SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ANDREW M. CUOMO, Plaintiff, v. NEW YORK STATE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT, Defendant.	**SUMMONS** Index No:

TO THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to serve upon Plaintiff's counsel an answer to the Complaint in this action within twenty (20) days after the service of this summons, exclusive of the day of service, or within thirty (30) days after service is complete if this summons is not personally delivered to you within the State of New York.

In the case of your failure to answer, judgment will be taken against you by default for the relief demanded in the Complaint.

PLEASE TAKE FURTHER NOTICE that Plaintiff designates Albany County as the basis of venue pursuant to CPLR 505(a), as Defendant is a public authority constituted under the laws of the State of New York that has its principal offices in Albany County.

Dated: New York, New York
April 25, 2023

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ANDREW M. CUOMO, Plaintiff, v. NEW YORK STATE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT, Defendant.	VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF Index No:

Plaintiff, Andrew M. Cuomo ("Cuomo" or "Plaintiff"), by and through his undersigned attorneys, in support of his Verified Complaint against the named Defendant, alleges as follows:

NATURE OF THIS ACTION

1. The Ethics Commission Reform Act of 2022 (the "Act") of the New York Legislature created the Commission on Ethics and Lobbying in Government ("COELIG") and conferred on it broad powers to enforce numerous ethics, lobbying, and other laws.[1] COELIG has charged Plaintiff in an enforcement proceeding with violating Public Officers Law Section 74 ("Section 74"), entitled "Code of Ethics."

2. By this action, Plaintiff challenges the constitutional authority of COELIG to prosecute him in the proceeding. As set forth below, the Act violates foundational separation-of-powers principles and the civil department structure set forth in Article V of the New York Constitution, a structure designed to enhance gubernatorial authority and accountability.

[1] A copy of the legislation is attached as Exhibit A to this Complaint.

3. "The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions." *NYC C.L.A.S.H., Inc. v. N.Y. State Office of Parks, Recreation, & Historic Preservation*, 27 N.Y.3d 174, 178 (2016). This "fundamental principle of the organic law" requires that each branch of government "be free from interference, in the discharge of its peculiar duties, by either of the others." *Maron v. Silver*, 14 N.Y.3d 230, 258 (2010) (quoting *Burby v. Howland*, 155 N.Y. 270, 282 (1898)). And this foundational principle is a structural one, inherent in the New York and United States constitutions, that serves as a bulwark safeguarding the constitutional rights and liberties granted to the people. *Maron*, 14 N.Y.3d at 258 ("The separation of the three branches is necessary for the preservation of liberty itself.") (citation and quotation marks omitted); *see also* The Federalist No. 51 (James Madison) (observing that the "separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty"). Of course, some admixture of the executive, legislative and judicial powers is both unavoidable and salutary. *People v. Tremaine*, 252 N.Y. 27, 39 (1929). But clear and well-established rules exist: one branch of government may not "dominat[e] or interfer[e] with the functioning of another coequal branch" or with the "discharge of its peculiar duties." *Maron*, 14 N.Y.3d at 244, 258. The Act is a flagrant violation of the doctrine of separation of powers.

4. New York's Constitution vests the executive power of the State—all of it—in the Governor, Art. IV, §1, and the "peculiar dut[y]"—indeed, the principal duty—assigned to the Governor is to "take care that the laws are faithfully executed." Art. IV, §3. As Madison explained, "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing and controlling those who execute the laws." 1 Annals of Cong. 481 (1789); *see*

Myers v. United States, 272 U.S. 52, 117–18 (1926) (discussing Madison's views expressed in the First Congress) ("As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be . . . that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. . . . If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.").

5. In stark contrast, and as is evident, "Legislative power, as distinguished from executive power, is the authority to make laws, *but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.*" *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (emphasis added). *See also Buckley v. Valeo*, 424 U.S. 1, 113 (1976) ("[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take care that the laws be faithfully executed.'") (quoting U.S. Const. Art. II, §3); *id*. ("The [Federal Election] Commission's enforcement power … is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress."); *Myers*, 272 U.S. at 126–27 ("[T]he power of appointment and removal is clearly provided for by the Constitution, and the legislative power of Congress in respect to both is excluded save by the specific exception as to inferior offices[.]").

