete record", which he had not done.[10]

Clear, too, from Mr. MacDonald's CPLR §2105 certification of his "Record on Appeal" [R.363], which stated:

> "I, Cameron J. MacDonald, of the Government Justice Center, Inc., attorney for Plaintiffs-Appellants, hereby certify under CPLR 2105 that the foregoing record on appeal has been compared with the originals, or copies, in the office of the Albany County Clerk, and the record on appeal contains accurate reproductions of the Notice of Appeal, the Order of Hon. Christina L. Ryba entered June 7, 2019 that is under appeal, and all the papers upon which the Order may have been based." (underlining added).

is that Justice Ryba's appealed-from June 7, 2019 decision/judgment [R.4-22] did not comply with CPLR §2219(a), which requires that "An order determining a motion made upon supporting papers shall recite the papers used on the motion…"

Treatise authority holds – and Assistant Solicitor General Paladino would have known this, additionally, from *CJA v. Cuomo*[11]–

> "An order must indicate papers on which the court exercised its discretion so as to subject it to meaningful appellate review…An order must indicate papers on which the court exercised its discretion so as to subject it to meaningful appellate review. Where it fails to do so, the appeal will be dismissed.", 1-3 New York Appellate Practice §3.04 "Appealable Paper", Matthew Bender & Co., citing *In re Dondi*, 63 N.Y.2d 331, 339 (1984).

---

https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=pbYFPOSRhBDUgbR8rrdaKg==&display=all&courtType=Albany%20County%20Supreme%20Court&resultsPageNum=1.

[10] §850.7(b)(2) of the Appellate Division, Third Department's Rules of Practice, entitled "Single Copy of the Record", states:

> "When the appendix method is used, in addition to the requirements of section 1250.9(a)(2) of the Practice Rules of the Appellate Division, the appellant is directed to file with the clerk of this court, with proof of service of a copy upon each party to the appeal, one hard copy of the complete record, accompanied by: (1) a stipulation in lieu of certification pursuant to CPLR 5532; (2) a certificate of the appellant's or petitioner's attorney, pursuant to CPLR 2105, after giving each other party 20 days' notice and not having received any objections or proposed amendments to the record, together with an attorney affirmation certifying compliance with the requirements of this section; or (3) if the record is incapable of being certified by either of those methods, an order settling the record by the court from which the appeal is taken." (underlining added).

[11] *CJA v Cuomo* record on appeal: R.540-541 (¶7); R.576-577; R.50-51; R.52; R.60.

Notably, Assistant Solicitor General Paladino filed his September 14, 2020 respondents' brief only after he had obtained a month's extension for its filing from the Appellate Division, stating, in his August 7, 2020 letter to the Appellate Division's clerk, that the "[a]dditional time [was] needed to review the record and prepare the respondents' brief". Surely, as a senior appellate attorney, in the office of New York's Solicitor General, no less, he did not require "[a]dditional time" to know that Mr. MacDonald's "Record on Appeal" was not that – and that the *Delgado* plaintiffs' appeal from Justice Ryba's decision/judgment was dismissible because it lacked the required CPLR §2219(a) recitation of papers on which it was based.

The reasonable inference is that Assistant Solicitor General Paladino and the *amici* did not believe the full record would reflect well on the course of the proceedings before Justice Ryba and her decisions underlying and culminating in the June 7, 2019 decision/judgment. Indeed, by the time Mr. MacDonald filed his July 15, 2020 appellants' brief and so-called "Record on Appeal" at the Appellate Division – to which Assistant Solicitor General Paladino purported to need a month's extension "to review the record and prepare the respondents' brief", he was already fully conversant with the record – having, the year earlier, engaged in litigation fraud, at the Court of Appeals, in the *Delgado* case to deprive the *Delgado* plaintiffs of the direct appeal from Justice Ryba's June 7, 2019 decision/judgment to which they were constitutionally entitled – which was simultaneous with his litigation fraud, at the Court of Appeals, in *CJA v. Cuomo*, depriving the *CJA* plaintiffs of the appeals of right and by leave from the Appellate Division's December 27, 2018 decision to which they were constitutionally entitled.

Ironically, the first document in Mr. MacDonald's "Record on Appeal" [R.1] was not – as it should have been – the August 9, 2019 notice of cross-appeal to the Appellate Division that he had filed in response to Assistant Attorney General Lynch's July 15, 2019 notice of appeal from Justice Ryba's decision/judgment. Instead, it was his August 9, 2019 notice to the Court of Appeals pursuant to "Article 6, Section 3(b)(2) of the New York Constitution and CPLR 5601(b)(2)" for a direct appeal dealing "solely with the constitutionality of Part HHH of Chapter 59 of the Laws of 2018."

Mr. MacDonald did not include in his "Record on Appeal" any document reflecting what had happened to his direct appeal to the Court of Appeals – and he made no reference to it in his July 15, 2020 appellants' brief. The panel's opinion also made no reference to the direct appeal, although Assistant Solicitor General Paladino's September 14, 2020 respondents' brief did, in a paragraph reading (at pp. 15-16):

> "Defendants initially appealed the judgment, but then withdrew their appeal under Rule 1250.2(b). See NYSCEF App. Div. No. 529556, Doc. Nos. 1, 4 & 5. Plaintiffs attempted to appeal the judgment directly to the New York Court of Appeals under C.P.L.R. 5601(b)(2). (R1.) After a jurisdictional inquiry, the Court of Appeals transferred plaintiffs' appeal to this Court, *Delgado v. State of New York*, 34 N.Y.3d 986 (2019)."

The electronic docket for *Delgado* at the Appellate Division, Third Department[12] does not reflect any such transfer of the appeal, nor post the November 21, 2019 Court of Appeals order which read:

> "ORDERED, that the appeal is transferred without costs, by the Court sua sponte, to the Appellate Division, Third Department, upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved (see NY Const, art VI §§3[b][2], 5[b]; CPLR 5601[b][2]).
>
> Chief Judge DiFiore took no part."

The Opinion's Misleading Punctiliousness as to Form by its Declaration as to Plaintiffs' First Cause of Action & Failure to Determine Justice Ryba's Adherence to the Standards Governing CPLR §3211(a)(7) Motions

Presumably, the Appellate Division, Third Department's clerk's office examines the appeal papers filed with it for purposes of determining their conformity with Appellate Division, Third Department rules – and acts, ministerially, based thereon. At very least, deficiencies as obvious as the absence of a true "Record on Appeal", the absence of the correct notice of appeal, and the absence of a CPLR §2219(a) recitation in an appealed-from order might reasonably be acted upon, *sua sponte*, by the clerk's office or brought to the attention of the justices for *sua sponte* action. In any event, such deficiencies would have been readily apparent to the five panel justices – and their law clerks.

The opinion conceals the "pass" given to these three requirements – while conveying the impression that the justices are punctilious as to form. Thus, at the end of their opinion, they make a *sua sponte* modification of Justice Ryba's decision/judgment, stating (at pp. 9-10):

> "As a final matter, as this is a declaratory judgment action, Supreme Court should have made a declaration in defendants' favor on plaintiffs' first cause of action, rather than dismissing it (see Inter-Power of N.Y. v. Niagara Mohawk Power Corp., 208 AD2d 1073, 1075 [1994]; Einbinder v. Ancowitz, 38 AD2d 721, 721 [1972], lv denied 30 NY2d 484 [1972]. We modify the judgment accordingly."
>
> …
>
> ORDERED that the judgment is modified, on the law, without costs, by declaring that the Laws of 2018, chapter 59, 1, part HHH has not been shown to be unconstitutional, and, as so modified, affirmed."

This is a deceit by its inference that the *Delgado* plaintiffs sought a declaratory judgment only as to their first cause of action – when the outset of the opinion identifies (at p. 3) that they were seeking:

---

[12] The Appellate Division, Third Department electronic docket for *Delgado* is accessible, here: https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=9GX5bZQ91vcpyzcuYyNKzg==&display=all&courtType=Appellate%20Division%20-%203rd%20Dept&resultsPageNum=1

> "declarations that (1) the enabling statute was an unlawful delegation of legislative authority under the NY Constitution, (2) the Committee exceeded the scope of any authority lawfully delegated to it, (3) the disbursement of funds according to the Committee's report was unlawful under State Finance Law §123, and (4) the Committee's report was void under the Open Meetings Law (see Public Officers Law art 7)." (underlining added).

The opinion does not identify why Justice Ryba's dismissals of plaintiffs' second, third, and fourth causes of action should not, likewise, have resulted in declarations in defendants' favor with respect to the third and fourth causes of action – and, as to the second cause of action, to which plaintiffs had gotten a partial declaration in their favor, a declaration in defendants' favor as to the balance. Why didn't the opinion also "modify the judgment accordingly" as to these three causes of action – and append the comparable declarations. Was it a recognition that the comparable declarations could not be purported to be "on the law", unless no material facts were in dispute – and that there were disputed material facts as to these, indeed, also as to the first cause of action, precluding declaratory judgments for the defendants and mandating the denial of Assistant Attorney General Lynch's CPLR §3211(a)(7) dismissal motion, in its entirety.

This is obvious from bedrock decisional law governing adjudication of CPLR §3211(a)(7) motions, such as Assistant Attorney General Lynch had made – and which Justice Ryba decision furnished by a 1-1/2 page recitation of such law under the title heading "Standard" [R.8-9]. Among the cited decisions, the Appellate Division, Third Department decision in *Metro Enterprises Corp. v. NY State Dept of Taxation & Finance*, 171 AD3d 1377 (2019), by a five-judge panel including Justice Garry, written by Justice Lynch[13], and the Appellate Division, Third Department decision in *Dashnaw v. Town of Peru*, 111 AD3d 1222 (2013), by a four-judge panel including Justice

---

[13] *Metro Enterprises Corp. v. NY State Dept of Taxation & Finance*, 171 AD3d 1377, 1378-79 (2019):

> "On a motion to dismiss pursuant to CPLR 3211(a)(7), 'we must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide the plaintiff the benefit of every possible inference' (*Matter of Dashnaw v. Town of Peru,* 111 A.D.3d 1222, 1225, 976 N.Y.S.2d 288 [2013] [internal quotation marks, brackets and citation omitted]). Generally, 'a motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration' (*North Oyster Bay Baymen's Assn. v. Town of Oyster Bay*, 130 A.D.3d 885, 890, 16 N.Y.S.3d 555 [2015] [internal quotation marks, brackets and citations omitted]; *see Matter of Dashnaw v. Town of Peru,* 111 A.D.3d at 1225, 976 N.Y.S.2d 288). Further, on a motion to dismiss pursuant to CPLR 3211(a)(7), courts may reach 'the merits of a properly pleaded cause of action for a declaratory judgment ... where no questions of fact are presented by the controversy' (*Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie,* 87 A.D.3d 1148, 1150, 930 N.Y.S.2d 34 [2011] [internal quotation marks, brackets and citation omitted]; *see Matter of Dashnaw v. Town of Peru,* 111 A.D.3d at 1225, 976 N.Y.S.2d 288)."

