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May 17, 2021

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

Re: *Delgado v. State of New York*  
**APL 2021-00080**

Dear Mr. Asiello:

Respondents the State of New York and Thomas P. DiNapoli, Comptroller of the State of New York, submit this letter in response to the Court's May 5, 2021 letter requesting the parties' comments on whether a substantial constitutional question is directly involved to support an appeal as of right. As explained below, the Court should dismiss this putative appeal because no substantial constitutional question is directly involved.

### **Background**

In 2018, the New York State Legislature passed a budget bill—signed by the Governor—(L. 2018, ch. 59, part HHH) (the “Enabling Act”) that created the Committee on Legislative and Executive Compensation and tasked it with examining the pay levels of legislators, statewide

elected officials, and commissioners of executive agencies, and determining whether they “warranted an increase.” After holding four public hearings, the Committee issued a report recommending pay increases for these public officials; for legislators, the Committee also recommended restrictions on certain activities and limitations on outside earned income. Under the terms of the 2018 statute, the Committee’s recommendations acquired the force of law when the Legislature did not reject or modify them within a specified time.

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

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

The Appellate Division, Third Department, unanimously rejected plaintiffs’ contentions in a comprehensive 10-page opinion. Because Supreme Court had dismissed the constitutional claims rather than issuing declaratory relief, the Appellate Division modified Supreme Court’s judgment by adding a declaration that the Enabling Act had not been shown to be unconstitutional, and, as so modified, affirmed the

judgment. 194 A.D.3d 98 (3d Dep't March 18, 2021). By notice of appeal dated April 19, 2021, plaintiffs have appealed as of right to this Court under C.P.L.R. 5601(b)(1).

**No appeal as of right lies under C.P.L.R. 5601(b)(1)**

An appeal as of right does not lie here because the Appellate Division's decision does not directly involve a substantial constitutional question. An appeal on constitutional grounds will be dismissed for want of substantiality when the position urged by the appellant is contrary to settled law. Arthur Karger, *Powers of the New York Court of Appeals* § 7:5 at 227 (3d ed. 2005). That is the case here.

**The unlawful delegation claim is insubstantial**

First, the unlawful delegation claim is insubstantial. The law of this Court has been settled for 45 years that the Constitution permits "the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature." *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976).

Here, the Enabling Act specified the operative standard, namely, that compensation for state officials must be "adequate." L. 2018, ch. 59, part HHH, § 1. The statute set forth non-exclusive factors for the Committee to consider in determining whether salaries warranted an increase. *Id.* § 2 (3). The "basic policy decision[]" that statewide officials should receive "adequate" compensation, as determined by relevant factors, was thus "made and articulated by the Legislature." *Matter of N.Y. State Health Facilities Ass'n v. Axelrod*, 77 N.Y.2d 340, 348 (1991).

The statute also provided reasonable structural safeguards: it required the Committee to submit its report directly to the Legislature, so the Legislature would have enough time, before the recommendations became effective, to exercise its prerogative to modify or reject them. L. 2018, ch. 59, part HHH, § 4(1),(2).

As the Appellate Division aptly observed, the statute at issue here is essentially identical to the statute upheld in *Ctr. for Judicial Accountability, Inc. v. Cuomo*, 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). In *Ctr. for Judicial Accountability*, the Appellate Division rejected an unlawful delegation challenge to a statute that empowered a 2015 Commission to recommend salary increases for judges. The statute in *Ctr. for Judicial Accountability* contained the same operative standard (that salaries be adequate), set forth essentially the same enumerated factors, and provided essentially the same safeguard as the 2018 statute at issue here.

The plaintiffs in *Ctr. for Judicial Accountability* attempted to appeal as of right to this Court, arguing that the Appellate Division wrongly decided the delegation-of-authority claim. Although the Appellate Division had squarely addressed that claim, this Court 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.

In the Appellate Division, plaintiffs did not dispute that *Ctr. for Judicial Accountability* was on all fours, but argued, unconvincingly, that it was wrongly decided. Plaintiffs argued (App. Div. Brief for Appellants [Br.] at 13-15) that the Enabling Act impermissibly delegated law-making power because it declared that the Committee’s recommendations, unless abrogated or modified by the Legislature, shall “supersede” inconsistent provisions of various statutes. L. 2018, ch. 59, part HHH, § 4(2). However, the 2015 statute upheld in *Ctr. For Judicial Accountability* contained the same superseding language. *See* L. 2015, ch. 60, § 1, part E, § 7. Because the Legislature made the basic policy decisions and provided adequate standards and safeguards, under settled delegation principles it could constitutionally confer on the Committee the power to make recommendations that would acquire the force and effect of law, including the effect of superseding inconsistent statutory provisions.

