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Court of Appeals

of the

State of New York

ANDREW M. CUOMO,

Respondent,

– against –

NEW YORK STATE COMMISSION ON ETHICS
AND LOBBYING IN GOVERNMENT,

Appellant.

BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF APPELLANT NEW YORK STATE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT

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No party's counsel has contributed content to the proposed brief of *Amici* or participated in the preparation of the brief in any other manner; no party or party's counsel has contributed money that was intended to fund preparation or submission of the brief; and no person or entity, other than the movants or their counsel, has contributed money that was intended to fund preparation or submission of the brief.

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF THE *AMICI*. 1

II. STATEMENT OF THE ISSUES PRESENTED. 3

III. SUMMARY OF THE ARGUMENT. 3

IV. STATEMENT OF THE CASE. 7

A. New York Has an Ongoing Serious Risk of Corruption. 7

B. Prior Efforts Have Failed to Deter Corruption and Enforce Ethics Laws, and Hold Bad Actors Accountable. 10

V. ARGUMENT 16

A. The Court Misconstrued the Power of the Governor. 16

B. The Appointment Process in the COELIG Statute is Constitutional. 18

1. The Inclusion of Legislative Appointees Is Constitutional. **20**

2. The Fact that Private Parties Have a Role in the Appointment Process Does Not Violate the Constitution. **23**

3. The Lack of Removal Power by the Governor is Not Dispositive. **24**

C. The Statute Strikes a Fair Balance between Legislative and Executive Power. 26

VI. CONCLUSION 29

TABLE OF AUTHORITIES

Cases — Page(s)

Bourquin v. Cuomo,

85 N.Y.2d 781 (1995) 19

Delgado v. State of New York,

39 N.Y.3d 242 (2022) 26, 27, 28

Lanza v Wagner,

11 N.Y.2d 317 (1962) 23

LaValle v. Hayden,

98 N.Y.2d 155 (2002) 19

Lavine v. State of New York,

78 Misc. 3d 744 (N.Y. Sup. Ct. 2023) 23

Overstock.com v. N.Y. State Dep't of Taxation and Fin.,

20 N.Y.3d (2013) 19

Soares v. State of New York,

68 Misc 3d 249 (Sup. Ct. Albany Cnty 2020) 22, 25

Stefanik v. Hochul,

___ NY3d ___, 2024 NY Slip Op 04236 (Aug. 20, 2024) 19

Trump v. United States,

603 U.S. ___ (2024) 5

Statutes

AR Code § 7-6-217 22

GA Code § 21-5-4 22

IA Code § 68 22

N.Y. B.C.L. § 606 17

N.Y. Constitution, Article IV 17

N.Y. Educ. § 101 18

N.Y. Educ. § 202 18

N.Y. Elec. § 3-100 ..... 21, 22

N.Y. EPTL § 8-1.4 17

N.Y. Exec. § 63 17

N.Y. Pub. Auth. § 1020-d 21

N.Y. Pub. Health § 230 23

N.Y. Pub. Off. § 74 1

N.Y. Rac. Pari-M § 102 21

N.Y. Gen. Bus. § 352 17

N.Y. Constitution, Article V, § 1 17

SC Code § 13-310 22

I. Identity and Interest of the *Amici*.

The *Amici* are Citizens Union, Committee to Reform the State Constitution, Common Cause NY, New York City Bar Association, NYPIRG, Reinvent Albany and the Sexual Harassment Working Group. These organizations have a long history of promoting transparency and accountability in government and in advocating for mechanisms which seek to ensure that state and city governments in New York operate in an ethical manner free from corruption.

Specifically, the *Amici* have been long-time advocates for the creation of an entity at the state level that could effectively enforce the State Code of Ethics[1] and other policies designed to promote transparency and accountability, and deter breaches of the public trust, abuse of power, and other forms of official corruption in all branches and instrumentalities of New York State government.[2] In pursuit of this goal, many of them have testified before legislative committees and met with Legislative leaders, Governors and members of their staffs over a number of decades. They provided input on the relevant issues in connection with the creation of the Joint Commission on Public Ethics ("JCOPE"), have studied how JCOPE had performed its responsibilities, and have publicly and in meetings urged the

[1] N.Y. Pub. Off. § 74

[2] In 2011 former Governor Cuomo signed legislation creating the Joint Commission on Public Ethics ("JCOPE"), which was an unsuccessful attempt to create such an entity.

Governor and Legislative leaders to either strengthen or replace JCOPE with a more effective entity.

A major focus of their study and advocacy has been the adoption of a method of appointing the members of the ethics entity that would assure their independence from the public officials and lobbyists they regulate. Because breaches of the public trust and abuses of power that violate the State Code of Ethics often occur at the highest levels of state government, the *Amici* have argued that it is problematic to give exclusive appointment power to the Governor and Legislative leaders because they may in fact, and certainly in public perception, lack the incentive to appoint independently-minded members ready and willing to act without fear or favor.