Garry.[14] Justice Ryba's implication was that she was adhering to the "Standard" of those decisions.

The opinion, by contrast, furnished no law as to the standards governing adjudication of CPLR §3211(a)(7) motions, as if Justice Ryba's adherence thereto was a given. However, from the culminating final sentence of Justice Ryba's "Standard", the panel might reasonably have discerned that it materially misrepresented the applicable law, stating [R.9]:

> "Finally, it is well settled that 'a query concerning the scope and interpretation of a statute or a challenge to its constitutional validity' is a pure question of law and therefore does not entail consideration of questions of fact (In re 381 Search Warrants Directed to Facebook, Inc., 29 NY3d 231, 270 [2017]; Cayuga Indian Nation of NY v. Gould 14 NY3d 614 [2010])."

Neither of the cited two Court of Appeals decisions stands for the proposition that "consideration of questions of fact" is irrelevant to "a pure question of law" – as the quote makes it appear. Rather, "a pure question of law" exists only where "the facts relevant…are undisputed". Thus, the example of "a pure question of law", stated in *Cayuga* – and then accurately quoted in *In re 381 Search Warrants* – is

> "a query concerning the scope and interpretation of a statute or a challenge to its constitutional validity—and the facts relevant to that issue are undisputed".

At bar, the record before Justice Ryba established that "the facts relevant" to the *Delgado* plaintiffs' four causes of action were not "undisputed", that their verified amended complaint [R.23-177] sufficiently stated four causes of action entitling them to a verified answer from the

---

[14] *Dashnaw v. Town of Peru*, 111 AD3d 1222, 1225 (2013):

> "In reviewing the merits of the motion to dismiss for failure to state a cause of action, we 'must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide [the] plaintiff the benefit of every possible inference' (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26 [2005]; *see Vectron Intl., Inc. v. Corning Oak Holding, Inc.*, 106 A.D.3d 1164, 1165, 964 N.Y.S.2d 724 [2013]). Specifically, with regard to a pre-answer motion to dismiss a declaratory judgment action, the only issue presented for consideration is 'whether a cause of action for declaratory relief is set forth, not ... whether the plaintiff is entitled to a favorable declaration' (*North Shore Towers Apts. Inc. v. Three Towers Assoc.*, 104 A.D.3d 825, 827, 961 N.Y.S.2d 504 [2013] [internal quotation marks and citation omitted]; *see Hallock v. State of New York*, 32 N.Y.2d 599, 603, 347 N.Y.S.2d 60, 300 N.E.2d 430 [1973]). However, 'where the court, deeming the material allegations of the complaint to be true, is nonetheless able to determine, as a matter of law, that the defendant is entitled to a declaration in his or her favor, the court may enter a judgment making the appropriate declaration' (*DiGiorgio v. 1109–1113 Manhattan Ave. Partners, LLC*, 102 A.D.3d 725, 728, 958 N.Y.S.2d 417 [2013]). On the other hand, 'if the material allegations of the complaint, taken as true, implicate 'factual issues such that the rights of the parties cannot be determined as a matter of law, a declaration upon a motion to dismiss is not permissible'' (*id.*, quoting *Matter of Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 A.D.3d 1148, 1151, 930 N.Y.S.2d 34 [2011])."

Delgado defendants, to discovery by interrogatories and depositions, and, based thereon, to summary judgment or a trial. Indeed, even the deficient "Record on Appeal" before the appeal panel sufficed to establish that.

The Opinion's Concealment of the Procedurally-Improper Course of the Proceedings before Justice Ryba & Assistant Solicitor General Paladino's Assertion, in His Respondents' Brief, that She Converted Defendants' Motion to Dismiss Plaintiffs' Amended Complaint to Summary Judgment, Following Notice

The opinion conceals the course of the proceedings before Justice Ryba. The entirety of what it says on the subject is in its single-sentence first paragraph (at p.2):

> "Appeal from a judgment of the Supreme Court (Ryba, J.), entered June 7, 2019 in Albany County, which, among other things, partially granted defendants' motion to dismiss the amended complaint."

This is continued after two intervening paragraphs, as follows (at pp. 3-4):

> "Plaintiffs commenced this declaratory judgment action seeking, among other things, declarations that (1) the enabling statute was an unlawful delegation of legislative authority under the NY Constitution, (2) the Committee exceeded the scope of any authority lawfully delegated to it, (3) the disbursement of funds according to the Committee's report was unlawful under State Finance Law §123, and (4) the Committee's report was void under the Open Meetings Law (see Public Officers Law art 7). Defendants filed a pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(7).
>
> Supreme Court dismissed plaintiffs' first, third and fourth causes of action in their entirety. In that respect, the court found that the enabling statute did not unlawfully delegate legislative authority to the Committee, and any violation of the Open Meetings Law was technical in nature and did not provide good cause to warrant nullification. With respect to the second cause of action, the court invalidated the 2020 and 2021 legislative salary increases, concluding that the Committee exceeded the scope of its authority in recommending a prohibition on certain outside employment activities and a cap on outside earned income, and finding that these invalid recommendations were intertwined with the salary increases for 2020 and 2021. It otherwise dismissed the remainder of the second cause of action. Plaintiffs appeal."

Concealed by the two above-quoted paragraphs are all the facts pertaining to plaintiffs' filing of their "amended complaint", to which the opinion's one-sentence first paragraph refers. The most important fact – other than that the amended complaint was verified, just as the original complaint, was verified – was that the verified amended complaint was plaintiffs' response to Justice Ryba's *sua sponte* February 19, 2019 so-ordered letter in which she stated:

> "This letter serves as notice of the Court's intention to treat defendants' motion to dismiss, dated January 28, 2019, as one for

> summary judgment pursuant to CPLR 3211(c). The parties are therefore directed to submit any supplemental evidence they deem relevant to the motion for summary judgment to the Court on or before March 4, 2019, the new return date of the motion."

The consequence of this unexplained and conclusory *sua sponte* notice by Justice Ryba – whose basis and sufficiency Mr. MacDonald questioned, without answer from her, as likewise without answer to whether, as he contended, plaintiffs were entitled to file their verified amended complaint, as of right, without necessity of a motion – was to clear the way for summary judgment to defendants without their having to submit a verified answer wherein they would have had to admit or deny each and every allegation of plaintiffs' verified complaint – a safeguard that would have underscored what ANY appropriate comparison of Assistant Attorney General Lynch's January 28, 2019 dismissal motion and the *Delgado* plaintiffs' December 14, 2018 verified complaint would have revealed: that Assistant Attorney General Lynch's dismissal motion pursuant to CPLR §3211(a)(7) had to be denied, *as a matter of law*, because she had not shown – as the caselaw pertaining to CPLR §3211(a)(7) requires – that all the complaints' allegations, accepted as true, did not state a cause of action.

In fact, based on the record before Justice Ryba, the only justification for her *sua sponte* February 19, 2018 so-ordered letter was if she were going to grant summary judgment to plaintiffs on their second and third causes of action that the Committee had exceeded the scope of its authority and that disbursements of salary increases were unlawful by reason thereof – thereby potentially mooting the complaint's first and fourth causes of action,[15] as well as Mr. MacDonald's then *sub judice* December 21, 2018 order to show cause for a preliminary injunction.

This disposition – which if it did not end the case, at its inception, certainly entitled plaintiffs to the granting of the TRO sought by Mr. MacDonald's December 21, 2018 order to show cause – was obvious from key allegations of plaintiffs' December 14, 2018 complaint pertaining to the Committee's December 10, 2018 report – concealed by both Assistant Attorney General Lynch's January 28, 2019 dismissal motion and her January 7, 2019 opposition to Mr. MacDonald's December 21, 2018 order to show cause. These were the allegations appearing at ¶¶67-72 of the complaint under the heading "The Report and Recommendations":

> "67. Moreover, there is no evidence that the committee fulfilled its mandate, as unconstitutional as it was, to examine and evaluate **compensation, non-salary benefits, and allowances**.
>
> 69. **The Committee's records contain no evidence that the Committee examined or evaluated total compensation, including non-salary benefits such as health benefits and pensions.**
>
> 70. State by state comparisons of members of the Legislature, statewide elected officials, and salaries of state officers referred to in section 169 of the executive law only compare salary levels.
>
> 71. Comparisons of public and elected officials to their private-sector counterparts did not address non-salary compensation.

[15] *New York Public Interest Research Group, Inc. v. Carey*, 42 NY2d 527 (1977).

> 72. Nothing in the record on the committee's website indicates that it examined or evaluated all the elements of compensation, making any state by state, or position by position comparisons." (bold in the original),

continued by ¶93 of the complaint's "Count 2: Declaratory Judgment – Committee Report":

> "93. The committee failed to fulfill its assigned tasks by not adequately examining and evaluating compensation and non-salary benefits for legislators, statewide elected officials, and state officers referred to in section 169 of the Executive Law."

Plaintiffs' March 4, 2019 verified amended complaint preserved these allegations, *verbatim*: what had been ¶¶67-72 was now ¶¶81-85 under the same heading "The Report and Recommendations" [R.35] and what had been ¶93 was now ¶122 under the same heading "Count 2: Declaratory Judgment – Committee Report" [R.39-40]. These renumbered, but identical, allegations would now would be identically concealed by Assistant Attorney General Lynch's May 6, 2019 CPLR §3211(a)(7) dismissal motion [R.178-276] – and by the *amicus* Assembly Speaker Heastie [R.277-306] – for the obvious reason that their truth was verifiable from the face of the Committee's December 10, 2018 report and from the VIDEOS of its four public meetings, establishing that the Committee had NOT "fulfilled its mandate, as unconstitutional as it was" – requiring it to examine and "take into account" "compensation and non-salary benefits" [R.72].

Based on ¶¶81-85, ¶122 [R.35, 39-40], Justice Ryba could not, *as a matter of law*, grant Assistant Attorney General Lynch's May 6, 2019 CPLR §3211(a)(7) motion to dismiss plaintiffs' second and third causes of action – just as she could not, *as a matter of law*, based on those identical allegations have granted Assistant Attorney General Lynch's January 28, 2019 CPLR §3211(a)(7) motion to dismiss the identical second and third causes of action. Consistent with what she had done by her *sua sponte* February 19, 2019 notice, she should have either issued a comparable *sua sponte* notice, identifying that she would now treat defendants' May 6, 2019 dismissal motion as one for summary judgment pursuant to CPLR §3211(c) – or have rendered a decision clearly stating that by reason of the evidentiary posture of the case, resulting from her February 19, 2019 notice, she was dispensing with further notice and treating the February 19, 2019 notice as if governing the May 6, 2019 dismissal motion, in other words, summary judgment, which she was granting to plaintiffs.