In passing the Enabling Act, the Legislature plainly understood that for any recommendations of the Committee to take effect, they would have to supersede existing statutory provisions. In other words, the Legislature recognized that if the Committee determined that public officers’ salaries warranted an increase, then its recommendations would

necessarily conflict with, and thus if passed into law supplant, existing statutes that fixed those salaries at lower levels. Thus, it was not the Committee that supplanted the pre-existing statutes but the Legislature itself, acting through the Enabling Act. Plaintiffs' position, if accepted, would render delegations to a recommending committee largely meaningless by preventing any recommendations from superseding pre-existing statutes. Since the Legislature could constitutionally empower the Committee to raise the salaries of public officers, then by necessary implication the Legislature had the concomitant authority to provide that the Committee's recommendations would supersede provisions of law that provided different salaries.

Attempting to distinguish *Ctr. For Judicial Accountability*, plaintiffs contended that the delegation of authority was unlawful because, under the New York Constitution, legislative compensation is required to be "fixed by law" (N.Y. Const., art. III, § 6), a phrase plaintiffs interpret to mean codified in a published statute passed by the Legislature itself. The Appellate Division properly rejected this contention, based on settled law. Contrary to plaintiffs' suggestions, the phrase "by law" is not limited to statutes. Courts have long understood the term "law" to embrace not just statutes but also rules, regulations, and ordinances adopted pursuant to, and within, legislatively-delegated authority. It is well-established that rules and regulations, if reasonable and within the scope of delegated authority, have the "force and effect of law." *Molina v. Games Mgt. Servs.*, 58 N.Y.2d 523, 529 (1983). Similarly, this Court has held that an ordinance of a common council, duly passed and "within the scope of the authority conferred upon it by the legislature, is a law." *Matter of Mutual Life Ins. Co.*, 89 N.Y. 530, 533 (1882). The constitutional phrase "fixed by law" unambiguously uses the term "law" "in a generic sense, as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force." *U.S. Fid. and Guar. Co. v. Guenther*, 281 U.S. 34, 37 (1930).

Thus, the settled, ordinary meaning of "fixed by law" is not limited to statutes but embraces any "controlling authority" that has "binding legal force." *Id.* That describes precisely the Committee's recommendations, which by the terms of the Enabling Act, acquired the

“force and effect of law” when the Legislature declined to abrogate or modify them.

### **The excess-of-authority claims are insubstantial as well**

Also insubstantial are plaintiffs’ claims that the Committee exceeded the scope of its authority with respect to the 2019 legislative salary increases and the changes to the compensation tiers for commissioners whose salaries were previously set under Executive Law § 169. The Appellate Division correctly rejected these claims, based on the analysis in *Boreali v. Axelrod*, 71 N.Y.2d 1, 11-14 (1987), and its progeny.

The Committee operated within its statutory mandate when it recommended a salary increase for members of the Legislature beginning in 2019. The Legislature established the Committee to “examine, evaluate and make recommendations with respect to adequate levels of compensation, non-salary benefits, and allowances” for, among others, “members of the Legislature.” L. 2018, ch. 59, part HHH, § 2(1) & (2). In making that determination, the Committee was empowered to consider all appropriate factors including rates of inflation, levels of compensation received by legislators of other states and the federal government, the overall economic climate, and the State’s ability to fund salary increases. *Id.* § 2(3).

The Committee’s detailed report shows that it considered those factors in concluding that a salary increase for members of the Legislature was warranted beginning in 2019. Among other things, the Committee found that the duties and responsibilities of the members of the Legislature were “amongst the most complex in the world;” that legislators’ salaries had failed to keep pace with inflation since 1999, when they last received a pay increase; that the State’s fiscal condition was strong; that New York legislators’ work product and time was roughly equivalent to that of legislators in Michigan, California and Pennsylvania, but that New York legislators in some instances received lower salaries; and that New York legislators faced relatively high costs of living. (R54-56.) Thus, in recommending a salary increase for members

of the Legislature beginning in 2019, the Committee did exactly what the Legislature authorized it to do.