While they were unsuccessful in convincing the Governor and the Legislature to create a body where public officials appoint a selection committee which in turn appoints the members, they were actively involved in the discussions which led to the creation of the New York State Commission on Ethics and Lobbying in Government ("COELIG"). They believe COELIG is an improvement on JCOPE and that the process for appointing COELIG's Commissioners, while in need of much further improvement, is an advance on the JCOPE process.[3]

[3] Some of the *Amici* supported a constitutional amendment that would have provided that a majority of the members of the entity to replace JCOPE would be appointed by the Chief Judge and the Presiding Justices of the Appellate Divisions. This approach was modeled on the

II. Statement of the Issues Presented.

A. Was the Court Below in Error When It Held that the Power of the Governor to Enforce the Law is Exclusive under the Constitution?

B. Did the Court Below Correctly Analyze the Significance of the Ability of Legislative leaders to Appoint Members to the Commission?

C. Did the Court Below Correctly Analyze the Significance of the Law School Deans Performing a Screening Function?

D. Did the Court Below Correctly Analyze the Significance of the Governor's Inability to Remove Commission Members?

E. Did the Court Below Correctly Analyze the Fair and Reasonable Balancing of Executive and Legislative Power that Underlies the COELIG Structure?

III. Summary of the Argument.

When the Governor and the Legislature agreed on the statute creating COELIG they were not operating on a clean slate. For decades New York had been suffering from an epidemic of corruption and misconduct, including multiple investigations into harassment and discrimination, which led to the resignations and/or indictment of two Governors, a Lieutenant Governor, an Attorney General,

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Commission of Judicial Conduct where a majority of the commissioners are appointed by the Governor and Legislative leaders. Some of the *Amici* opposed the COELIG legislation on the ground that vetting by the law school deans was not adequate to achieve the fundamental goal of independence, and that once the COELIG legislation was passed, the burden of convincing the Governor and the Legislature to revisit the issue would be too great.

a Comptroller, an Assembly Speaker and two Senate Majority Leaders. At the same time, the entity responsible for deterring and policing ethics and corruption – JCOPE – was widely perceived to be a failure both because of deficiencies in the underlying statute and the ways in which former Governor Cuomo sought to influence its decisions.

In certain ways, COELIG is similar to JCOPE, and former Governor Cuomo signed the legislation creating JCOPE presumably believing it was constitutional. Pursuant to that legislation, the Governor could only appoint a minority of its members; the Legislative leaders appointed a majority. Further, the Governor could remove no members absent agreement with the Lieutenant Governor, and even then, could only remove the minority of members the Governor and Lt. Governor had appointed.

JCOPE, however, had a number of significant flaws that radically undercut its ability to maintain public confidence in government. For example, while COELIG now operates by majority vote with an odd number of members, the JCOPE statute allowed two of JCOPE's 14 members, who were appointed by the Governor, to veto an investigation of or finding of ethics law violation by the Governor or his staff. Whereas the COELIG Chair is now elected by its members, the JCOPE Chair was appointed by the Governor to serve at his or her pleasure. While COELIG members are now vetted by the Deans of the New York State law

schools, the Governor and the Legislature were free to appoint JCOPE Commissioners lacking a commitment to vigorous ethics enforcement and unwilling to take action against the political interests of their appointing authority. Whereas in order better to protect their independence COELIG members are protected from removal by their appointing authority, in JCOPE Commissioners could be removed for what that appointing authority in its discretion perceived to be good cause.

In finding a number of these corrective measures to be unconstitutional, the Court below wrongly assumed that the New York Governor has exclusive executive authority comparable to that suggested by recent decisions of the Supreme Court of the United States for the President of the United States. *See, e.g., Trump v. United States*, 603 U.S. __ (2024) (law enforcement is a core exclusive responsibility of the President and his or her interactions with the Department of Justice are therefore absolutely privileged.) New York, however, does not have a unitary executive. Under the New York Constitution, executive power, including law enforcement power, is widely dispersed. The Attorney General has broad law enforcement responsibility. The Comptroller has important investigative and audit responsibilities. Further, the Board of Regents creates and enforces education policy as established by law. None of these entities or individuals report to, or are

appointed by, the Governor. The failure of the Court below to recognize this important distinction tainted its analysis of the relevant issues.

There is precedent for the Legislature appointing members of entities purporting to reside in the Executive Branch. That precedent includes entities where the Governor's appointees constitute a minority of its members, as was the case with JCOPE. Similarly, the inability of the Governor to unilaterally remove members of such an entity finds precedent, including once again in connection with JCOPE. As discussed below, other statutes provide private individuals and organizations with more control over appointments to state entities than is the case with the limited role given to Law School Deans in the appointment process for COELIG.