6. In extraordinary and unprecedented ways, the Act flouts these long-established and sacrosanct principles of the constitutional structure that are designed to protect the liberty interests of New Yorkers. In derogation of the Governor's constitutional powers and obligations,

it vests COELIG, through its members and officers, with sweeping powers of investigation, enforcement, and punishment that are quintessentially executive. COELIG is authorized to enforce certain ethics, lobbying, and other laws—laws that govern not only the conduct of public officers and employees but also the conduct of private citizens—and to visit penalties on all persons (with one exception, members and employees of the legislative branch, that further exposes its unconstitutionality) subject to its enforcement jurisdiction. Exec. L. §94(n) and (p). The Act also authorizes COELIG to "adopt, amend, and rescind any . . . procedures for . . . enforcement," *id.* §94(5)(a)(ii), and confers on COELIG the "power and duty to administer and enforce all the provisions of [the Act]," including by seeking judicial relief, *id.* §94(14).

7. Accordingly, as alleged in detail below, the Act blatantly violates the separation of powers because it creates an unaccountable agency exercising quintessentially executive powers—depriving the Governor of her exclusive "power of appointing, overseeing and controlling those who execute the laws." Madison, 1 Annals of Cong. 481; *see* Federalist No. 51 ("In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.").

8. This unconstitutional deprivation necessarily interferes—indeed, designedly so—with the Governor's ability to perform her "peculiar dut[y]" to "take care" that "the laws"—*all* the laws, including the Covered Statutes—are "faithfully executed."

9. The Governor is granted *no* power whatsoever to appoint the members of COELIG. Remarkably, the Act vests the ultimate power to appoint members of a body vested

with core executive powers in a group of private persons (the "independent review committee") who are accountable to *no one* in the performance of this power. These private persons have unfettered power to appoint COELIG's members. Remarkably, and unconstitutionally, the Act does not provide a shred of guidance with respect to the standards by which these private persons should exercise this inherent executive power. Remarkably, and unconstitutionally, the Act deprives the Governor of any power to appoint the private persons who exercise this executive appointment power.

10. Nor does the Governor have any power whatsoever to appoint COELIG's Executive Director, to whom the members are expressly authorized to delegate substantial authority, including enforcement authority. Rather, the Act authorizes a majority of the members of COELIG to, in turn, appoint the Executive Director.

11. The independent review committee appoints COELIG's members only after receiving the names of candidates nominated by so-called "selection members." Six of the nominees, a majority of the eleven members, are nominated by the legislative leaders (two by the Speaker, two by the temporary president of the Senate, and one each by the minority leaders). The Governor, in whom all the executive power of the State is vested, is consigned to nominating only three members, and the Attorney General and Comptroller are each authorized to nominate one member. The selection members submit one and only one name for each COELIG member the selection member is empowered to nominate. The independent review committee then appoints or rejects the nominee in an up-or-down vote. Thus, contrary to bedrock separation-of-powers precepts, agents of the legislative branch are empowered to enforce the laws, and, to boot, they are charged with enforcing them against executive branch officers and employees, as well as against private citizens.

12. Under the Act, a majority of COELIG's members (6 out of 11) constitutes a quorum, and COELIG has "the power to act by majority vote of the total number of members of the commission without vacancy." Exec. L. §94(4)(h). Accordingly, legislative agents—the six members appointed on nomination of the legislative leaders—can control the full complement of COELIG's enforcement powers, including the power to seek penalties, and can exercise them (or determine to not exercise them) in any given case regardless of whether the three members appointed on nomination of the Governor agree or disagree with the legislative agents' enforcement decisions or actions.

13. As noted above, the United States Supreme Court has made clear that this grant of executive power to enforce the law to agents of the Legislature necessarily violates the separation of powers. So, too, has the New York Court of Appeals. *See Tremaine*, 252 N.Y at 43 (the Legislature "may not engraft executive duties upon a legislative office and thus usurp the executive power by indirection") (citing *Springer*, 277 U.S. 189 (1928)); *Springer*, 277 U.S. at 202 (stating that legislative power does not include the authority to "enforce [laws] or appoint the agents charged with the duty of such enforcement").