In the Appellate Division, plaintiffs argued that the Committee exceeded its authority when it tied the salary increases to limits on outside activities and outside income commencing in 2020 and 2021, and Supreme Court agreed, annulling those limitations along with the associated salary increases for 2020 and 2021. That holding is not at issue here. Plaintiffs maintained that the 2019 salary increase must be annulled too, because the Committee allegedly predicated that increase on a “policy determination” that New York legislators will henceforth be “full-time” (Br. at 22). Plaintiffs misread the Committee’s report.

Nowhere in the report did the Committee purport to convert the New York Legislature into a full-time body. To the contrary, the Committee merely observed that New York’s Legislature operates, in reality, *more like* a full-time legislature compared to other state legislatures, considering its workload and productivity. (R56, ¶ 10.) This was an observation of practical reality, not a distinct recommendation that acquired the force and effect of law. Had the Committee sought to give its observation some legal status, it would have set it forth as a distinct recommendation. It did not do so. The Committee stopped short of recommending that members of the Legislature henceforth be restricted to working full time on legislative duties.

Nor did the Committee exceed its authority by simplifying the tiered salary structure in Executive Law § 169, by reducing the tiers from six to four and by recommending for Tier C and Tier D commissioners a range of salaries for 2019, 2020, and 2021, and giving the Governor discretion to set a precise salary within those ranges. (R.51, 61.) Plaintiffs take the myopic view that the Committee’s authority was limited to simply recommending a salary amount for each of the pre-existing six tiers of commissioners. The law on delegation of authority is not so cramped, however. It “does not require that the agency be given rigid marching orders.” *Matter of LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018). Rather, the Committee’s recommendations may permissibly “go beyond the text of its enabling legislation, so long as [they] are consistent with the statutory language and underlying

purpose.” *Matter of Acevedo v. New York State Dept. of Motor Vehs.*, 29 N.Y.3d 202, 221 (2017). Because the Committee’s actions further the Enabling Act’s basic policy goal of adequate compensation and do not conflict with any of its terms, the Committee was free to make “subsidiary policy choices consistent with the enabling legislation.” *McKinney v. Comm’r, N.Y. State Dept. of Health*, 41 A.D.3d 252, 253 (1st Dep’t), *appeal dismissed*, 9 N.Y.3d 891, *lv. denied*, 9 N.Y.3d 815 (2007).

Simplifying the tiered salary structure from six to four tiers directly furthered the Enabling Act’s overarching goal of adequate pay levels for the commissioners. The simplified structure did not implement a broad new policy; rather, it was a quintessential example of a subsidiary policy choice consistent with the enabling legislation’s basic policy goal. The Committee made a factual finding that the pre-existing six-tier structure no longer accurately reflected the differences in the size and scope of the Commissioners’ duties and responsibilities, and plaintiffs nowhere dispute that finding. Nor do they contest the finding that the simplified structure better reflects the Commissioners’ *current* duties and responsibilities and their “performance” of their “statutory and Constitutional responsibilities.” In arguing that the Enabling Act did not specifically authorize a restructuring of the tiers, plaintiffs state the law backwards. The question is whether anything in the Enabling Act *prohibited* the Committee from recommending a restructuring of the tiers to achieve the Act’s basic policy goal. Plaintiffs cannot identify any such restriction.

For similar reasons, the Committee did not range beyond its statutory mandate when it recommended salary ranges for Tier C and Tier D commissioners, with the specific salary determined by a schedule established by the Governor. Once again, this recommendation rationally furthered the goal of adequate compensation, as that term is used in the Enabling Act. The Act authorized the Committee, in recommending salaries, to consider not only the Commissioners’ performance of their statutory and Constitutional responsibilities but also “the ability to attract talent in competition with comparable private sector positions.” L. 2018 ch. 59, Part HHH, § 2(3). A single fixed salary could be reasonably seen to limit the talent pool, whereas having a range of salary options



affords greater flexibility in hiring and increases the ability to attract talent.

In sum, because no substantial constitutional question is directly involved in the Appellate Division's decision in this case, plaintiffs' appeal should be dismissed.

Respectfully submitted,

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