May 27, 2021

Via Hand Delivery

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

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

Dear Mr. Asiello:

I am writing regarding your examination of the Court's subject matter jurisdiction with respect to whether a substantial constitutional question is directly involved to support an appeal as of right under CPLR 5601(b)(1).

Appellants in the courts below directly challenged the constitutionality of Part HHH, Chapter 59 of the Laws of 2018 (the "2018 Law"). They raised a substantial constitutional question whether an unelected committee established to determine legislative, executive, and statewide elected official compensation could make determinations that "supersede, where appropriate, inconsistent provisions of section 169 of the executive law, and sections 5 and 5-a of the legislative law." L. 2018, ch. 59, Part HHH, § 4.2.

This case is not about a question regarding administrative law and the bounds of the delegation doctrine, i.e., an agency's power to administer laws passed by the Legislature through rulemaking, adjudication, or enforcement. On its face, the 2018 Law provides for an unelected body to make new laws superseding existing laws that violates the Constitution, which reserves all lawmaking to the Legislature.

Background

The 2018 Law created a committee ("Committee") to "determine whether, on January 1, 2019, the annual salary and allowances of members of the legislature, statewide elected officials, and salaries of state officers referred to in section 169 of the Executive Law, warrant an increase." *Id*. § 2.2

The Legislature gave the Committee a non-exhaustive list of factors to consider limited to determining whether compensation amounts warranted an increase. *Id*. § 2.3 The Legislature did not make any policy determination whether legislators should be paid full-time salaries. The Committee, however, charged itself with implementing a comprehensive new compensation scheme intended to ensure "legislator performance" (Record on Appeal [R] at 54).

The Committee determined "legislator performance" includes on-time budgets passed each year (without any regard to their positive or negative financial impact on the state), which would be being rewarded with a salary increase the next January (*Id*.). It also concluded that legislator performance could be ensured, and ethics reforms achieved, by limiting allowances and prohibiting and capping legislator outside income (*Id*.).

The 2018 Law did not give the Committee authority to make recommendations that superseded Executive Law sec-

tions 40 (Comptroller salary) or 60 (Attorney General salary). Regardless, the Attorney General and State Comptroller salaries went up effective January 1, 2019 and rose to $220,000 on January 1, 2021 (R61).

In addition, the Committee granted itself additional legislative power, purporting to re-write Executive Law § 169 to delegate to the Governor the Legislature's power to set certain state official salaries (R20). As of January 1, 2019, salary levels for section 169 Executive Law public officials were adjusted upwards and re-grouped into four tiers from six. Two tiers have salary ranges instead of fixed amounts and the Committee granted the Governor discretion to set specific amounts within those ranges.

The Committee published its report on December 10, 2018 (the "Report")(R44). The Legislature took no action on the Report (R31). The Report's recommendations had the force of law and superseded existing statutes on January 1, 2019. L. 2018, ch. 59, Part HHH, § 4.

Meanwhile, Plaintiffs filed their declaratory judgment action seeking to have the 2018 Law declared unconstitutional and the Committee's actions in the Report nullified. In April 2019, Plaintiffs filed an amended complaint that the Defendants moved to dismiss (R178). On June 7, 2019, the Supreme Court entered its decision and judgment.

First, the Supreme Court concluded Plaintiffs did not raise sufficient violations of the Open Meetings Law to require nullifying the Committee's actions (R10). Second, the Supreme Court concluded the Committee was not an agency authorized by the 2018 Law to make rules or final decisions in adjudicatory proceedings subject to the State Administrative Procedures Act (R12).

Third, the Supreme Court concluded the Legislature could delegate the power to the Committee to make certain determinations contained in the Report (R14). The Court, however, determined that the Committee exceeded its authority when it made recommendations prohibiting and limiting legislator outside income (R15). It determined the Legislature did not grant the Committee authority to make recommendations that supersede the Public Officers Law (R18). Accordingly, the Court nullified all Committee recommendations relating to Legislator salary increases and bonuses in 2020 and 2021. It left in place changes to the legislator salaries and allowances effective January 1, 2019 (R18-19).

Appellants appealed. The Appellate Division, Third Department, affirmed and modified the Supreme Court judgment to declare the 2018 Law constitutional.

The Constitution and the rule of law mandate review.

On June 3, 2021, the New York State Bar is conducting a program titled "Advocating for the Rule of Law" and describes the rule of law for one its sessions as depending "on the evenhanded application of well-publicized laws to a citizenry to whom they are responsible – a citizenry actively engaged in making those laws." New York State Bar Association, "Advocating for the Rule of Law, June 3, 2021 (https://nysba.org/events/advocating-for-the-rule-of-law). To that end, the Constitution makes the Legislature responsible for making laws. N.Y. Const., art. III, § 1. And it contains several provisions to ensure laws are well-publicized. See, e.g., N.Y. Const., art. III, § 10, 13, 14, 15, 16, and 22. It follows that any act to amend or modify and existing law must also be well-publicized.