Instead, Justice Ryba's June 7, 2019 decision described the posture of the case, as follows [R.6-7]:

> "…After the [January 28, 2019] motion to dismiss was fully-submitted, the Court provided the parties with written notice that pursuant to CPLR 3211(c), it would treat the motion as one for summary judgment. Accordingly the Court extended the return date of the motion to allow the parties an opportunity to submit additional evidence to develop an appropriate record (see, Rovello v. Orofino Realty Co., 40 NY2d 633, 635 [1976]). However, **rather than submitting additional evidence**, plaintiffs served an amended complaint and thereby rendered the defendants' motion to dismiss the original complaint moot.

> Defendants thereafter filed a second motion pursuant to CPLR 3211(a)(7), seeking dismissal of the amended complaint for failure to state a cause of action. … Heastie has submitted a letter requesting that his previously filed amicus brief be considered in connection with defendants' motion, and the Court in its discretion hereby grants that request. … Plaintiffs opposed the motion to dismiss, and the matter is now ripe for determination." (bold added).

This is materially false by its inference that plaintiffs' March 4, 2019 "amended complaint" was not "additional evidence". Indeed, Mr. MacDonald furnished Justice Ryba with a full briefing on the subject by his memorandum of law in support of his March 20, 2019 motion for leave to file the verified amended complaint, if plaintiffs were not entitled to file it, as of right – also summarizing the evidence that was before her, stating (at pp. 3-4):

> "CPLR 3211(c) recognizes that '[u]pon the hearing of a motion made under [CPLR 3211] subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment.' Defendants, however, chose not to submit any evidence by affidavit, relying instead on legal arguments based on the allegations of the complaint. The affirmation accompanying the motion to dismiss did not contain additional evidence. Instead, it related irrelevant procedural history and attached a copy of the complaint and one of its two exhibits.
>
> Nevertheless, the Court advised the parties of its intention to treat the motion to dismiss as a motion for summary judgment without any indication of the issues it was considering for summary judgment that are dispositive of the action. *Four Seasons Hotels Ltd. V. Vinnik*, 127 A.D.2d 310, 320, 515 N.Y.S.2d 1, 8 (1987)('[CPLR 34211(c)] notice must come directly from the court and should fairly advise as to the issues it deems dispositive of the action.'*); Shah v. New York Foundling Hosp.*, 62 A.D.2d 899, 900, 415 N.Y.S.2d 893, 895 (1979)('It is not enough that the papers submitted contain adequate proof to justify the granting of summary judgment; the parties are entitled to know the purpose for which the court will make use of the evidence.').
>
> Under CPLR 105(u), parties may utilize a verified pleading where an affidavit is required. Thus, the Plaintiffs filed a <u>verified</u> amended complaint consistent with the Court's directive to submit supplemental evidence by March 4, 2019. *See Hladczuk v. Epstein*, 98 A.D.2d 990, 990, 470 N.Y.S.2d 211, 211 (1983)('a verified pleading is the equivalent of a responsive affidavit for purposes of a motion for summary judgment.').
>
> The <u>verified</u> amended complaint updates wording, corrects non-material mistakes, and clarifies and expands allegations made in the original complaint. The new contents consist primarily of additional evidence to supplement the evidence in the record that are consistent with the original allegations. As such, the <u>verified</u> complaint complied with the law and rules, as made applicable by this Court's February 19, 2019 directive." (underlining added).

Mr. MacDonald's March 25, 2019 reply memorandum of law then further reinforced the evidence that was before Justice Ryba, pointing out that Assistant Attorney General Lynch, by her

opposition to his March 20, 2019 motion, was:

> "object[ing] to an amended complaint containing additional facts, consistent with the allegations of the original complaint, that further rebut factual assertions the Defendants make, without affidavits, in their motion to dismiss. …" (at p. 1, underlying added.)

and that:

> "While the Defendants have not submitted any evidence to contradict Plaintiffs' allegations, they have made arguments conveying factual assertions…" (at p. 4, underlining added.).

To be clear, Mr. MacDonald was accurately reciting the evidence before Justice Ryba: Assistant Attorney General Lynch's January 28, 2019 pre-answer CPLR §3211(a)(7) dismissal motion had not been supported by sworn statements – other than her own attorney's affirmation that was simply a vehicle for attaching two exhibits: plaintiffs' December 14, 2018 verified complaint, plus its Exhibit A: the Committee's December 10, 2018 report. He was also complaining that her memorandum of law improperly contained factual assertions which belonged in an affidavit – and that these factual assertions were false. An example of this was, certainly, its statement (at p. 18): "The Committee followed its mandate. It considered all of the factors that it was mandated to consider…"

That was the sum total of evidence that was before Justice Ryba when she issued her February 19, 2019 notice directing the parties "to submit any supplemental evidence they deem relevant to the motion for summary judgment" by March 4, 2019. To this, Assistant Attorney General Lynch had submitted nothing – and MacDonald had submitted plaintiffs' March 4, 2019 amended verified complaint, which pursuant to CPLR §105(u) "is the equivalent of a responsive affidavit for purposes of a motion for summary judgment".

By decision/order dated April 9, 2019, Justice Ryba granted Mr. MacDonald's motion for leave to file the March 4, 2019 amended complaint, asserting that this mooted whether plaintiffs were entitled to have filed it, of right. The decision did not contest the accuracy of any aspect of Mr. MacDonald's factual or legal presentation, including as to the insufficiency of her February 19, 2019 notice, the evidentiary state of the record before her in rendering it, and the evidentiary significance of the March 4, 2019 verified amended complaint for purposes of compliance with her February 19, 2019 notice to furnish "supplemental evidence".

On May 6, 2019, Assistant Attorney General Lynch made a pre-answer CPLR §3211(a)(7) motion to dismiss plaintiffs' March 4, 2019 amended verified complaint for failure to state a cause of action [R.178-276] – largely identical to her January 28, 2019 dismissal motion, inasmuch as plaintiffs' amended complaint was largely identical to their original complaint. Once again, her moving affirmation was simply a vehicle for annexing two exhibits: the verified amended complaint and its Exhibit A: the Committee's December 10, 2018 report. And, once again, her memorandum of law improperly contained factual assertions that belonged in an affidavit, as, for instance, its statement [R.203]: "The Committee followed its mandate. It considered all of the

factors that it was mandated to consider…"

Suffice to say that notwithstanding Justice Ryba's decision does NOT purport to be treating Assistant Attorney General Lynch's CPLR §3211(a)(7) motion as one for summary judgment – and would have had no basis to award defendants summary judgment on any of the plaintiffs' four causes of action, Assistant Solicitor General Paladino states, in his respondents' brief (at p. 2):

> "Plaintiffs appeal from a judgment of Supreme Court (Ryba, J.), entered in Albany County on June 7, 2019, which converted defendants' motion to dismiss to a motion for summary judgment and granted that motion in part and denied it in part (Record [R.] 4-22)." (underlining added).

Further on, he states (at p. 14):

> "In lieu of an answer, defendants moved to dismiss the amended complaint for failure to state a cause of action. (R178.) Supreme Court notified the parties that it intended to treat the motion to dismiss as one for summary judgment. (R6.)…" (underlining added).

In other words, he purports that Justice Ryba "notified the parties" that she was converting the motion to dismiss plaintiffs "amended complaint" to one for summary judgment, which is false – and which his own cited reference "(R6.)" reveals to be false, this being Justice Ryba's June 7, 2019 decision/judgment, reciting that the notice she gave was with respect to the earlier motion to dismiss plaintiffs' complaint.

The Opinion's Fraudulent Concealment of Plaintiffs' Entitlement to Summary Judgment on their Second & Third Causes of Action: The Unconstitutionality of Part HHH, Chapter 59 of the Laws of 2018, *As Applied*, & Violations of State Finance Law §123

The opinion gives a truncated recital of the Committee's mandate, stating (at p. 2):

> "The Committee was tasked with 'determin[ing] whether, on January 1, 2019, the annual salary and allowances of members of the [L]egislature, statewide elected officials, and ... [Executive Law §169 commissioners] warrant an increase' (L 2018, ch 59, §1, part HHH, §2[2]). The enabling statute set forth a non-exhaustive list of factors for the Committee to consider in guiding its analysis, including 'the parties' performance and timely fulfillment of their statutory and [c]onstitutional responsibilities; the overall economic climate; ... the levels of compensation and non-salary benefits received by executive branch officials and legislators of other states and of the federal government; ... the ability to attract talent in competition with comparable private sector positions; and the state's ability to fund increases in compensation and non-salary benefits' (L 2018, ch 59, §1, part HHH,§2[3])." (underlining added).

A fuller quoting of Part HHH would have included the first sentence of the statute [R.72-74], at §1:

> "There is hereby established a compensation committee to examine, evaluate, and make recommendations with respect to adequate levels of compensation, non-salary benefits, and allowances pursuant to section 5-a of the legislative law, for members of the legislature, statewide elected officials, and those state officers referred to in section 169 of the executive law." [R.72, underlining added]

and, its §2(1):

> "In accordance with the provisions of this act, the committee shall examine the prevailing adequacy of pay levels, allowances pursuant to section 5-a of the legislative law, and other non-salary benefits for members of the legislature, statewide elected officials, and those state officers referred to in section 169 of the executive law." [R.72, underlining added]

and its §2(3), which – in addition to the opinion's above-quoting of two of the express "factors" that §2(3) required the Committee to "take into account" that specified "compensation and non-salary benefits" – contained a third:

> "the levels of compensation and non-salary benefits received by comparable professionals in government, academia and private and nonprofit enterprise" [R.72, underlining added].