In any event, in reforming JCOPE the Governor and the Legislature came together in agreeing on a fair balance between legislative and executive power that is entirely consistent with the analysis of Chief Judge Rowan Wilson's concurring opinion in *Delgado v. State of New York*, 39 N.Y.3d 242 (2022). Importantly, COELIG has no power to make law. It does have the power to investigate and report findings of violation of the State Ethics Law by both executive branch and legislative branch public officials. It regulates lobbying – a subject of concern for both the legislative and executive branches. There can be no substantial question that a sharing of appointments between the legislative and executive branches is

appropriate. And when the legislative appointments are divided between majority and minority, a 6-5 split to maintain an odd number of members is entirely reasonable. So too are the steps taken to increase the actual or perceived independence from political considerations of the COELIG Commissioners. The appointees of both branches are subject to the law school dean vetting process and are equally protected from removal by the appointing authority.

IV. Statement of the Case.

A. New York Has an Ongoing Serious Risk of Corruption.

In the past 20 years, New York State has experienced an epidemic of corruption and serious ethical lapses involving its elected officials, which have undermined the public's confidence in its government. These scandals have involved more than 30 elected officials,[4] ranging from members of the Legislature to Governors of the State. A chronology of just some of these cases, which rarely resulted from actions of JCOPE, demonstrates the severity of the problem.

- In 2006 the State Comptroller, Alan Hevesi, was forced to resign after pleading guilty to criminal charges relating to his misuse of government resources for his personal benefit. Then in 2011 he was imprisoned after pleading guilty to

[4] *See* "The Many Faces of New York's Political Scandals," Susanne Craig, William K. Rashbaum and Thomas Kaplan, New York Times, May 3, 2016. (available at https://www.nytimes.com/interactive/2014/07/23/nyregion/23moreland-commission-and-new-york-political-scandals.html).

corruption charges relating to his oversight of New York State's public pension funds.

- In 2008 Governor Eliot Spitzer was forced to resign after he came under federal investigation for his use of prostitutes while purportedly traveling on government business.
- In 2009 former State Senate Majority Leader Joseph Bruno was indicted on federal corruption charges.
- In 2010 Governor David Paterson was fined $62,125 for his receipt of free World Series tickets and then lying under oath to cover up what he had done.
- In 2013 State Senate Majority Leader Malcolm Smith was indicted on federal corruption charges.
- In 2013 Vito Lopez, Chair of the Assembly Committee on Housing, was forced to resign because of his sexual harassment of staff members.
- In 2014 Assemblyman Dennis Gabryszak was forced to resign because of his sexual harassment of staff members.
- In 2015 Speaker of the Assembly Sheldon Silver was indicted on federal corruption charges.
- In 2015 State Senate Majority Leader Dean Skelos was indicted on federal corruption charges.

- In 2016 Todd Howe, an unregistered lobbyist who had worked for both Governor Andrew Cuomo and his father, pleaded guilty to federal public corruption charges involving bribery in connection with State projects.
- In 2016 two close associates of the Governor, his former Executive Deputy Secretary, Joseph Percoco, and SUNY Poly President, Alain Kaloyeros, were indicted on federal corruption charges in connection with their involvement in State projects.
- In 2018 State Attorney General Eric Schneiderman was forced to resign in the face of allegations of physical abuse of multiple women.
- In 2021 Governor Cuomo resigned after multiple allegations of sexual harassment. He also was being investigated over the underreporting of deaths in nursing homes during the pandemic.
- In 2022 Lieutenant Governor Brian Benjamin resigned after being indicted on federal corruption charges.

The *Amici* recognize that convictions were not sustained in some of these cases because of issues relating to the applicability of federal law. However, the facts of each of these cases demonstrated serious misconduct involving significant New York political figures. The fate of these federal prosecutions, and the epidemic of ethical failings which New York has experienced, make clear that it is

important that New York have its own effective mechanisms to deter corruption and enforce ethics laws, and not only rely on federal law.

A key part of COELIG's responsibilities is to reinforce public confidence in government and to deter corruption,[5] which are two of the main goals of government ethics regulation. Indeed, the State Code of Ethics, along with associated financial disclosure requirements and enforcement provisions, and education and training on how to build an ethical culture in government, are the first line of defense against corruption. Because ethical rules are designed to avoid even the appearance of corruption, one crosses the line of unethical behavior well before one crosses the line of illegal corrupt behavior.

B. Prior Efforts Have Failed to Deter Corruption and Enforce Ethics Laws, and Hold Bad Actors Accountable.

In 2011 Governor Cuomo signed a law creating JCOPE. Like COELIG, a majority of its 14 members were appointed by Legislative leaders. Over time, however, it became clear that because of both structural defects embedded in the statute and efforts by Governor Cuomo to influence how it operated, JCOPE was simply incapable of providing the necessary oversight to promote public confidence in state government.

[5] "The Nature and Purpose of Ethical Rules for Government Officials", by Evan Davis in Ethical Standards in the Public Sector, 3rd ed., J. Rodgers and E. Davis editors, ABA Publishing, 2022.