Salaries are fixed for legislators by Legislative Law § 5 and for the Comptroller and Attorney General Executive Law §§ 40 and 60 respectively. Elected and other state public

officials cannot receive more than the amounts set out in the Legislative and Executive Laws without those laws being vacated or superseded by the Legislature. Neither happened. Instead, an unelected committee made recommendations that purported to supersede existing laws.

None of the salary provisions in the Legislative and Executive Laws today reflect the committee recommendations under the 2018 Law. Amounts currently paid to legislators and other public officials conflict with the laws on the books. The Legislature has neither vacated nor amended Legislative Law §§ 5 and 5-A, or Executive Law §§ 40, 60, and 169. Yet a committee's recommendations purported to supersede those laws. The 2018 Law and the Report that followed violate the principles of the rule of law as embodied by the Constitution. There cannot be a more substantial Constitutional question than how existing laws can be modified or amended without following the Constitution's prescriptions.

Settled delegation doctrine is not being challenged.

This is not a case that challenges this Court's precedent regarding the delegation doctrine. Delegation remains available to lawmakers through properly drafted laws. This case only addresses a law that improperly ceded the Legislature's lawmaking power to an unelected committee to make recommendations that "shall supersede, where appropriate, inconsistent provisions" of existing laws. L. 2018, ch. 59, Part HHH, § 4.2. This Court has never addressed the Legislature's ability to cede its power in such a manner.

It is well-settled that the Legislature's *lawmaking* functions cannot be delegated. "Because of the constitutional provision that '[t]he legislative power of this State shall be vested in the Senate and the Assembly' (NY Const, art III, § 1), the Legislature cannot pass on its law-making functions to other bodies." *Matter of Levine v. Whalen*, 39 N.Y.2d 510,

515 (1976). Here, however, the 2018 Law's plain words delegate lawmaking to the Committee. The Committee's recommendations "shall supersede, where appropriate, inconsistent provisions of section 169 of the executive law and sections 5 and 5-a of the legislative law ..." L. 2018, ch. 59, Part HHH, § 4.2.

Unelected bodies cannot be delegated legislative power to enact recommendations that can supersede inconsistent provisions of law. There is no authority in the Constitution or in this Court's precedent for the idea that an unelected body can make rules or regulations that supersede laws passed by the Legislature. Administrative agencies, commissions, and committees may only work within the framework of existing law enacted by the Legislature. And the Constitution contains specific prescriptions for the Legislature to enact those laws.

The 2018 Law violates the Constitution's legislative prescriptions.

Article III, Section 1 of the New York State Constitution states that the legislative power "shall be vested in the Senate and Assembly." Article III, Section 13 provides that "no law shall be enacted except by a bill." Article III, Section 9 establishes that "a majority of each house shall constitute a quorum to do business." Article III, Section 14 states that no bill shall be passed "or become law" except by the vote of a majority of the members elected to each branch of the Legislature. Finally, Article IV, Section 7 of the Constitution gives the Governor the authority to veto any bill.

Despite the Constitution's directions and prohibitions, the Committee stated that the Legislature and the Governor granted it the power to re-write the statutes reserved exclusively to the Legislature: "This Committee has been empowered to take any action with respect to compensation that a

statute could effectuate" (R63). Indeed, the 2018 Law purported to have the Report's recommendations supersede existing laws, i.e., become laws themselves, without a quorum, a vote, or presentment to the Governor.

The 2018 does not contain the mechanisms the Constitution requires for the Report's recommendations to become new laws that supersede existing laws. The 2018 Law contained no provision for putting the Report's recommendations into a written bill, convening a quorum, and conducting a vote as the Constitution requires.

Moreover, the Committee's recommendations could become law if less than a majority of Assembly members (75 of 150) failed to show up in Albany in December, when the Legislature typically is not convened. There is no precedent for the Legislature being able to pass new laws superseding and amending old ones just by not showing up.

For the same reasons, the Niagara County Supreme Court last year ruled unconstitutional a law creating the New York State Public Campaign Finance Commission that used similar statutory language to empower an unelected commission to make recommendations superseding the Election Law (App. Div. Appellants Brief [Br.], Addendum [Add.] at 6-7). "Each recommendation made to implement a determination pursuant to this act shall have the force of law, and *shall supersede, where appropriate, inconsistent provisions of the election law*, unless modified or abrogated by statute prior to December 22, 2019." L. 2019, ch. 59, Part XXX § 1(5)(emphasis added).

The Niagara County Supreme Court concluded correctly that the Legislature transgressed the line between administrative rule-making and legislative action. It noted the Constitution reserves solely to the Legislature the power to cre-

ate new law and repeal existing law. The Legislature reserving itself the right to modify or abrogate the commission's laws did not validate the process. And the Legislature's vote to pass the public campaign finance law could not be deemed to ratify blindly the commission's recommendations superseding provisions of the Election Law that could not be known when the law was passed (Br. Add. at 7). The court further noted "to repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice" (*Id*., quoting *Moran v. LaGuardia*, 270 N.Y. 450, 452 (1936)).