14. The Act further deprives the Governor of the quintessential executive power to "oversee[] and control[] those who execute the laws," Madison, 1 Annals of Cong. 481, by wholly depriving the Governor of any authority whatsoever—direct or indirect—to remove COELIG's members or its Executive Director. Nor are COELIG's members or the Executive Director subject to removal by any government official whom the Governor appoints, oversees, or has authority to remove. To the contrary, COELIG's members and the Executive Director may be removed only by a majority vote of the members themselves, and only on specified grounds. Exec. L. §94(4)(c); *id.* §94(6)(a)(ii).

15. As the Court of Appeals stated long ago: "In this country the power of removal is an executive power, and in this state it has been vested in the governor by the people." *People v. Guden*, 171 N.Y. 529, 531 (1902); *see also Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2191 (2020) ("The President's power to remove—and thus supervise—those who would held executive power on his behalf follows from the text of Article II," which vests "the 'executive Power'—all of it— … 'in a President,' who must 'take [c]are that the laws be faithfully executed.'") (quoting U.S. Const. Art. II, §1, cl.1); *Myers*, 272 U.S. at 126 ("[T]he power of appointment to executive office carries with it, as a necessary incident, the power of removal.").

16. The Act, accordingly, turns Madison's apothegm on its head by depriving the Governor of the inherently executive and critically important "power of appointing, overseeing and controlling those who execute the laws." 1 Annals of Cong. 481 (1789); *see* Federalist No. 47 (James Madison) ("the appointment to offices, particularly executive offices, is in its nature an executive function").

17. And the Act does so by design. One of the Act's stated goals is to make COELIG "truly independent" of the Governor. In myriad ways, the Act accomplishes that unconstitutional goal. Thus, the Act vests in COELIG's members executive powers that the New York Constitution "vest[s]" in "the governor," Art. IV, §1—i.e., the powers to enforce the Covered Statutes and punish purported violations—all while COELIG's members are accountable to no one except themselves. Remarkably, the members are not even subject to—let alone accountable for violations of—the very ethics laws they are empowered to enforce.

18. Although the foregoing account of the structure of COELIG is more than sufficient to expose its gross and unprecedented violation of the separation of powers, there is

more—much more. The Act's efforts to render COELIG "truly independent" of the Governor include a provision that purports: (1) to require the Governor to "separately state the recommended appropriations for [COELIG]" in her annual appropriations bills; and (2) to preclude the Governor from including in her appropriation bills any provision permitting the "separately stated appropriations" from being "decreased by interchange with any other appropriation." Exec. L. §94(1)(f).

19. Under this provision, a Governor who believed that COELIG was failing, systematically or otherwise, to "faithfully execute[]" the Covered Statutes would have no power to craft her items of appropriation in a manner that enabled the Governor to affect COELIG's improper exercise of its enforcement powers. In particular, the provision would preclude the Governor: (i) from proposing items of appropriation not to COELIG itself, but to the Department of State in which COELIG is purportedly housed by the Act, §94(1)(a), which is headed by a direct appointee of the Governor who could exercise judgment about the extent to which portions of the items should be allocated to COELIG; and (ii) from including provisions in her appropriations bills authorizing the interchange of items of appropriations directly to COELIG (and this reducing them) with any other items of appropriation.

20. This provision of the Act is patently unconstitutional for an independent reason. It deprives the Governor of the full exercise of her powers under Article VII, Sections 1 through 6, of the New York Constitution. Under these sections of Article VII, the Governor is the sole "constructor" of appropriations bills, *Pataki v. New York State Assembly*, 4 N.Y.3d 75, 85 (2004) (plurality opinion), and the Legislature has no authority to intrude on this role of the Governor in the executive budgeting system by restricting the Governor's judgment on "what preconditions should be imposed on [proposed expenditures,]" *id.* at 90. The Governor cannot be required by

the Legislature either to propose a lump sum appropriation or to not propose interchange authority.