One of the most fundamental deficiencies in the statute was the restrictions placed on JCOPE's ability to investigate the Governor, the Comptroller, the Attorney General, members of the Legislature, candidates for the State Legislature, and employees of the Executive Branch and Legislature. These restrictions are commonly referred to as the "minority veto." While others could be investigated if approved by a majority vote of the Commission, these select office holders could be investigated only if certain plainly protective requirements were satisfied. Statewide elected officials and their appointees could only be investigated if two of the three Governor's appointees were part of the majority and were members of the same political party as the person proposed for investigation. Where the potential subject of the investigation was related to the Legislature, two of the votes in the majority had to come from commission members who were appointees of the Legislative leaders of the same party as the person to be investigated.

The appearance that partisan considerations could protect elected officials and their appointees from scrutiny was only one of JCOPE's flaws. The unfettered right of the Governor and Legislative leaders to appoint whomever they wanted and to remove them if certain vague criteria were satisfied, and the fact that the Governor appointed the Chair to serve at the Governor's pleasure, created still more concerns as to how independent JCOPE would be. Even more questions about its independence from the Governor were raised when JCOPE's first three

Executive Directors had previously served in senior positions working for Governor Cuomo.[6]

An incident in 2019 also demonstrated that the Governor not only had access to the deliberations of the Commission, but was prepared to use that access to influence the Commission. JCOPE had been considering whether to open its own investigation of Joseph Percoco after he had been convicted on Federal corruption charges. After the Governor improperly obtained information about Commission deliberations, he contacted the Speaker of the Assembly to complain that one of his appointees – Julie Garcia – had voted in favor of pursuing the investigation.[7] Moreover, an independent report concerning JCOPE's approval of the book deal at issue in this case identified significant failures by JCOPE in approving the arrangement on an expedited basis, an approval which did not even go to the Commission for its consideration.[8]

Governor Cuomo's apparent willingness to interfere with efforts to deal with corruption was also demonstrated by his actions and those of his top aide in

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[6] *See* "Cuomo signals a 'modification' in increased wage for ag workers," Albany Times Union, March 22, 2016.

[7] *See* "Seiler: Julie Garcia and the price we pay," The Daily News Online, August 27, 2021. In a subsequent investigation of the leak by the State Inspector General, who also had worked for Governor Cuomo and who reported to his top aide, apparently neither the Governor nor the Speaker were interviewed. Not surprisingly the investigation did not identify what had occurred. Id.

[8] *See* Hogan Lovells Report at 3 (available at https://ethics,ny.gov/system/files/documents/2022/07/hogan-lovells-jcope-report_2022.07.pdf

connection with the Moreland Act Commission, which the Governor himself had created. When Governor Cuomo announced its creation in 2013, he made clear that the Commission would be totally independent and could investigate potential wrongdoing anywhere in the State government, including in the Governor's own office. The reality, however, was very different. Acting through his top aide, the Governor repeatedly pressured the Commission to withdraw subpoenas and not investigate anything that might touch the Governor's office. Then, 18 months later, the Governor abruptly used his power to shut down the Commission, a decision which itself became the subject of an investigation by the Southern District United States Attorney.[9]

Finally, as referenced above, Governor Cuomo, plagued by various scandals, resigned in 2021. So, in 2022, based on the real-world example of seeing a Governor frustrate efforts to enforce, investigate, and hold bad actors accountable for misconduct, and extreme public skepticism as to the independence of JCOPE – particularly if it involved investigations of the Governor's Office – the new Governor and the Legislature worked together to create a new entity to replace JCOPE. The *Amici* were actively involved in providing input into this process.

[9] *See* "Cuomo's Office Hobbled Ethics Inquiries by Moreland Commission," New York Times, July 23, 2014. No charges ultimately were filed against Governor Cuomo based on his closure of the Commission.

Both before and during this process, some of the *Amici* proposed a variety of appointment mechanisms that would have more cleanly eliminated the ability of the Governor and Legislative leaders to be involved in the appointment process, and that would have been stronger than the statute at issue in this case. For example, the City Bar Association suggested an appointment process with power conferred on a variety of parties, including the Chief Judge, the Comptroller and the Attorney General, while recognizing that this kind of structure might require a constitutional amendment, given the express constitutional restriction on assigning non-judicial duties to Judges.[10] Various *Amici* also proposed that the Chief Judge and the Presiding Justices of the Appellate Division make the majority of appointments to the Commission.[11]

In a letter sent on their behalf during the negotiating process, a majority of the *Amici* proposed the creation of a selection committee where the Governor would only select one of seven members, and that committee would make the appointments to a new state ethics commission.[12] The *Amici* also understood that a constitutional amendment may have been required to overcome the Legislature's

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[10] New York City Bar, Report by the Government Ethics and State Affairs Committee, p.16. (available at https://s3.amazonaws.com/documents.nycbar.org/files/2020852-JCOPE10YearReport.pdf).