The Committee's failure to adhere to the unequivocal and repeatedly-stated mandate imposed upon it by Part HHH to examine, evaluate, and make recommendations with respect to "compensation and non-salary benefits" – the subject of ¶¶81-85, ¶93 of the *Delgado* plaintiffs' amended complaint – rendered its December 10, 2018 report not only statutorily-violative, but unconstitutional. Indeed, the opinion itself reflects this unconstitutionality, born of the statutory violations, in reciting the relevant caselaw, as follows (at pp. 7-8):

> "Where a body acts beyond the scope of authority granted to it by the Legislature, 'it usurps the legislative role and violates the doctrine of separation of powers' (Matter of Leading Age N.Y., Inc. v Shah, 32 NY3d 249, 260 [2018]). The Committee, 'as a creature of the Legislature, is clothed with those powers expressly conferred by its [enabling statute], as well as those required by necessary implication' (Matter of City of New York v State of N.Y. Commn. on Cable Tel., 47 NY2d 89, 92[1979]; see Greater N.Y. Taxi Assn. v New York City Taxi &Limousine Commn., 25 NY3d 600, 608 [2015]). 'The separation of powers doctrine commands that the [L]egislature make the primary policy decisions but does not require that the [Committee] be given rigid marching orders' (Matter of Leading Age N.Y., Inc. v Shah, 32 NY3d at 260; see Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn., 25 NY3d at 609). Where enabling legislation confers a broad grant of authority, a body may 'fill in the details, as long as reasonable safeguards and guidelines are provided' by the Legislature, and as

> long as those details are consistent with the Legislature's policy choices (Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn., 25 NY3d at 608; see Matter of Medical Socy. of State of N.Y. v Serio,100 NY2d 854, 864[2003]; Dorst v Pataki, 90 NY2d 696, 699 [1997]; see also Boreali v Axelrod, 71 NY2d 1, 11-14 [1987])."

Yet, not only did the opinion conceal – just as Justice Ryba's decision had – the violations of the Committee's statutory duty to examine "compensation and non-salary benefits", alleged by plaintiffs' ¶¶81-85, ¶122 [R.35, 39-40], but affirmatively asserted (at p. 8) what Justice Ryba had not: that the Committee had given "careful consideration of the factors set forth in the enabling statute (see L2018, ch59, part HHH, 2[3]". This was an outright LIE, adopting the false factual assertions, before Justice Ryba, of Assistant Attorney General Lynch, improperly made and implied in her memoranda of law, and by the *amicus* counsel of Assembly Speaker Heastie, improperly made and implied in his *amicus* brief – and then echoed, on appeal, by the false factual assertions of Assistant Solicitor General Paladino and the three *amici* counsel of the Governor, Senate Majority Leader, and Assembly Speaker, improperly made and implied in their briefs.

These unsworn factual statements were NOT evidence, in contrast to the *Delgado* plaintiffs' verified amended complaint challenging the December 10, 2018 report, which it annexed as its Exhibit A and which, on its face, reflected NO "consideration" of "health benefits and pensions", nor other "non-salary benefits", as Part HHH mandated. Such entitled them to summary judgment on their second and third causes of action, *as a matter of law* – and rendered the Committee's report and recommendations unconstitutional, "usurp[ing] the legislative role and violat[ing] the doctrine of separation of powers".

The Opinion's Fraudulent Disposition of Plaintiffs' First Cause of Action: The Unconstitutionality of Part HHH, Chapter 59, of the Laws of 2018, *As Written*

The opinion's disposition of plaintiffs' first cause of action spans from page 4 to page 7, citing to the December 27, 2018 *CJA v. Cuomo* decision seven times in three of its four paragraphs – the first, second, and fourth.

The first and fourth paragraphs are quoted below, in pertinent part – with the second paragraph quoted, in full:

> "Plaintiffs argue that the Legislature unconstitutionally delegated its lawmaking authority to the Committee insofar as its recommendations were allowed to acquire the force of law and to supersede inconsistent provisions of various statutes (see NY Const, art III, §1). We are unpersuaded…' While the Legislature cannot delegate its lawmaking functions to other bodies, there is no constitutional prohibition against the delegation of power to an agency or commission to administer the laws promulgated by the Legislature, provided that power is circumscribed by reasonable safeguards and standards' (Center for Jud. Accountability, Inc. v Cuomo, 167 AD3d 1406, 1410[2018] [internal quotation marks and citations omitted], appeal dismissed 33 NY3d 993 [2019], lv denied 34 NY3d 961 [2019]; see McKinney v Commissioner of N.Y. State Dept. of Health,

41 AD3d 252, 253 [2007], appeal dismissed 9 NY3d 891 [2007], lv denied 9 NY3d 815 [2007]). Although the NY Constitution vests in the Legislature the authority to ''determine its own compensation''…; see NY Const, art III, §6…plaintiffs have proffered no persuasive authority supporting the proposition that the Legislature may not delegate such authority to **an independent body** in the manner done here, so long as the Legislature makes the basic policy choice and provides reasonable standards and safeguards circumscribing the body's authority.

In fact, plaintiffs' arguments are foreclosed by our decision in Center for Jud. Accountability, Inc. v Cuomo (167 AD3d at 1409-1412), wherein we upheld a nearly identical delegation of authority regarding judicial compensation. In Center for Jud. Accountability, this Court rejected a constitutional challenge to an enabling statute – contained in a supplemental budget bill – that empowered the 2015 Commission to recommend salary increases for judges. Like the enabling statute at issue here, the supplemental budget bill at issue in Center for Jud. Accountability had a supersession clause providing that the recommendations of the 2015 Commission would 'have the force of law and [would] supersede, where appropriate, inconsistent provisions of [Judiciary Law] article 7–B, . . .[Executive Law §169], and [Legislative Law §§5 and 5–a], unless modified or abrogated by statute' (L 2015, ch 60, §1, part E, §3[7]). Noting that the Legislature had 'made the determination that judicial salaries must be appropriate and adequate' and had provided safeguards to guide the 2015 Commission's analysis, we rejected the plaintiffs' argument that the Legislature had unlawfully delegated its lawmaking authority over judicial compensation (Center for Jud. Accountability, Inc. v Cuomo, 167 AD3d at 1411). The same result applies here, as the Legislature enacted a law making the basic policy choice that the salaries of legislators, statewide elected officials and executive branch commissioners must be 'adequate,' and circumscribed the Committee's power by providing a list of factors to help guide its analysis (L 2018, ch 59, §1, part HHH, §§1, 2[3]). The Legislature then implemented a safeguard whereby it reserved the right to view a report of the Committee's recommendations, after which it could either modify them or grant them the force of law. In other words, it was the Legislature – not the Committee – that had the final say in determining whether the Committee's recommended changes would go into effect (see NY Const, art III, §1; Center for Jud. Accountability, Inc. v Cuomo, 167 AD3d at 1411).

…

Plaintiffs also contend that the delegation of authority was unlawful because, under the NY Constitution, legislative compensation is required to be 'fixed by law' (NY Const, art III, §6) – a phrase that plaintiffs interpret to mean codified in a published statute passed by the Legislature itself. We do not interpret the term so narrowly … and note that the NY Constitution contains a concomitant provision requiring judicial compensation to be 'established by law' (NY Const, art VI, §25 [a]) – a process which was satisfied in Center for Jud. Accountability, Inc. v Cuomo (167 AD3d at 1411) when the Legislature delegated its authority over judicial compensation to **an independent commission** through the same procedure that plaintiffs challenge here. The Committee's recommendations acquired the

> force of law on January 1, 2019 pursuant to the procedure set forth in **duly enacted legislation** passed by both houses of the Legislature and signed by the Governor. Accordingly, in our view, the 2019 legislative salary increases were properly 'fixed by law' within the meaning of the NY Constitution (NY Const, art III, §6…)." (bold added).

This is utterly fraudulent:

> (1) The *CJA v. Cuomo* appellate decision upheld the constitutionality of Part E, Chapter 60, of the Laws of 2015, *as written*, by concealing ALL the particularized allegations of its unconstitutionality presented by the *CJA* plaintiffs' sixth cause of action of their verified complaint [*CJA*-R.109-110 (188-194)], the state of the record with respect thereto, and by conclusory falsehoods. The details are set forth by pages 13-20 of the *CJA* plaintiffs' legal autopsy"/analysis of the decision;
>
> (2) The Commission on Legislative, Judicial and Executive Compensation established by Part E, Chapter 60, of the Laws of 2015 was NOT "an independent commission" – and its ACTUAL BIAS was particularized by the *CJA* plaintiffs' seventh cause of action pertaining to the unconstitutionality of Part E, Chapter 60, of the Laws of 2015, as *applied* [*CJA*-R.112-114 (201-212)] and, additionally, by their eighth cause of action as to the Commission's multitudinous violations of express provisions of Part E, Chapter 60, of the Laws of 2015, rendering their judicial salary increase recommendations null and void [*CJA*-R.114 (212-213)]. The *CJA v. Cuomo* decision disposed of the seventh and eighth causes of action in exactly the same way as it disposed of the sixth cause of action: by concealing ALL their particularized allegations, the state of the record with respect thereto, and by conclusory falsehoods. The details are set forth by pages 24-27 of the *CJA* plaintiffs' "legal autopsy"/analysis of the decision;
>
> (3) The Committee on Legislative and Executive Compensation established by Part HHH, Chapter 59, of the Laws of 2018 was NOT "an independent body"[16] – and such was evidenced by the *Delgado* plaintiffs' verified amended complaint:
>
> - by its above-quoted ¶¶81-85, ¶122 [R.35, 39-40] pertaining to the Committee's failure to examine, evaluate, and make recommendations as to "total compensation, including non-salary benefits such as health benefits and pensions", which were its statutory charge;
>
> - by its below-quoted ¶¶87-107 [R.35-38] pertaining to the Committee's violations of the Open Meetings Law; and
>
> - by such additional paragraphs as ¶¶1, 4, 50-52, 57 relating to statutory violations, unconstitutionality, and bias, *to wit*,

[16] Assistant Solicitor General Paladino used that term during the February 5, 2021 oral argument – and it appears, repeatedly, in his September 14, 2020 respondents' brief (at pp. 22-23, 25, 29).

"1. …a five-member committee – [fn1]: The chief judge of the state of New York declined to serve, and the remaining four members were the comptroller of the state of New York, the chairman of the State University of New York board of trustees and 52nd comptroller for the state of New York, the comptroller of the city of New York, and the chairman of the city university of New York board of trustees and 42nd comptroller for the city of New York." [R.23].

…

4. Not coincidentally, although formed in March, the committee could not manage to conduct its first meeting until a week after the general election – November 13, 2018. In less than four weeks, however, the committee manages to schedule four meetings and produce its report." [R.24].

…

"50. The committee did not convene until November 13, 2018, and then with only four of five members agreeing to serve.

51. One of the four, the state comptroller tasked with auditing the state's finances, was appointed and served despite the Constitution's Article V, Section 1 prohibition on the Legislature assigning him administrative duties.

52. Three committee members hold positions appointed by the Governor." [R.30].

…

"57. By January 1, 2021, the Attorney General and State Comptroller salaries will rise to $220,000." [R.31].