21. What is more, the Act entirely immunizes the legislative branch from one of the most consequential powers vested in COELIG: the power to impose penalties on those subject to its jurisdiction for violations of specified Covered Statutes. The Act declares that COELIG "shall have no jurisdiction to impose penalties or discipline upon members of or candidates for members of the legislature or legislative leaders for any violation of the public officers or section one hundred seven of the civil service law." Thus, even as the Act sweepingly subjects the executive branch to enforcement by legislative agents, it sweepingly excludes legislators (and legislative employees) from any such penalties. What the Legislature deemed good for the goose (the unconstitutionally enfeebled head of the executive branch), it tellingly spared for the gander (*i.e.*, itself, the unconstitutionally empowered members of the legislative branch).

22. In this way, the Act recognizes (even as it transgresses) the dictates of separation of powers that inhere when one branch of government is subjected to the disciplinary authority of another. Indeed, in light of those separation of powers principles, a constitutional amendment was required to empower the Commission on Judicial Conduct, a body composed of a hybrid of executive, legislative, and judicial appointees, to impose disciplinary sanctions against members of the judiciary for ethics violations. *See* N.Y. Const. art. VI, §22; *see also id.* art. III, §11 (providing additional protection in furtherance of the separation of powers by prohibiting the other branches from attempting to discipline legislative members "[f]or any speech or debate in either house of the legislature").

23. For all of the preceding reasons, COELIG is as constitutionally grotesque as it is unprecedented—a misshapen constitutional monstrosity designed to bypass the separation of

powers, with (i) the leaders of the legislative branch appointing an empowered majority of COELIG's members who themselves may enforce the law and punish purported violators, (ii) total insulation of COELIG's members from executive branch supervision and removal, and (iii) private parties exercising appointment powers to executive office. It is imperative to bear in mind that if the current structure of COELIG does not flout the fundamental precept of the separation of powers by interfering with and usurping the powers of the Governor, then there is no constitutional reason why the Legislature could not have structured COELIG, or restructure it, so that *every* member was a nominee of the legislative leaders—or, for that matter, a direct appointee of the leaders—removable only by the legislative leaders.

24. There is still more. The Act is also unconstitutional for the further, independent reason that it is but an effort by the Legislature to do indirectly what it cannot do directly—evade the dictates of Article V, Sections 2 and 4 of the New York Constitution. *See Burby,* 155 N.Y. at 280 ("When the main purpose of a statute, or of part of a statute, is to evade the constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law."). Article V, Section 2 directs that "[t]here shall not be more than twenty civil departments in the state government," and Article V, Section 4 specifies, with exceptions not relevant here, that "the heads of . . . departments[,] . . . excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law."

25. A central purpose of these constitutional provisions was to confer *greater* power—and, perforce, *greater* accountability—upon the Governor. *See Matter of Cappelli v. Sweeney*, 167 Misc. 2d 220, 232 (Sup. Ct., Kings Cty. 1995), *aff'd on decision below*, 230 A.D.

2d 733 (2nd Dep't 1996) (reviewing constitutional history and observing the "clear intention in modifying the organization of the executive branch to being greater economy and efficiency to government and confer greater power and, concomitantly, greater accountability upon the Governor").

26. Thus, the Legislature could not have created COELIG as a new civil department unless it provided for a head of COELIG—be it an individual or group of individuals—to be appointed by the Governor (with the advice and consent of the Senate) and removable by the Governor (in a manner determined by the Legislature).

27. The Act is nothing more than a transparent dodge around these constitutional strictures. The Act recites that COELIG is "established within the department of state," §94(i)(a), but that recitation is pure lip service. After all, COELIG is not answerable in any way to the head of the Department of State (the Secretary of State), to any other official within that department, or to any official within the other civil departments. Nor does the Secretary of State or any other executive official have any authority whatsoever over COELIG. As a matter of substance rather than form, COELIG is obviously a department unto itself, but with a head that is *not* appointed by the Governor. In short, contrary to the text and intent of Article V of the New York Constitution, the Act still further diminishes the power and accountability of the Governor.