[11] One of the *Amici* proposed the vetting process by the Law School Deans, but that proposal was not supported by other *Amici*.

[12] *See* March 23, 2022 letter. (available at https://reinventalbany.org/wp-content/uploads/2022/03/Memo-to-Legislature-on-Ethics-Commission-Appointment-March-23-2022.pdf).

position that the Speech and Debate Clause precluded giving the new entity direct power to penalize legislators. For that reason, the *Amici* did not press giving the new entity that power, which now rests with the Legislative Ethics Commission. At no point did the *Amici* believe that the selection committee appointment process which they had suggested, or the statutory process as ultimately passed, would require a constitutional amendment.

The *Amici* view the final version of the selection process for COELIG as providing insufficient independence of the Commission because it still leaves the selection of commissioners in the hands of the Governor and Legislative leaders. Because, however, the statute eliminates the "minority veto," empowers the Commission to appoint its own Chair, includes appointees from the Comptroller and Attorney General, authorizes the Commission to determine whether the criteria for removal of a Commissioner are satisfied, and adds the protection of the Law School Dean screening process, it is an improvement over JCOPE. And, critical to COELIG being an effective protector against corruption and unethical conduct by our public officials, it has the necessary power to impose penalties. Without that power it risks becoming a "toothless tiger." The *Amici* believe that the COELIG statute plainly is constitutional, and that a contrary ruling would be inconsistent with the fundamental structure of how power is allocated under New York's Constitution and implementing legislation.

The *Amici* also believe that this case needs to be resolved as quickly as possible. Given the decisions below, the operations of COELIG have been severely hampered. As a result, for example, proceedings involving complaints by state employees concerning sexual harassment have been delayed.[13] These delays compound the harm that these victims have experienced. It is in the public interest that the cloud over COELIG's legitimacy be removed so that New York can have a fully functioning ethics agency for there to be public trust in government.

V. Argument

A. The Court Misconstrued the Power of the Governor.

Central to the opinion of the Court below was its assumption that the Governor's duty to faithfully execute the laws conferred on the Governor provides an exclusive enforcement authority that was usurped by the COELIG structure. That Court held this structure "usurps the Governor's power to ensure the faithful execution of the applicable ethics laws." It found the involvement of legislative appointees in the enforcement of the ethics laws particularly objectionable. It wrote, "[W]hile the Legislature may delegate many of those powers that it "may rightfully exercise itself" (Delgado v. State of New York, 39 NY3d 242, 251 [2022] [internal quotation marks and citation omitted]), it may not usurp the power

[13] *See* "Judge ices ethics commission's case against former Senate IDC leader," Times Union, July 10, 2024 (available at https://www.timesunion.com/capitol/article/judge-ices-ethics-commission-s-case-former-senate-19505571.php)

of the executive by placing upon itself that power conferred upon the executive to faithfully execute the laws." This overblown view of gubernatorial exclusive authority tainted the analysis of the extent to which the COELIG statute's appointment provisions intruded on the Governor's powers.

While the New York Constitution does include among the Governor's duties the responsibility to "take care that the laws are faithfully executed,"[14] it actually disperses the responsibility for enforcing those laws to several entities that the Governor does not control. For example, under Article V, section 4 of the Constitution, it is the Attorney General, a separately elected official who is not subject to the control of the Governor, who heads the Department of Law. That person, not the Governor, is primarily responsible for enforcing numerous laws, and is the State's chief legal officer. Moreover, as various laws were enacted assigning enforcement responsibility to the Attorney General, it would appear that no claim was ever made that doing so impermissibly infringed on the power of the Governor.[15] Another separately elected official – the Comptroller – has the responsibility to prescribe the methods of accounting to be used by state agencies

[14] *See* N.Y. Constitution, Article IV.
[15] *See e.g.*, N.Y. Exec. § 63(General Duties); N.Y. Bus. § 352 (Donnelly Act); N.Y. Gen. Bus. § 352 (Martin Act); N.Y. B.C.L. § 606 (Security Takeover Disclosure Act); N.Y. EPTL § 8-1.4 (investigative authority over Trustees for charitable purposes).

and who must approve all vouchers for payment.[16] In the Federal Government, all these powers are exercised by departments whose heads report to the President.

Another significant area of executive authority where the Governor does not have the kind of control that the President has, and which one would normally expect a Governor to have, is education. Article XI, Section 2 of the Constitution continues in existence the Regents of the University of the State of New York and provides that the Legislature, not the Governor, shall have power over that entity. The Regents then has the power to appoint and remove the Commissioner of Education.[17] And the Regents governing body, as created by statute, is the Board of Regents whose members are appointed by the Legislature, not the Governor.[18] Acting through the Commissioner of Education, the Board of Regents not only sets education policy for the State but enforces it.