(4) Part HHH, Chapter 59, of the Laws of 2018 is NOT "duly enacted legislation" that could meet the "fixed by law" requirement of Article III, §6 for legislative compensation. Rather, Part HHH is an "unconstitutional rider" that was inserted into the FY2018-2019 executive budget as part of the revenue budget bill, after "behind-closed-doors, three-men-in-a-room budget deal-making" that was "completely unlawful, unconstitutional" – as CJA so-stated by its testimony before the Committee on November 30, 2018, the details of which it furnished to the Committee the following week, by CJA's December 6, 2018 letter to Assembly Speaker Heastie entitled "Demand that You Substantiate Your November 30, 2018 Testimony before the New York State Compensation Committee with EVIDENCE – as You Furnished NONE", to which the Committee was cc'd.[17]

---

[17] In pertinent part, CJA's December 6, 2018 letter to Assembly Speaker Heastie stated (at p. 4):

"As for your sham 37 standing committees, why don't you demonstrate their functioning, in the context of the current 2018-2019 fiscal year budget. Please start with the Assembly Ways and Means Committee – the only one whose funding is specified in the Legislature's budget – and to which all the Governor's budget bills, introduced on January 18, 2018, were 'referred'.

As to the only paragraph of the opinion's four-paragraph disposition of the *Delgado* plaintiffs' first cause of action that did not cite to the *CJA v. Cuomo* appellate decision – the third paragraph – it is, as follows (at p. 6):

> "We are also unpersuaded by plaintiffs' contention that the enabling statute is invalid insofar as the Governor did not have veto power over the Committee's recommendations (see NY Const, art IV, §7).[fn2] By signing the enabling statute, the Governor consented to giving the Committee a broad grant of authority to determine whether legislative and executive branch compensation should be increased through a process that allowed its recommendations to acquire the force of law. The Committee's recommendations did not evade gubernatorial review, as the Committee was required to submit a report to the Governor detailing its findings (see L 2018, ch 59, part HHH, §4[1]).[fn3]"

This paragraph – and its annotating footnote 3 – appear to imply that if the Governor and Legislature agree between themselves to dispense with constitutional requirements, it is not

---

As the Governor's revenue budget bill #S.7509/A.9509 ended up as the vehicle for Part HHH, establishing the Compensation Committee, begin with that bill. That is what I was intending to do, as part of my testimony, substantiated by relevant records, which I had brought to the hearing, only to be cut off because of the Committee's demand that I conclude my testimony because of its 5-minute time-limitation for registered speakers.

How was the revenue budget bill 'amended' – apart from the Governor's 30-day amendment, of right, which changed his bill #S.7509/A.9509 to #S.7509-a/A.8509-a. Then what happened? Where was the vote, on March 13, 2018, that 'amended' #A/9509-a to #A.9509-b? Was it by the members of the Ways and Means Committee – and, if so, at what meeting? And where was the vote by the Ways and Means Committee – or the Assembly – on March 30, 2018 – that voted to 'amend' #A.9509-b to make it #A.9509-c? Isn't it correct that NO Assembly members ever voted to 'amend' #A.9509-a to #A.9509-b – which was done, behind-closed-doors, by staff. Likewise, that NO Assembly members ever voted to amend the staff-'amended"#A.9509-b to #A.9509-c, with its inserted HHH – which was done by you, Governor Cuomo, and Temporary Senate President Flanagan, behind-closed-doors, as part of your 'three-men-in-a-room' budget deal-making. What legal authority do you have for the Legislature to operate in such fashion?

There is so much more to say – but the Compensation Committee is meeting at 2:30 p.m. today and this is enough, for present purposes."

"[fn3] Contrary to plaintiffs' contention, this process is not clearly inconsistent with the intent of the drafters of the 1948 amendment to the NY Constitution that now governs legislative compensation. A 1946 joint legislative committee report conceived of a process whereby the Legislature would be vested with the authority to adjust the salaries of its members subject to the 'consent of the Governor' (Final Rep of the Joint Legislative Commn on Legislative Methods, Practices, Procedures and Expenditures, 1946 NY Legis Doc No. 31at 171). Nothing in the 1946 report indicated an intent to limit the Legislature's ability to delegate its authority on this issue to an **independent** committee, and the Governor gave his consent in this case by signing the 2018 budget bill granting the Committee broad authority." (bold added).

unconstitutional – a proposition rejected by the Court of Appeals in *New York State Bankers Association v. Wetzler*, 81 N.Y.2d 98, 104 (1993), and so flagrantly insupportable that the opinion offers no legal authority to substantiate it.

Moreover, the implication that "gubernatorial review" consisting of nothing more than being provided with the Committee's report, as to which the Governor then has zero power, somehow substitutes for a gubernatorial veto is absurd, on its face.

As for the paragraph's annotating footnote 2, stating:

> "We note that the Governor has filed an amicus curiae brief in support of defendants' position that the delegation process was lawful",

the opinion does not identify what the *amicus* Governor's response was to "plaintiffs' contention" that Part HHH's delegation of legislative power is unconstitutional by its elimination of the Governor's Article IV, §7 veto power. Nor does the opinion identify what Assistant Solicitor General Paladino's response had been. Both concealed the issue, completely, as did the *amicus* Senate Majority Leader and the *amicus* Assembly Speaker – because it is so obviously dispositive of unconstitutionality. Instead, throughout their briefs, they all relied on the *CJA v. Cuomo* appellate decision as establishing that just as Part E was constitutional, so the "substantively identical"[18], "in all relevant respects identical"[19], "practically identical"[20], "identical in all material respects"[21] Part HHH was constitutional. The closest any came to addressing the Article IV, §7 gubernatorial veto issue was Assistant Solicitor General Paladino's respondents' brief stating (at pp. 19-20):

> "Finally, the statute contained a safeguard that allowed the Legislature an opportunity to review the Committee's work: it required the Committee to submit its report directly to the Legislature, so the Legislature would have sufficient time, before the recommendations became effective, to exercise its prerogative to modify or reject them. L. 2018, ch. 59, part HHH, §4(1),(2). This safeguard was found constitutionally adequate in *Ctr. For Judicial Accountability*, 167 A.D.3d at 1411."

Notably, the elimination of the gubernatorial veto was among the grounds specified by the *CJA* plaintiffs' sixth cause of action [*CJA*-R.109-110 (R.190-191)] as to why Part E, Chapter 60 of the Laws of 2015 was unconstitutional, substantiating same by *St. Joseph Hospital, et al. v. Novello, et al.*, 43 A.D.3d 139 (2007) – involving the gubernatorial veto issue. The pertinent paragraphs were as follows [*CJA*-R.190-191]:

---

[18] Governor's *amicus* brief, at p. 7.

[19] Governor's *amicus* brief, at p. 9.

[20] Assembly Speaker's *amicus* brief, at p. 10.

[21] Assistant Solicitor General Paladino's respondents' brief, at pp. 16-17.

"390. In *St. Joseph Hospital, et al. v. Novello, et al.*, 43 A.D.3d 139 (2007), a case challenging a statute that gave 'force of law' effect to a special commission's recommendations – Chapter 63, Part E, of the Laws of 2005 – then Appellate Division, Fourth Department Justice Eugene Fahey, writing in dissent, deemed the statute unconstitutional, violating the presentment clause and separation of powers:

> 'It is apparent that the Legislation inverts the usual procedure utilized for the passage of a bill. According to the usual procedure, a bill is presented to the Governor for his or her signature or veto after passage by the Senate and the Assembly. Should the Governor sign the bill, it becomes law; should the bill be vetoed, the veto may be overridden by a two-thirds vote of the Legislature. Here, the Legislation creates a process that allows the recommendations of the Commission to become law without ever being presented to the Governor after the action of the Legislature.' *Id*, 152.

391. Justice Fahey's dissent was cited by the New York City Bar Association's *amicus curiae* brief to the Court of Appeals in a different case challenging the same statute, *Mary McKinney, et al. v. Commissioner of the New York State Department of Health, et al*., 15 Misc.3d 743 (S.Ct. Bronx 2006), affm'd 41 A.D.3d 252 (1st Dept. 2007), appeal dismissed, 9 N.Y.3d 891 (2007), appeal denied, 9 N.Y.3d 815; motion granted, 9 N.Y.3d 986. It characterized 'the force of law' provision 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)';
>
> 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);
>
> 'most unusual [in its]…self-executing mechanism by which recommendations formulated by an unelected commission automatically become law…without any legislative action' (at p. 28);
>
> 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).[fn] .

The *CJA v. Cuomo* appellate decision, on which the opinion relies, concealed all this and that the delegation of legislative power that *CJA v. Cuomo* was challenging, superseding existing law, was NOT a routine, run-of-the-mill delegation of power – the product of "settled law" – as Assistant Solicitor General Paladino and *amici* falsely argued in their briefs. This was another point that Mr. MacDonald's appellants' brief argued (at p. 15, fn. 45):

> "To be sure, over the years the courts have approved actions taken by administrative agencies as delegated tasks occurring within the bounds of laws passed under the Legislature's plenary power. In none of those cases did the Court condone agency actions purporting to make laws that superseded existing laws. *See, e.g., Matter of Levine v. Whalen*, 39 N.Y.2d 510 (1976); *Matter of LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249 (2018); *Matter of City of N.Y. v. State of N.Y. Comm'n on Cable Television*, 47 N.Y.2d 89 (1979); *Sleepy Hollow Lake, Inc. v. Public Service Comm'n*, 43 A.D.2d 439 (3d Dept. 1974)."

And it was a point that Mr. MacDonald repeated before the panel at the February 5, 2021 oral argument.

Finally, and moving to the very end of the opinion (at p. 10) to its "ORDERED" declaration:

> "that the Laws of 2018, chapter 59, 1, part HHH has not been shown to be unconstitutional",

such concealed the *Delgado* plaintiffs' further showing of the unconstitutionality of Part HHH, *as written*, pertaining to its §§4(b) and (c) [R.72]– having no parallel in the sixth cause of action of the *CJA* plaintiffs' complaint [*CJA*-R.109-112 (189-213)]. These were ¶¶37 and 49 of the *Delgado* amended complaint [R.28, R.30]:

> "37. It further unlawfully purports to increase legislative salaries during the legislative term upon the Legislature's timely passing the prior year's budget, contrary to Article III, Section 6 of the New York State Constitution.
>
> …
>
> 49. The 2018 law also permits the committee to 'implement cost-of-living adjustments that apply annually and/or phase-in salary adjustments annually for 3 years' except that 'any phase-in of a salary increase or cost of living adjustment will be conditioned upon performance of the executive and legislative branch and upon the timely legislative passage of the budget for the preceding year.'"

then expanded upon by ¶¶74-80 [R.34-35] as to how the Committee had actualized this unconstitutionality by its December 10, 2018 report:

> 74. Further, the committee report violates the Constitution by putting in place a financial incentive for legislators to increase their salaries during their term by passing an on-time budget.