28. Moreover, the purpose and effect of the Act's unconstitutional restrictions on the Governor's authority to propose the terms and conditions of items of appropriations for COELIG is to ensure that it is immunized to the greatest possible extent from the power of the purse conferred on the Governor by Article VII, §§1–6.

29. Finally, as noted, in derogation of the Governor's appointment power, the Act unconstitutionally vests authority to appoint members of COELIG in a committee of private

individuals, who are not themselves public officers and who are in no way accountable to the people of this State, all while failing to provide the private selection committee with any standard, let alone an intelligible one, for selection.

PARTIES, JURISDICTION, AND VENUE

30. Plaintiff Andrew M. Cuomo is the former governor of the State of New York and the respondent in an administrative enforcement proceeding brought by COELIG.

31. Defendant New York State Commission on Ethics and Lobbying in Government ("COELIG") is a government agency established by the Ethics Commission Reform Act of 2022 (the "Act").

32. This Court has jurisdiction over this action pursuant to Civil Practice Law and Rules ("CPLR") §§301, 3001 and §3017(b), as well as CPLR §6311.

33. This Court also has jurisdiction over this action pursuant to its general jurisdiction under the New York State Constitution, art. VI, §7, and New York Judiciary Law §140-B.

34. Venue is proper in Albany County pursuant to CPLR §505(a) because COELIG maintains its principal office in Albany County.

FACTUAL ALLEGATIONS

A. Calls for a More "Independent" Ethics Agency

35. On August 25, 2021, the New York State Senate Standing Committee on Ethics and Internal Governance held a public hearing on the state's system of ethics oversight and enforcement, focusing on concerns about COELIG's predecessor, the Joint Commission on Public Ethics ("JCOPE").[2] Specifically, the Committee was concerned about JCOPE's

[2] The committee's report from that hearing, dated December 17, 2021, is attached to this Complaint as Exhibit B ("Ex. B").

"neutrality and ability to function as an independent body." Ex. B at 2. The consensus among those who testified was that JCOPE had failed as an ethics watchdog because it was insufficiently "independent" of those in power, particularly of the Governor. As described by the Senate committee in its December 17, 2021 report, "JCOPE's structure and function are set up to avoid holding those in power accountable." *Id.* The Senate committee concluded that "immediate change and structural reform" was needed—the stated goal being to "replace JCOPE with a truly independent body." *Id.*

36. The Senate committee thought it "clear" that such a goal could be achieved only through a "comprehensive constitutional amendment," such as the bill introduced by Senator Krueger (S855), which would replace JCOPE with an ethics agency modeled on the New York State Commission on Judicial Conduct established in Article VI, §22. *Id.*[3] The structure of the proposed agency would have 13 members: 7 members jointly appointed by the chief judge of the court of appeals and the presiding justices of each of the appellate divisions; 1 member appointed by each of the four legislative leaders; and 2 members appointed by the Governor. Ex. C at §2(c).

37. Support for Senator Krueger's amendment was shared by so-called good government groups and advocates at the hearing. According to written testimony submitted by the New York City Bar Association Committee on Government Ethics and State Affairs, the necessary reforms "can only be realized by abolishing JCOPE and replacing it with an entity to be established by constitutional amendment." Ex. B. The city bar committee further explained why, in its view, a constitutional amendment was necessary: "The Constitution must be amended to achieve that goal so that the ability of the judicial branch to participate in making

[3] A copy of the Krueger Amendment (S855) is attached to this Complaint as Exhibit C ("Ex. C").

appointments and the creation of a single entity with jurisdiction over the legislative and executive branches is *beyond constitutional question*." Ex. D at 3 (emphasis added).[4] Another advocacy group expressly supported a constitutional amendment "to limit the Governor's policy-making authority." Ex. B.