Thus, rather than the all-powerful Governor described in the Trial Court's opinion, executive power is dispersed among various office holders independent of the Governor. Any analysis of the extent to which the COELIG statute impinges on the authority of the Governor needs to reflect how the New York Constitution actually defines and limits the powers of the Governor.

B. <u>The Appointment Process in the COELIG Statute is Constitutional.</u>

[16] *See* N.Y. Constitution, Article V, § 1.
[17] *See* N.Y. Educ. § 101.
[18] *See* N.Y. Educ. § 202.

It is well established in New York jurisprudence that when the Legislature passes a statute there is a strong presumption that the statute is constitutional. *See Overstock.com v. N.Y. State Dep't of Taxation and Fin.*, 20 N.Y.3d 590 (2013); *LaValle v. Hayden*, 98 N.Y.2d 155,161 (2002). The significance of this presumption was again recognized by the Court of Appeals in its recent decision upholding the Early Voting Act. *See Stefanik v. Hochul, ___ NY3d ___, 2024 NY Slip Op 04236 (Aug. 20, 2024)*. Moreover, the Court of Appeals has recognized that in analyzing separation of powers issues, courts should view the doctrine from a "common sense" perspective. *See Bourquin v. Cuomo*, 85 N.Y.2d 781 (1995).

In attempting to address a critical issue confronting the State, in the COELIG statute, the Governor and the Legislature agreed on how to create a new entity that would remedy many of the defects of JCOPE. The resulting legislation which created COELIG and embodied that agreement did not exceed constitutional bounds. The ability of the Legislature to make appointments is well established; the fact that the majority of the Commissioners are not gubernatorial appointees is both constitutional and consistent with the JCOPE statute, which former Governor Cuomo himself signed; the role of private parties in appointments to executive Branch entities has a number of precedents; and the inability of the Governor to remove Commissioners is not dispositive. Moreover, the acquiescence of the Governor to this legislation to address New York's historic corruption problem is

still another reason that the constitutionality of the COELIG statute should be upheld.

In considering the constitutionality of COELIG, it also is important to remember that under the statute creating JCOPE, the Governor did not have the power either to appoint or remove a majority of the members of that Commission. Indeed, because under the JCOPE statute, the appointing authority for the Executive Branch was the Governor and the Lt. Governor, it appears that the Governor acting alone had no power to remove any member of the Commission. In any event, the most that the Governor could do was only remove the minority of members that the Governor and the Lt. Governor had appointed.

Not only did Andrew Cuomo sign this law, but in the more than a decade of its existence, there was, to the knowledge of the *Amici*, no challenge to JCOPE's constitutionality.

1. *The Inclusion of Legislative Appointees Is Constitutional.*

The statute vests the power of appointment in the Governor (3 appointments), the Temporary President of the Senate (2 appointments), the Speaker of the Assembly (2 appointments), the minority leaders of the Senate and Assembly (1 appointment each), the Attorney General (1 appointment) and the Comptroller (1 appointment). The qualifications of each selection by one of the appointing authorities must also be reviewed by an Independent Review

Committee ("IRC"), comprised of the Deans of the 15 New York law schools or their designees. Once the IRC approves the qualifications of the individual selected, that person's appointment becomes effective.

First, there is no question that Legislative participation in the appointment process is appropriate. The policy of creating some political balance in state entities by allowing Legislative leaders to make direct appointments is reflected in a number of statutes. Examples include the Long Island Power Authority (N.Y. Pub. Auth. § 1020-d), which, as a government entity, operates an electrical utility; the Gaming Commission (N.Y. Rac. Pari-M § 102), which regulates all forms of gambling in New York State; and the State Commission of Prosecutorial Conduct (N.Y. Jud. Art. 15-a), which has the power to investigate prosecutors throughout the State. The statute creating the Board of Elections, which the Trial Court recognized as exercising executive powers, grants even more authority to Legislative leaders since the Governor can only appoint individuals selected by the Legislative leaders or the leaders of the Democratic and Republican parties as Members of the Board. *See* N.Y. Elec. § 3-100. Governors have no ability to make their own selections for the Board, despite the fact that the Board has full authority over the conduct of elections in New York.

Second, the fact that the Governor appoints only a minority of the Commissioners to COELIG does not create a constitutional issue. That was also

the structure of JCOPE, and in signing the bill creating that entity Governor Cuomo presumably determined that it was consistent with the Constitution. As to the Board of Elections, as discussed above, the Governor effectively has no appointments and may only choose between two persons recommended by each of the Chairs of the two major political parties and the Legislative leaders. *See* N.Y. Elec. § 3-100; *see also Soares v. State of New York*, 68 Misc 3d 249 (Sup. Ct. Albany County 2020), upholding the constitutionality of the State Commission of Prosecutorial Conduct, where the Governor appoints only a minority of the members. While the Trial Court dismissed the significance of *Soares* because the Legislature also had a minority of appointments, it disregarded the fact that the Governor also only appointed a minority of that Commission's members.