In *Moran v. Laguardia*, this Court rejected the idea that a concurrent resolution of the Legislature could be effective to *modify* or repeal a statutory enactment. Regarding such a concurrent resolution, this Court stated

> A concurrent resolution of the two houses is not a statute. A concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body. It resembles a statute neither in its mode of passage nor in its consequences. The form of a bill is lacking and readings are not required. It does not have to lie on the desks of members of the Legislature for three legislative days. But more important, its adoption is complete without the concurrent action of the Governor, or lacking this, passage by a two-thirds vote of each house of the Legislature over his veto.

Matter of Moran v La Guardia, 270 N.Y. 450, 452 (1936)(citations omitted).

The 2018 Law fails to set out the mechanisms necessary for legislative equivalency as described in *Moran* and mandated by the Constitution. The only legislative equivalent could have been the 2018 Law itself. But if so, then the 2018

Law was not a final bill as required by the Constitution. N.Y. Const., art. III, § 14. The 2018 Law required the additional work of the Committee to be complete and final. And the Legislature certainly did nothing to fix compensation by law for themselves and other officers as required by the Constitution. N.Y. Const., art. III, § 6; N.Y. Const. art. XIII, § 7.

The Committee raised a substantial issue when it exceeded its authority.

The Report states, "In all cases, where employment is not prohibited, a hard cap of 15% of legislative base salary shall be imposed on outside earned income to ensure the primary source of earned income is from the state" (R59), i.e., full-time job. The Committee further found that "the consideration of compensation cannot be complete without considering outside income, its role in overall legislative compensation and the ability of Legislators to fulfill their responsibilities to serve the public in a focused and ethical manner" (R57).

The driving factor in determining the legislator salary amount was the Committee's desire to make legislative pay each legislator's primary source of income. It bundled the salary increase into its policy determination to make legislators full-time by eliminating most allowances and outside income. Nothing in the 2018 Law, however, conveys that the Legislature made a policy determination that Legislators should be full-time.

The Committee similarly exceeded its limited authority for Executive Law § 169 Commissioners—to determine whether their salaries warranted an increase. Instead, the Committee made a policy decision to restructure the tiers to "reflect the current sense of the importance of the various agencies governed by these public servants" and provided the Governor with a new ability to determine salaries within ranges in two of the tiers (R37).

While the Legislature is not confined to providing bodies executing its laws "rigid marching orders" (*Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018), the Legislature in the 2018 Law gave the committee narrow instructions. It was only to determine whether salaries warranted increases.

The committee had no room to roam "to fill in details and interstices and to make subsidiary policy choices consistent with the enabling legislation." *McKinney v. Commissioner of N.Y. State Dept. of Health*, 41 A.D.3d 252 (1st Dept. 2007). The Legislature was capable of asking the committee to restructure the tiers in section 169 in plain language, but it did not. Nor did it provide for the Governor to have discretion within the tiers that did not exist before the 2018 Law.

In each category of legislator and commissioner compensation the Committee exceeded the scope of its authority, beyond any power the Legislature may have lawfully delegated. This is a substantial issue that this Court should address.

Conclusion

The committee or commission mechanism the Legislature has deployed in the recent past to have unelected bodies enact legislation that supersedes laws passed by the Legislature does violence to the constitutional order put in place by the people of New York. The Legislature, for reasons unexplained to the people, has determined on several occasions to abdicate its responsibility to legislate. The Legislature having abdicated its responsibility, this Court must take up its

role, exercise its jurisdiction over this appeal, and enforce the provisions of New York's Constitution to declare Part HHH, Chapter 59 of the Laws of 2018 unconstitutional.

Yours truly,

Cameron Macdonald

cc: Victor Paladino (*via First Class Mail*)

NEW YORK STATE
COURT OF APPEALS

Roxanne Delgado, *et al.*,

Appellants,

v.

Albany County Supreme Court
Index No. 907537-18

State of New York, *et al.*,

Respondents.

AFFIDAVIT OF SERVICE

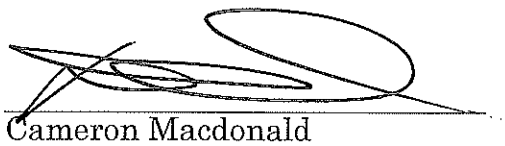
I, Cameron J. Macdonald, hereby certify that on May 27, 2021, I served:

Appellants' Letter to Chief Clerk John P. Asiello

by depositing it enclosed in a first-class postpaid wrapper, addressed to counsel for the respondents:

Victor Paladino
Attorney General
The Capitol
Albany, New York 12224

in a post office under the exclusive care and custody of the United States Postal Service within the United States.



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