38. Senator Krueger's amendment never made it out of committee, and no other constitutional amendment was passed. Undaunted by the want of an amendment designed to legitimize a body much like COELIG, on January 5, 2022, Governor Hochul announced her own plan to replace JCOPE with a "truly independent agency"[5]—but through the Act, not a constitutional amendment. *See* Ethics Commission Reform Act of 2022 (L. 2022, c. 56, Part QQ). On April 8, 2022, the Legislature passed the Act, and Governor Hochul signed it into law the next day.

B. COELIG's Composition and Structure

39. As noted, the Act replaced JCOPE with COELIG. It did so by repealing Executive Law Section 94 ("former Section 94") and replacing it with a new Section 94. Whereas JCOPE's members were directly appointed by elected officials,[6] COELIG's members are nominated by elected officials but ultimately selected by the newly created independent review committee (IRC), which consists of the deans, interim deans, or associate deans of New York State's accredited law schools, both public and private. Exec. L. §94(2)(c). Despite the

[4] The New York City Bar Association Report on Legislation by the Committee on Government Ethics and State Affairs, reissued on March 2021, is attached to this Complaint as Exhibit D ("Ex. D").

[5] Press Release, "Governor Hochul Announces Plan to Replace JCOPE with New Independent Ethics Agency," dated January 5, 2022. A copy of the press release is attached to this Complaint as Exhibit E ("Ex. E").

[6] The Governor (and Lieutenant Governor) directly appointed six JCOPE members, and the remaining eight were appointed by the four legislative leaders. Former Exec. L. §94(2).

fact that the individuals on the IRC are empowered to discharge duties solely for the benefit of the public, the Act states that they "shall neither be public officers nor be subject to the requirements of the public officers law." *Id.* §94(3)(l).

40. The IRC is charged with reviewing the "background and expertise" of candidates, and any candidate whom the IRC "deems to meet the qualifications necessary for the services required . . . shall be appointed as a commission member. *Id.* §94(3)(d). The Act does not further define the term "qualifications necessary for the services required" and does not otherwise set forth any standards by which the IRC is to approve or deny nominations. Rather, the Act instructs the IRC to create "a procedure by which it will review and select the commission members," which it must then "publish on the commission's website." *Id.* §94(3)(c). However, "[d]uring the pendency of the review and approval or denial of the candidates," the Act requires the IRC to "maintain confidentiality in all independent review committee processes, reviews, analyses, approvals, and denials." *Id.* §94(3)(i).

41. Individuals on the IRC may be removed only by majority vote of the IRC and only for "substantial neglect of duty, misconduct, violation of the confidentiality restrictions set forth in this section, inability to discharge the powers or duties of the committee or violation of this section, after written notice and opportunity for a reply." *Id.*

42. COELIG consists of eleven members. *Id.* §94(3)(a). Candidates for COELIG membership are first nominated by the "selection members." *Id.* §§94(3)(a), (2)(b). Six of the nominees, and thus a majority of the members, are nominated by the legislative leaders (two by the Speaker, two by the temporary president of the Senate, and one each by the minority leaders). The Governor nominates only three members, and the Attorney General and Comptroller are each authorized to nominate one member. *Id.* §94(3)(a).

43. COELIG members have terms of four years (except that the initial cohort serves staggered terms). *Id.* §94(4)(a). Under the Act, a majority of COELIG's members (6 out of 11) constitutes a quorum, and COELIG has "the power to act by majority vote of the total number of members of the commission without vacancy." *Id.* §94(4)(h). COELIG is directed to elect a chairperson from among its members for a term of two years. *Id.* §94(4)(b).

44. Because COELIG members are neither appointed by any government official nor entitled to receive a fixed salary, *id.* §94(4)(f) (members "shall receive a per diem allowance"), COELIG members are not (by statute, that is) considered public officers subject to the requirements of the Public Officers Law, including the very ethics laws they are tasked with overseeing. *See* Public Officers Law §2 ("The term 'state officer' includes every officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer, appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state."); *id.* §73(1)(i)(iii) (excluding from the definition of "state officer or employee" officers of "boards, commissions or councils who receive no compensation or are compensated on a per diem basis"); *id.* §73-a(1)(c)(ii) (excluding from the definition of "state officer or employee" those who do not "receive annual compensation" (in excess of a certain amount)); *id.* §74(1) (defining "state agency" as "any state department, or division, board, commission, or bureau of any state department or any public benefit corporation or public authority at least one of whose members is appointed by the governor").