New York is not the only state that has recognized the importance of creating an ethics oversight body with significant enforcement powers that does not have a majority of members selected by its Governor. Indeed, numerous states have recognized that having such an ethics oversight entity is both good policy and consistent with the demands of the separation of powers doctrine.[19]

[19] *See, e.g.*, AR Code § 7-6-217 (Arkansas); CA Code § 83100-102(California); CT Code § 1-80(Connecticut); DE Code § 1-80 (Delaware); GA Code § 21-5-4 (Georgia); HI Code § 84-21 (Hawaii); IL Code § 30/20-5 (Illinois); IA Code § 68 B.32 (Iowa); SC Code § 13-310 (South Carolina); WA Code § 42.52.350 (Washington); *see also* Anthony Jenouri and Chel Miller, *Independent Ethics Commissions in the United States and U.S. Territories*, Albany Law School, December 2022, p. 6, Tables 3.2 and 3.4.

2. The Fact that Private Parties Have a Role in the Appointment Process Does Not Violate the Constitution.

In analyzing the alleged encroachment on the Governor's authority, the Trial Court repeatedly described the IRC as making appointments to the Commission. That is plainly wrong. That entity serves only as a screening mechanism to ensure that the members selected by the appointing authorities meet some basic qualifications. It has no power to select any member and only individuals selected by the appointing authority may become members of the Commission.[20] Given the past actions of former Governor Cuomo, it represents a modest attempt to provide some protection from a future Governor, or indeed, other appointing authorities, placing on the Commission individuals susceptible to being pressured.

In any event, private parties have long had a role in appointments to other state entities without creating constitutional issues. As discussed above, the leaders of the Republican and Democratic state parties decide whom they want on the Board of Elections, and the Governor must appoint their choices. The State Board for Professional Medical Conduct has significant enforcement powers to discipline medical practitioners, yet the overwhelming percentage of its members must be appointed from nominations made by a number of private medical organizations.

[20] In *Lavine v. State of New York*, 78 Misc. 3d 744 (N.Y. Sup. Ct. 2023), the Court rejected a constitutional challenge to the IRC based on an argument that it infringed on the Senate's advise and consent power.

See N.Y. Pub. Health § 230; *see also Lanza v Wagner*, 11 N.Y.2d 317 (1962), which, in addition to pointing to other existing precedents, upheld a state law providing that the Mayor could only appoint members of a reorganized New York City Board of Education who were on a list prepared by a selection board that consisted of the Presidents of universities and of other private civic organizations.

In each of these cases, the private entities had far more power than the IRC. The Governor or Mayor could only appoint those previously selected by these private individuals or organizations. Here, the appointing authorities, including the Governor, decide whom they want to appoint. The IRC only screens these appointees, and if it finds a candidate whom it deems unqualified, it is the appointing authority, not the IRC, who chooses a replacement.[21]

3. The Lack of Removal Power by the Governor Is Not Dispositive.

The Court below relied in its opinion on the inability of the Governor to remove Commissioners. This was an error.

First, in reaching this conclusion, the Court approved the Trial Court's reliance for guidance on federal cases involving the power of the President of the United States. But, as discussed above, the powers of the Governor are very different, with the executive power under the New York Constitution shared with a

[21] While not involving private individuals under the Federal Ethics in Government Act of 1978 a panel of judges, not the President or the Attorney General, was given the authority to appoint Independent Counsels and to define the scope of their authority.

number of offices that the Governor does not control. Indeed, putting aside the enforcement of criminal law by the 63 elected District Attorneys, the Attorney General has more authority to enforce the laws of the State than the Governor.

The Court in *Soares v. State of New York*, 68 Misc.3d 249 (Sup. Ct. Albany 2020) recognized the difference between the powers of the Governor and the powers of the President when it found that the inability of the Governor to remove all members of the State Commission on Prosecutorial Conduct ("CPC") did not violate the Constitution. To the contrary, in distinguishing Federal cases, the Court held "[t]he [President's] right to remove was, in short, found to be part and parcel of the President's right to appoint and supervise executive branch officials. For reasons stated above, I do not find any blanket constitutional rule in New York State that compels gubernatorial control over all members of investigative and quasi-judicial bodies. For the same reasons, the Supreme Court's rulings on the executive's right to remove such officials is inapposite." *Id* at 278. Even though the Trial Court attempted to distinguish *Soares* because the CPC had less power than COELIG and because the Legislature appointed a minority of CPC commissioners, those distinctions do not affect the analysis of the Governor's removal power in *Soares*. Moreover, as referenced above, while the Legislature only appointed a minority of the members of CPC, the Governor also only appointed a minority of its members. This simply is another place where the Court below failed to properly

consider the differences between the power of the President and the power of the Governor.