> 75. By its operation, the report makes phased-in increases of legislator salaries conditional upon the 'timely legislative passage of the budget for the preceding year.'
>
> 76. Specifically, on January 1, 2020, legislators can expect a salary increase from $110,000 to $120,000 if they legislatively pass a budget by March 31, 2019, regardless of its contents and its fiscal impact on New Yorkers.
>
> 77. This determination directly contravenes the Constitution, which provides that '[n]either the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he or she shall have been elected . . .'
>
> 78. Under the same provision of the Constitution, '[e]ach member of the Legislature shall receive for his services a like annual salary, to be fixed by law.'
>
> 79. This unseemly $10,000 cash incentive for legislators to pass a timely budget 'un-fixes' their salaries through an unconstitutional quid pro quo mechanism by increasing or decreasing (depending upon one's perspective) those salaries during the term for which the legislators are elected.
>
> 80. The Committee's recommendation to increase legislator salaries based upon the Legislature timely passing a budget violates the Constitution."

In their appellate advocacy, neither Assistant Solicitor General Paladino nor the *amici* identified or addressed any of these paragraphs, except, and in a different context, ¶78. The same was true of Assistant Attorney General Lynch and *amicus* Assembly Speaker Heastie before Justice Ryba. And neither Justice Ryba's decision – nor the panel's opinion – made any reference to, or addressed, the unconstitutionality of Part HHH's §§4(b) and (c) that plaintiffs' complaint had alleged.

In sum, it was a fraud for the opinion to affirm Justice Ryba's dismissal of plaintiffs' first cause of action – on a CPLR §3211(a)(7) motion, no less – embodying it in an ORDERED declaration "that the Laws of 2018, chapter 59, 1, part HHH has not been shown to be unconstitutional":

(1) when the plaintiffs' verified amended complaint plainly stated a cause of action as to the unconstitutionality of Part HHH, *as written*, including as to its §§4(b) and (c) having no parallel in the sixth cause of action of the *CJA* plaintiffs' verified complaint [*CJA*-R.109-112/189-213];

(2) when four of its five justices knew that the *CJA v. Cuomo* appellate decision was fraudulent;

(3) when the panel's affirmance, based on *CJA v. Cuomo*, required the manufacture of facts as to Part HHH having been "duly enacted", which was not alleged in plaintiffs' amended complaint, and as to the Committee being "independent", which was contrary to the allegations of plaintiffs' amended complaint and rebutted by the record; and

(4) when, without explanation, it ignored the March 12, 2020 decision of Niagara County Supreme Court Justice Ralph Boniello, III in *Hurley v. Public Campaign Financing and Election Commission of the State of New York*, pointed out by Mr. MacDonald's September

24, 2020 reply brief (at p. 7), as having "answered no" the question as to "whether the Legislature can grant a body authority to make recommendations that supersede existing laws unless abrogated or modified by the Legislature" – to which he also referred at the February 5, 2021 oral argument.[22] As stated by that decision,[23] sent to and served upon the attorneys in *Hurley* – including Attorney General James and the attorney representing the Senate Majority Leader, the same as is her *amicus* counsel in *Delgado*, and the attorney representing the Public Campaign Financing and Election Commission, the same as is the Governor's *amicus* counsel in *Delgado*:

> "…the Court finds that the Legislature, clearly and unequivocally, empowered the Commission to legislate new law and repeal existing statutes. The line between administrative rule-making (which can be delegated) and legislative action (which cannot be delegated) has clearly been transgressed. The Legislature established the Commission and delegated to it the authority to create new law and to repeal existing law which is a function reserved solely to the Legislature under the Constitution. The transgression became final when the recommendations of the Commission became law without further action by the Legislature. The Court notes that the fact that the Legislature reserved the right to modify or abrogate by statute the recommendations of the Commission does not validate the process. The legislative function must be followed with proper procedure as mandated by the Constitution and adopted and historically followed by the Legislature. The vote taken by the Legislature to pass the statute cannot be deemed to blindly ratify the recommendations of the Commission especially since such recommendations would not be known at the time of the passage of the Statute… The Court further notes that the doctrine of legislative equivalency requires that 'to repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice' (*Moran v. LaGuardia*, 270 NY 450 [1936]).
>
> Accordingly, the Motions for Summary Judgment Dismissing the Complaint by the Moving Defendants are denied. Although there is a severability clause in the Statute, the Court finds that the Statute is an improper and unconstitutional delegation of legislative authority to the

---

[22] The only brief to address *Hurley* was that of *amicus* Heastie (at pp. 11-13), describing Justice's decision as an "unpublished, nonprecedential, and non-appealed decision", as to which Mr. MacDonald's reliance was "misplaced", concluding its argument as follows (at p. 13): "*Hurley* is easily distinguished from circumstances of this case, and is, anyway, of no binding authority over and has no persuasive effect on this Court—particularly in the face of this Court's decision in *Center for Judicial Accountability*." The opinion chose not to make any distinction.

[23] That the March 12, 2020 decision is unpublished reflects the Judiciary's skewing and falsification of caselaw by its practice of selective publishing of decisions. It is accessible from the electronic docket for the *Hurley* case, here: https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=qycpUi2TaMp0AKmP53eERw==&display=all&courtType=Niagara%20County%20Supreme%20Court&resultsPageNum=1.

> Commission. The Court awards summary judgment to the Plaintiffs (*see*, CPLR §3212[b]; *Estate of Giffune v. Kavanagh*, 302 AD2d 878 [4th Dept 2003])."

Indeed, such decision was a flat-out rejection of the position taken by the Senate Majority Leader's counsel in *Hurley*[24] – who nine months later would be the Senate Majority Leader's *amicus* counsel in *Delgado*.

The Opinion's Concealment of Plaintiffs' Entitlement to Summary Judgment -- &, at Least, Discovery, on their Fourth Cause of Action: Violation of the Open Meetings Law

The opinion affirms Justice Ryba's dismissal of plaintiffs' fourth cause of action in a three-sentence, completely conclusory paragraph, as follows (at p. 9):

> "Finally, Supreme Court did not abuse its discretion in declining to nullify the Committee's report under the Open Meetings Law. The Committee held four public hearings on the matter, during which multiple interested parties expressed their views, and its members discussed and voted on recommendations that would be included in the final report to the Governor and the Legislature. The purported violations identified by plaintiffs were technical in nature, did not amount to 'good cause' for nullifying the Committee's actions, and there was no showing that any such violations were intentional (Public Officers Law §107; see Matter of Oakwood Prop. Mgt., LLC v Town of Brunswick, 103 AD3d 1067, 1070 [2013], lv denied 21 NY3d 853 [2013]; Matter of MCI Telecom. Corp. v Public Serv. Commn. of State of N.Y., 231 AD2d 284, 291 [1997]; Town of Moriah v Cole-Layer-Trumble Co., 200 AD2d 879, 881 [1994])."

---

[24] December 5, 2019 memorandum of law of Senate Majority Leader's counsel Cuti Hecker Wang LLP, signed by Eric Hecker, Esq., stating, at page 7:

> "…recent appellate precedent shows that the Legislature may validly delegate authority to a commission to supersede existing statutes. *Center for Judicial Accountability, Inc. v. Cuomo*, 167 A.D.3d 1406, 1411(3d Dep't 2018), *appeal dismissed*, 33N.Y.3d 993(2019), *leave to appeal denied*, 34 N.Y.3d 961 (2019)('[T]he enabling statute contains the safeguard of requiring that the Commission report its recommendations directly to the Legislature so that it would have sufficient time to exercise its prerogative to reject any Commission recommendations before they become effective. Thus, we conclude that the statute does not unconstitutionally delegate legislative power to the Commission.')."[fn1]

The footnote 1 was:

> "The Third Department's holding is binding on this court. *See Phelps v. Phelps*, 128 A.D.3d 1545 (4th Dep't 2015)(holding that where an issue has not been addressed within an Appellate Division Department, the Supreme Court is bound by the doctrine of *stare decisis* to apply precedent established in another Department until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals)."

In other words, the opinion does not identify a single violation of the Open Meetings Law presented by the plaintiffs' amended complaint, simply characterizing them as "technical in nature", nor identify ANY of the argument presented by Mr. MacDonald's appellants' brief. This is fraud – and not only because the violations were NOT "technical in nature", but because, on appeal, Mr. MacDonald had furnished the "good cause" required by the cited Public Officers Law §107 for nullifying the December 10, 2018 report, *as a matter of law* – namely, the Open Meeting Law violations were of constitutional magnitude because the Committee's report, with its "force of law" recommendations, were substituting for the legislative law-making that Article III, §10 requires be open and that Article III, §14 requires be by bills, in "final form" and "upon the desks of the members…at least three calendar legislative days". This rendered supererogatory whether the violations were "intentional", as they rendered the report unconstitutional – and, if not, they entitled the *Delgado* plaintiffs to discovery, by interrogatories and deposition, so as to make the requisite "showing".

Firstly, as to the violations being "technical", this was a necessary deceit without which the opinion could not affirm Justice Ryba's CPLR §3211(a)(7) dismissal for failure to state a cause of action – and required:

> (1) concealing ¶¶87-107 of the amended complaint under the heading "Open Meetings Law" [R.35-38];
>
> (2) concealing Public Officers Law §105, §106, and §103(e); and
>
> (3) concealing the governing adjudicative standard, articulated by the Court of Appeals, that the provisions of Public Officers Law Article VII "are to be liberally construed", *Gordon v. Monticello*, 87 N.Y.2d 124 (N.Y. 1995).

Evident from even perfunctory examination of Justice Ryba's decision was that its sentence: "Even if the Court credits these technical violations as true" [R.11], rested on the skewed and materially false characterization of plaintiffs' ¶¶87-107 in her immediately preceding sentence [R.10-11]:

> "Plaintiffs allege a number of violations of Open Meetings Law, including (1) not providing the audio-visual recording of the November 28, 2018 meeting; (2) deciding to retain council; and meeting with said counsel, outside of a public meeting; (3) starting a meeting late, which plaintiffs allege was 'presumably' because they had met in executive session, (4) the final written report issued by the Committee was not on the table to be voted on for the fourth and final public meeting, and (5) several details of the implementation found in the final report were not fully discussed and voted on during the public meetings." (underlining added).