45. COELIG members may be removed only by majority vote of the members, and only "for substantial neglect of duty, misconduct in office, violation of the confidentiality

restrictions set forth in this section, inability to discharge the powers or duties of office or violation of this section, after written notice and opportunity for a reply." Exec. L. §94(4)(c).

46. The Act requires COELIG (by majority vote) to appoint an Executive Director to help carry out its functions and policies. *Id.* §94(6)(a)(i).[7] The Act expressly authorizes COELIG to delegate substantial authority, including enforcement authority, to the Executive Director. *Id.* §94(6)(b). The Executive Director serves for a term of four years and may be removed only by COELIG and only for "neglect of duty, misconduct in office, violation of the confidentiality restrictions in this section, or inability or failure to discharge the powers or duties of office, including the failure to follow the lawful instructions of the commission." *Id.* §94(6)(a)(iii), (iv).

47. In addition, the Act includes a provision that purports to require the Governor to "separately state the recommended appropriations for [COELIG]" in her annual appropriations bills. *Id.* §94(1)(f). The Act further restricts the Governor from including in her appropriation bills a provision permitting the "separately stated appropriations" from being "decreased by interchange with any other appropriation," as otherwise permitted under State Finance Law §51. *Id.*

C. The Covered Statutes

48. COELIG is an agency responsible for administering, enforcing, and interpreting New York state's ethics laws (Public Officers Law §73, Public Officers Law §73-a, and Public Officers Law §74), the Lobbying Act (Legislative Law §1-a), and the "Little Hatch Act" (Civil Service Law §107) (collectively, the "Covered Statutes"). Exec. L. §94(1)(a), (10)(a).

[7] In contrast, JCOPE's executive director could be appointed or removed only if supported by at least two of the members appointed by the Governor. Former Exec. L. §94(9)(a).

49. Public Officers Law §73 prohibits statewide elected officials, state officers and employees, and members and employees of the Legislature from engaging in certain relationships or conduct that pose a potential conflict of interest (e.g., accepting bribes, participating in state agency proceedings in a non-official capacity, accepting gifts and honorarium), including restrictions on certain post-employment activities. A subset of these provisions also applies to state or county political party chairmen, including in some cases the firm or association of which such person is a member or owns a controlling interest. *Id.* §§73(4), (7), and (12).

50. Public Officers Law §73-a imposes an annual financial disclosure requirement on the following public officers: statewide elected officials, state officers and employees, members of the Legislature, legislative employees, certain political party chairmen, and political candidates. *Id.* §73-a(2). The law broadly requires discourse into the nature and sources of a reporting individuals' income and other financial interests, including those of spouses and children. *Id.*§73-a(3).

51. Public Officers Law §74, the "Code of Ethics," establishes broad standards of conduct to guide the conduct of state officers and employees, members of the Legislature, and legislative employees and to steer them away from actual and apparent conflicts of interests. These standards govern conduct related to, among other things, outside employment and business activities, the disclosure of confidential information, and the use of state property. *Id.* §74(3).

52. Civil Service Law §107, known as the "Little Hatch Act," prohibits state civil service members from making employment decisions based on an individual's political views or activities. *Id*.

53. Legislative Law Article 1-a, known as the Lobbying Act, requires individuals and organizations engaged in lobbying to register with the Commission and submit periodic reports on lobbying activity. These reports must include, among other things, the identity of the lobbyist or client; the subject of the lobbying; the officials, bodies, or agencies lobbied; and the amount of money spent on those efforts. *Id.* §§1-e(c); 1-h(b); 1-j(b).

54. Accordingly, COELIG has jurisdiction over public and private individuals named in the Covered Statutes, to wit: (i) statewide elected officials (*i.e.*, the Governor, Lieutenant Governor, Comptroller, and Attorney General), (ii) executive branch officers and employees, (iii) members of the Legislature and legislative branch employees (although investigatory only), (iv) candidates for statewide elected offices and for the Legislature, (v) certain political party chairs, and (vi) registered lobbyists and their clients (collectively, the "Covered Individuals"). *Id.* §94(1)(a).