Second, as discussed above, even under the JCOPE statute, the Governor's ability to remove Commissioners was limited at most to removing their appointees, although the Governor could not even remove them without agreement from the Lt. Governor. It also never encompassed the ability to remove the Legislative appointees, which constituted the majority of the Commission's membership. Thus even under that statute, the Governor could not remove all, or even a majority of, the members of the Commission. As noted above, not only did Governor Cuomo sign the legislation creating JCOPE, but in the decade of its existence its constitutionality was never challenged.

C. The Statute Strikes a Fair Balance between Legislative and Executive Power.

The creation of COELIG was the product of an agreement between Governor Hochul and the Legislature on how to address a serious problem that was undermining the people's confidence in their government. Wholly apart from any other argument, pursuant to the decision of the Court of Appeals in *Delgado v. State of New York*, 39 N.Y.3d 242 (2022) the Governor's signing of this legislation is dispositive on the question of whether it impermissibly limited the Governor's

powers. Moreover, the legislation strikes a fair balance between executive and legislative power consistent with the Chief Judge's concurring opinion in that case.

Delgado involved the constitutionality of the Committee on Legislative and Executive Compensation ("CLEC"). That Committee was authorized to set the compensation for Members of the Legislature, the Governor, the Attorney General, the Comptroller, and various other State officers. While under the Constitution those salaries were to be set by law, pursuant to the CLEC authorizing statute, compensation set by the Committee became final unless a new law was passed overruling its decision. In considering, in part, whether the statute creating the Committee unconstitutionality impinged on the authority of the Governor to play a role in these compensation decisions (by vetoing any legislation providing for increased compensation), the Court held that by signing the enabling legislation, "the Governor assented having no objection to the Legislature's determination of what the law should be, the specific members named to the Committee in the statute or the process that tightly circumscribed the Committee's discretion. Nor did the Governor cede any authority to propose different legislation in the future or to veto future legislation." *Id* at 255.

Chief Judge Wilson wrote an opinion concurring in the result reached by the plurality that elaborated on New York separation of powers doctrine in the context of enacting laws. He analogized that doctrine to a toy called Tip-It in which the

players had to maintain the balance of a disc while moving pieces. That same analysis can be applied here albeit in the context of ethics and lobbying law enforcement. Indeed, the *Delgado* case applies *a fortiori,* since given the recognized limitations on the Governor's powers, limiting the Governor's veto power is a more intrusive step than limiting the Governor's ability to control the enforcement of ethics and lobbying laws.

A decision like the one below, based on the mistaken belief that the Governor has the exclusive right to execute the laws, grants the Governor a form of immunity that destroys the balance intended by our Constitution. This is illustrated by this very case now before the court. COELIG, like JCOPE, has two chief sanctions available to it – the imposition of fines and the ordering of the disgorgement of benefits obtained through ethics law violation. This suit is brought by a former Governor to block renewed proceedings that could result in a substantial order of disgorgement if it should be determined that he used state resources in violation of the State Code of Ethics to write a book for which he received substantial compensation. While the plaintiff-appellee is a former Governor, the events in question occurred while he was Governor and, but for certain intervening events, he could still be Governor. It is entirely unrealistic to expect the Governor to enforce the State's Code of Ethics against himself. Giving the Governor exclusive control is therefore tantamount to giving him immunity.

The factors that led the Chief Judge to find a fair balance are present here as well. As already shown, the fair balance between legislative branch and executive branch appointments is beyond reasonable question. Importantly, the decisions of COELIG are subject to judicial review in an Article 78 proceeding. The statutory provisions governing appointment and removal apply equally to both branches. COELIG's power to investigate and report applies to both branches and while its ability to apply sanctions against those in the legislative branch is constrained, this circumstance arguably implements the constitutional provision that legislators shall not be questioned in "any other place" for their lawmaking activity.

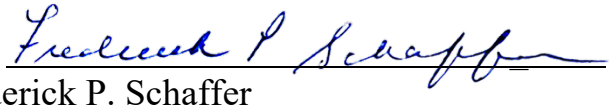
In sum, balancing all of these factors, we submit that the statute strikes a fair balance between Executive and Legislative power which comports with the New York State Constitution.[22]

VI. Conclusion

For the foregoing reasons, the decision of the court below should be reversed on the facts and the law and the constitutionality of the statute creating COELIG should be upheld in all respects.

[22] An additional factor that supports the constitutionality of the statute is the fact that COELIG lacks the power to discipline by removal or otherwise those who have violated the ethics laws. We believe the statute is constitutional without consideration of this factor and, indeed, that COELIG could and should be given such disciplinary power by statute. The Court, however, need not reach this issue to uphold the constitutionality of the statute.

Dated: New York, New York
August 23, 2024

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3) is 6,779 words.

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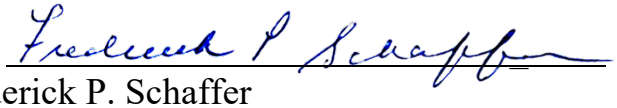
By: 

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