Justice Ryba had not quoted, or cited to, the paragraphs of plaintiffs' amended complaint [R.35-38] from which she was plucking the five so-called "technical violations",[25] did not identify what

[25] Most egregious is Justice Ryba's #4 and #5 [R.11], implying, by the words "final written report" and "final report" that a draft or preliminary report was "on the table to be voted on for the fourth and final public meetings"– when, as alleged by plaintiffs' ¶98 [R.37]: "The committee did not deliberate or vote on a draft report at any public meeting" and ¶99: "No report was on the table at the final meeting." [R.37].

Assistant Attorney General Lynch had said about them by her May 6, 2019 dismissal motion [R.213-218] – and with what evidence – and did not recite Mr. MacDonald's response [R.341-342], or any position taken by the *amicus* Assembly Speaker Heastie with respect thereto [R.301-302]. As for the applicable provisions of the Open Meetings Law, Justice Ryba's decision had neither cited to nor quoted them – nor the Court of Appeals' instruction that they were to be "liberally construed".

¶¶87-107 of plaintiffs' amended complaint [R.35-38] – to which liberal construction of the Open Meetings Law attached – were as follows:

> "87. The committee conducted four public meetings and acknowledged at the first meeting that the Open Meetings Law applied.
>
> 88. Four of the five appointed members attended each of the four public meetings.
>
> 89. At the first meeting, on November 13, 2018, the committee emerged from an executive session and announced that it had identified two candidates to be counsel to the committee.
>
> 90. At the next meeting, on November 28, 2018, for which the audiovisual recording is not available in contravention of the Open Meetings Law, the committee announced the appointment of counsel and introduced him at a meeting held in Albany, NY.
>
> 91. Upon information and belief, the committee determined to retain one of two counsel candidates outside of a public meeting, or outside of an executive session conducted within the confines of a public meeting.
>
> 92. At the fourth and final public meeting on December 6, 2018, the committee conducted minimal deliberations and voted on certain issues to be included in its report.
>
> 93. The meeting started 40 minutes late, presumably because the committee had met in an executive session that had not been subject to a public vote because neither the meeting summary nor the video recording reflect a vote to go into executive session.
>
> 94. The committee's chairman then made reference to two meetings the committee had with its lawyer and during the hearing the committee members then made multiple references to advice the committee had received from counsel at some point, which appeared earlier that day.
>
> 95. There are no records reflecting votes made or reasons given for the committee to go into executive sessions with the committee's counsel.
>
> 96. The committee had no basis to conduct unannounced executive sessions.
>
> 97. The meetings with counsel could not have been otherwise exempt because the committee members discussed advice they received, and the counsel provided additional legal advice in the public meeting held on December 6, 2018.
>
> 98. The committee did not deliberate or vote on a draft report at any public meeting.

Also, #2 and #3 [R.10-11], concealing and distorting plaintiffs' ¶¶91, 93-97, 101-107 pertaining to retention of counsel and its holding of executive sessions [R.36-38].

99. No report was on the table at the final meeting.

100. Four days later the Committee issued a final report.

101. Either the final report was not voted upon, or there was a meeting within the meaning of the Open Meetings Law that took place in violation of the Open Meetings Law.

102. If the final report was not voted upon, then the Committee did not vote on the details of provisions relating to allowances and state officer salary levels.

103. The December 6, 2018 meeting contained no discussion of the Legislators who would continue to receive allowances, but the report identifies several roles continuing to receive allowances that were never subject to a vote because the detail was to be left for the Report.

104. Regarding state officers under section 169 of the Executive Law, the Committee discussed redefining six tiers of commissioners into four tiers, but the Committee did not identify the state officers who would fall into each of the four categories, especially the positions collapsed into tiers C and D.

105. Presumably those determinations occurred and became final later, prior to the Report being final since there is no record from the meeting of the details being subject to a Committee vote.

106. The final report contains other materials and determinations that were not part of any public meeting.

107. If the final report is the product of deliberations by the committee, the committee violated the terms of the Open Meetings Law by voting on its contents outside of public sight."

These presented substantial violations of Public Officers Law §105, §106, and §103(e), as a comparison to those provisions make evident[26] – clearly sufficient to withstand a CPLR

---

[26] Public Officer Law §105, entitled "Conduct of executive sessions", reads, in full:

"1. Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys:

a. matters which will imperil the public safety if disclosed;

b. any matter which may disclose the identity of a law enforcement agent or informer;

c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

d. discussions regarding proposed, pending or current litigation;

e. collective negotiations pursuant to article fourteen of the civil service law;

f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;

g. the preparation, grading or administration of examinations; and

h. the proposed acquisition, sale or lease of real property or the proposed acquisition

§3211(a)(7) dismissal motion and making obvious that Assistant Attorney General Lynch's motion to dismiss them for failing to state a cause of action was frivolous, *as a matter of law*.

Indeed, here, too, in moving to dismiss plaintiffs' fourth cause of action by her May 6, 2019 dismissal motion [R.178-276], Assistant Attorney General Lynch offered up false factual statements not by affidavit or affirmation that would be subject to the penalties of perjury, but by a memorandum of law [R.180-220] that, *inter alia*, was also materially false as to the law. Thus, Assistant Attorney General Lynch's memorandum of law [at R.213-218]:

> (1) purported, falsely, that plaintiffs' allegations did not state a cause of action by concealing their content and resting on characterizations that plaintiffs' allegations were "conclusory" and "vague", citing to ¶106, ¶107, ¶¶94-96 and to none others;

> of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.
>
> 2. Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body."

Public Officers Law §106, entitled "Minutes", reads, in full:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Public Officers Law §103, entitled "Open meetings and executive sessions", states, in pertinent part, by its ¶e:

> "Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting. …"

(2) purported, falsely, that plaintiffs' allegations were "unsupported" by concealing the details furnished by ¶¶87-107;

(3) purported, falsely, that plaintiffs' allegations were "refuted" by the Committee's December 10, 2018 report, its appended summaries of the Committee's four meetings and, impliedly, by the VIDEOS of the meetings – which, if true, would have entitled her to have moved to dismiss pursuant to CPLR §3211(a)(1) "a defense is founded upon documentary evidence", which she had conspicuously NOT done because it was false;

(4) purported, falsely, that plaintiffs' allegations of "executive sessions with counsel" were "permissible" – when, pursuant to Public Officers Law §105 and §106, they were NOT.

Mr. MacDonald's May 17, 2019 opposing memorandum of law [at R.241-242] reiterated allegations from plaintiffs' amended complaint, asserting "None…are conclusory". Assistant Attorney General Lynch then continued her deceits by her May 22, 2019 reply memorandum of law [at R.259-260], purporting, falsely, that what was at issue were "Plaintiffs' mere disagreement with the way in which the Committee conducted its business [that] falls far short of stating an Open Meetings Law violation".

As for Assembly Speaker Heastie, his *amicus* brief [R.301-302] purported, by similar deceits, that there were no violation of the Open Meetings Law with respect to the Committee's recommendations for legislative salary increases – and that if there were Open Meeting Law violation with respect to other recommendations, they were severable.

Suffice to say that neither Assistant Attorney General Lynch nor counsel for *amicus* Assembly Speaker Heastie purported that the Open Meeting Law violations were "technical" – the *sua sponte* characterization Justice Ryba's June 7, 2019 decision would employ to justify why plaintiffs had not demonstrated "good cause" to nullify the Committee's report, stating [R.11]:

> "Even if the Court credits these technical violations as true, the Court would still find that plaintiffs have failed to meet their burden of demonstrating good cause warranting the exercise of the Court's discretionary power. The Committee held four public meetings in which they extensively explained their positions and public opinion was sought (and received), and plaintiffs have further <u>failed to provide any compelling evidence</u> that the Committee acted intentionally when it allegedly violated the Open Meetings Law. Accordingly, the Court finds that plaintiffs have failed to demonstrate sufficient good cause to warrant nullification of the Committee's recommendations with regard to Open Meetings Law…" (underlining added).

Moreover, apparent from the assertion that plaintiffs had supposedly failed "to provide any compelling evidence" was that Justice Ryba had improperly applied a summary judgment standard to what was a CPLR §3211(a)(7) dismissal motion for failure to state a cause of action.

On appeal, Mr. MacDonald's appellants' brief (at pp. 26-29) reiterated the allegations of plaintiffs' amended complaint that the Committee had no draft report on the table at its December 6, 2018 meeting and that the report issued four days later contained recommendations beyond what was discussed at the December 6, 2018 meeting, then stating (at pp. 28-29):

> "…The Supreme Court declined to exercise its discretion to nullify the Committee's Report for violating the Open Meetings Law. This, however, was not a village board's open meetings foot fault in not properly invoking an executive session or providing notice of minor amendments to a proposed law. The Report purports to create new state law that should not be subject to the wide latitude for transparency abuse the Supreme Court granted.
>
> The Open Meetings Law can be traced to the Constitution's transparency mandate. Among other things, the Constitution provides that the houses of the Legislature keep their doors open and maintain a journal of the proceedings, except when secrecy is required.[fn86] Bills must be printed and on members desks in final form before final passage.[fn87] Unless there is a message of necessity the final printed bills must be on a member's desk three calendar legislative days before the vote.[fn88] Upon the last reading of a final version of the bill the vote must be taken immediately and recorded in the journal. None of those elements was present here, and the Supreme Court should have exercised its discretion to nullify the Report."

The annotating footnote 86 was "NY Const. Art. III, §10." The annotating footnote 87 was "NY Const. Art. III, §14." – which was the "*Id*" to which annotating footnote 88 then referred.

This dispositive argument that the absence of any report on the table at the Committee's December 6, 2018 meeting, let alone a final report, rendered its "force of law" recommendations unconstitutional in the same way as a bill would be unconstitutional if the Legislature voted on it only in draft and behind-closed doors was ignored by Assistant Solicitor General Paladino's respondents' brief (at pp. 46-51). Instead, he disingenuously retorted (at p. 51):

> "Plaintiffs assert that the Committee did not deliberate or vote on a draft report at any of the public meetings, although they fail to identify any such requirement under the Open Meetings Law (Br. at 27)".

Assuredly, Assistant Solicitor General Paladino did not need Mr. MacDonald to point out to him Public Officers Law §103(e) – and interpretive opinions of the Committee on Open Government. He also now adopted Justice Ryba's characterization of plaintiffs' allegations in asserting: "Technical or non-prejudicial violations are insufficient to establish good cause" (at p. 47) and that "Supreme Court did not abuse its discretion in declining to find good cause to invalidate the Committee's work. The Open Meetings Law violations that plaintiffs allege are at most minor, technical violations that do not warrant nullification." (at pp. 48-49).

As for the three *amici*, only *amicus* Assembly Speaker Heastie's brief (at pp. 24-27) addressed the Open Meetings Law issue in conclusory and mischaracterizing fashion, not identifying and

addressing the specific allegations of plaintiffs' amended complaint – and making no reference to the plainly dispositive constitutional argument raised by Mr. MacDonald's appellants' brief.

The last word on the subject, by Mr. MacDonald's reply brief, contested the applicability of Assistant Attorney General Paladino's caselaw citations, stating (at pp. 15-16):

> "Defendants cite a broad array of cases demonstrating how inconsequential New York's Open Meetings Law[fn52] is when invoked by aggrieved parties. Regardless, Defendants do not cite any cases that square with the facts presented here. The committee purported to pass new legislation amending existing laws. It did so in private, generating the written laws only after it concluded public meetings. Legislation such as what the report purports to be, however, requires a transparent process under the Constitution.
>
> As explained in the Opening Brief, the Constitution provides that the houses of the Legislature keep their doors open and maintain a journal of the proceedings, except when secrecy is required.[fn53] Bills must be printed and on members desks in final form before final passage.[fn54] Unless there is a message of necessity the final printed bills must be on a member's desk three calendar legislative days before the vote.[fn55] Upon the last reading of a final version of the bill the vote must be taken immediately and recorded in the journal. None of those elements was present here, and the Supreme Court should have exercised its discretion to nullify the Report."

Mr. MacDonald's annotating footnote 52 was to "N.Y. Public Officers Law §100, et seq."; his footnote 53 was to "NY Const. Article III, §10; and his footnote 54 was "NY Const. Article III, §14" – which was the "*Id*." to which his footnote 55 referred.

The opinion makes no reference to these constitutional provisions and Mr. MacDonald's argument pertaining thereto – other than to state, in the first sentence of the immediately following concluding paragraph of the opinion (at p. 9):

> "Plaintiffs' remaining contentions, to the extent not expressly discussed herein, have been considered and found lacking in merit."

This is a further outright fraud as relates to Mr. MacDonald's constitutionally-based arguments pertaining to the Open Meeting Law violations – so plainly dispositive that neither Assistant Solicitor General Paladino nor the *amici* counsel could identify and confront them. Likewise, the panel.

The Opinion's Concealment of the Fraud Committed as to the Issue of Severability – & the Proof of the Committee's Intent *on the Face* of its December 10, 2018 Report

Among "[p]laintiffs' remaining contentions…not expressly discussed" that the opinion purports (at p. 9) to have "considered and found lacking in merit" is that pertaining to severability.

Justice Ryba's June 7, 2019 decision had expressly noted this as the unique contribution that *amicus* Heastie had made, stating [R.6-7]:

> "Notably, the argument advanced in Heastie's amicus curiae brief are virtually identical to those set forth in defendants' motion. However, Heastie also advances the alternative argument that in the event the Court invalidates the Committee's recommendations relating to non-salary items, it should sever the invalid recommendations and uphold the remaining recommendations relating to salary increases."

After determining that the Committee had exceeded its mandate in restricting outside income for legislators, her decision adopted the severability argument in Assembly Speaker Heastie's *amicus* brief, stating [R.20-21]:

> "The Court find that Heastie's alternative argument for severability has merit. The test for severability is 'whether the Legislature 'would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether' (see NY State Superfund Coalition, Inc. v NY State Dept of Envtl Conservation, 75 NY2d 88, 94 (citation omitted). Here, the enabling statute set forth a severability clause (Part UUU, of Chapter 59 of the Laws of 2018 ('Part UUU'). This clause raises a presumption that the Legislature intended the act to be severable. Therefore as outlined above, the recommendations that became law on January 1, 2019 related to salary increases for 2019 continue to have the force of law. The recommendations that contemplate prohibited activities and limitations on outside earned income commencing January 1, 2010 and beyond are null and void."

That Justice Ryba omitted what Mr. MacDonald's response had been to *amicus* Assembly Speaker Heastie's severability argument should have sparked the curiosity of any impartial appellate panel since the "argument for severability" she identified as having been adopted from the Assembly Speaker was, *on its face*, inapplicable. The recited "test for severability" – as quoted from *NY State Superfund Coalition* – pertains to whether, when a provision of an enacted bill has been deemed unconstitutional, the balance of the bill must be voided. Justice Ryba had NOT stricken any provision of Part HHH. Therefore, the Legislature's intent in enacting Part HHH – and Part UUU's severability clause that any provision in the bill found to be unconstitutional by a court was severable – had NO relevance.

Justice Ryba had done the very opposite of invalidating any portion of Part HHH. Rather, she was upholding its provisions by nullifying the Committee's recommendations restricting legislators' outside income, contained in the December 10, 2018 report, as exceeding the Committee's authority under Part HHH. The question in such circumstance was NOT the Legislature's intent, as it had NOT issued the report, but the Committee's intent by its report. Indeed, Justice Ryba had herself recognized this, on January 11, 2019, during argument on the January 7, 2019 order to show cause by counsel for Assembly Speaker Heastie to file an *amicus* brief in opposition to Mr. MacDonald's December 21, 2018 order to show cause for a preliminary injunction, in asking: "How would the Court determine what the intent of the Committee was if it were not taken all together? So, how would the Court determine that the salary increases are okay, but not the restrictions?" (VIDEO, at 45:33 mins).

The Committee's intent lay, quite obviously, in the report it had written – where the answer was clear: the restriction on outside income that was to take effect beginning January 1, 2020 was NOT severable from the first phase of salary increase to take effect on January 1, 2019. The Committee report itself explained the difference in the effective dates: "The Committee recognizes that a small number of Legislators have existing obligations and therefore provides this one-year window for Legislators to come into compliance." [R.57, at recommendation #14].

This was essentially what Mr. MacDonald said in response to *amicus* Assembly Speaker Heastie's severability argument. His May 17, 2019 opposing memorandum of law stated [R.337-338]:

> "…The committee made determinations on salary levels, stipends, and outside income that all purport to be phased in together by January 1, 2021. Together, the phases comprise one determination containing several unconstitutional acts by the committee… The enabling law does not have a severability clause that applies to the committee's report. … Moreover, the severability clause of the budget bill containing Part HHH cannot sever and rescue any of the committee's determinations. The severability clause in Part UUU only applies to the provisions of the statute, i.e., chapter 59, and not activities conducted under it. L. 2018, ch. 59, Part UUU. For the severability clause to apply to the committee's report itself, the report would need to be part of the law. But the report was never part of a bill subject to a vote. For the committee's report to be later incorporated into its enabling law and subject to that law's severability clause, the bill would have needed to be non-final when passed, which unequivocally violates the Article III, §14 of the New York Constitution."

Indeed, Mr. MacDonald had similarly alerted Justice Ryba to this by his March 25, 2019 affirmation opposing the March 11, 2019 order to show cause of Assembly Speaker Heastie's counsel for leave to file an *amicus* brief in support of Assistant Attorney General Lynch's January 28, 2019 dismissal motion. He there stated (at ¶26):

> "…in a desperate effort to keep the 2019 salary increase in place, Mr. Heastie introduces a new argument that the severability clause of the budget bill containing Part HHH should somehow sever and rescue the salary increase from all the other ultra vires actions of the committee. The severability clause only applies, however, to the provisions of the statute, and not activities conducted under it. For the severability clause to apply to the committee's report itself, the report would need to be part of the statute. But it was never part of a bill subject to a vote."[27]

---

[27] Mr. MacDonald's immediately following, closing ¶27 read:

> "The State has asserted the same interest in this litigation as Mr. Heastie. The Comptroller and his counsel, the Attorney General, have the same pecuniary interests in protecting their salary increases as Mr. Heastie. Mr. Heastie's participation, using taxpayer money, no less, serves no purpose other than giving the State a second chance at arguments and opportunities to delay that are fundamentally unfair to the Plaintiffs."

Suffice to point out that *amicus* Assembly Speaker Heastie never substantiated his severability argument before Justice Ryba by quoting the relevant language from the December 10, 2018 report – and, as clear from the Committee's "finding" #14 [R.57] and throughout the report – the Committee not only viewed the restriction of legislators' outside income legislative as a prerequisite to legislative salary raises, but justified the restriction as constituting the first "appropriate factor" it was required to "take into account" for any salary increase recommendation, *to wit,* "the parties' performance and timely fulfillment of their statutory and Constitutional responsibilities". Thus, it stated, by its "finding" #3 [R.54]:

> "The 'performance' of the legislature in its statutory and Constitutional activities…is to be interpreted and determined by this Committee. … Accordingly, we find that this first condition is met by the implementation of the Committee's limitations on stipends and outside earned income, that will advance the full-time nature of today's legislative duties to, as a body, satisfy fulfillment of their statutory and Constitutional responsibilities."

On appeal, Assembly Speaker Heastie, by his *amicus* brief (at pp. 27-30), not only reprised his misrepresentations as to severability, but purported that Justice Ryba's decision had made a "thorough severability analysis", which was an utter LIE. For his part, Assistant Solicitor General Paladino's respondents' brief (at pp. 33-35) gave endorsement to what Justice Ryba had done. Neither quoted the language of the Committee's December 10, 2018 report from which the indefensibility of the severability was evident.

POSTSCRIPT

Twelve days before the Appellate Division's December 27, 2018 "Memorandum and Order" in *CJA v. Cuomo*, the *CJA* plaintiffs made a final submission to the Appellate Division – a December 15, 2018 reply affidavit in further support of their November 27, 2018 order to show cause to disqualify the appeal panel for actual bias and other relief – a copy of which they furnished to then Attorney General Underwood, Assistant Solicitor General Paladino, and Assistant Attorney General Lynch. It annexed a copy of Mr. MacDonald's just-filed *Delgado* summons and complaint and identified the threshold issues of financial interest that would necessarily have to be confronted, both as to the judges who would be hearing the *Delgado* case and the Attorney General. It also annexed a copy of CJA's testimony at the Committee on Legislature and Executive Compensation's November 30, 2018 hearing, oral and written, dispositive of the Attorney General's duty to void its December 10, 2018 report based on the *CJA v. Cuomo* record. Because the affidavit so correctly diagnosed the situation, it is incorporated herein by reference.

April 25, 2021

Nevertheless, by an April 9, 2019 decision/order [R.278-282], Justice Ryba granted leave to Assembly Speaker Heastie to file his *amicus* brief in support of Assistant Attorney General Lynch's January 28, 2019 dismissal motion [R. 283-306]. By letter dated May 8, 2019 [R.277-306], *amicus* Assembly Speaker Heastie requested that this same *amicus* brief be considered in support of Assistant Attorney General Lynch's May 6, 2019 dismissal motion, which, by her June 7, 2019 decision/order, she granted [R.6].