D. COELIG's Enforcement Powers

55. The Act authorizes COELIG to enforce the Covered Statutes by, among other things, bringing enforcement actions. As discussed in more detail below, COELIG is empowered to take disciplinary action and assess civil penalties against those it finds to have violated certain provisions of the Covered Statutes. Exec. L. §94(n) and (p). The Act also authorizes COELIG to "adopt, amend, and rescind any . . . procedures for . . . enforcement" *id.* §94(5)(a), and confers on COELIG the "power and duty to administer and enforce all the provisions of [the Act]," including by seeking judicial relief, *id.* §94(14). These are quintessentially executive functions. *See, e.g.*, *Rapp v. Carey*, 44 N.Y.2d 157, 163 (1978) ("in this State the executive has the power to enforce legislation").

56. The Executive Director assists COELIG in carrying out its enforcement actions. The Act authorizes COELIG to delegate broad authority to the Executive Director "to act in the name of the commission between meetings," except for decisions that require a vote of the Commission. *Id.* §94(6)(b). COELIG may also delegate to the Executive Director the power to issue subpoenas in connection with investigation and enforcement proceedings. *Id.* §94(10)(c). Among other things, the Executive Director is tasked with hiring staff and deputy directors, including a deputy director of investigations and enforcement. *Id.* §94(6)(c), (d). The staff actively participates in COELIG's enforcement actions.

57. COELIG may initiate investigations on its own or based on complaints or referrals of alleged violations of the Covered Statutes. *Id.* §94(10)(a). The staff is then charged with conducting a review for "specific and credible evidence" of a violation, which may be based on the staff's "review of media reports and other information." *Id.* §94(10)(d). The staff may decide to "elevate" the matter from a "preliminary review into an investigation." *Id.* §94(10)(f).[8]

58. After notifying the individual under investigation (referred to as the respondent) of the charges and providing him with an opportunity to respond, the staff is required to prepare a report to COELIG recommending whether to begin a "confidential due process hearing." *Id.*

59. COELIG can accept or reject this recommendation, or return it for further investigation by the staff. *Id.* COELIG may accept the recommendation for an administrative hearing if it determines there is "credible evidence" of a Covered Statute. *Id.* §94(10)(h).

[8] In contrast, JCOPE could not initiate a full investigation unless two of the members voting in the majority were appointed by an authority in the same branch to which the respondent belonged. For example, where the respondent was a state officer or state employee, at least two of members voting in the majority must have been appointed by the Governor and Lieutenant Governor. Former Exec. Law §94(13)(a).

60. The administrative hearing is conducted by an "independent arbitrator," who is paid for acting as such. *Id.* §94(10)(i). No provision of §94 prescribes qualifications the "independent arbitrator" must have, or requires a minimum number of "independent arbitrators," or limits the period of time in which they may serve, or specifies who appoints the independent arbitrator, or how they are appointed. Neither the Secretary of State nor any other executive official has any role in the selection of, or authority over, the appointment of the independent arbitrators. In fact, this "independent arbitrator" is not independent of COELIG: they are selected by COELIG and serve at the pleasure of COELIG. No executive official has any authority over the independent arbitrator. COELIG has clarified that the term "independent arbitrator" has the same meaning as "hearing officer" as used in COELIG's regulations. 19 NYCCR §941.2(g).

61. At the conclusion of the hearing, "the hearing officer shall make findings of fact and a recommendation as to the appropriate penalty to be assessed or any other action taken." *Id.* §941.13(a); *see also id.* §941.7(b).

62. After receiving the proposed report from its staff, COELIG determines by majority vote whether there is "a substantial basis to conclude" that the respondent violated a Covered Statute. Exec. L. §94(10)(p). If so, COELIG shall issue a "Substantial Basis Report" and "Notice of Civil Assessment and/or Other Penalty." 19 NYCCR §941.13(c). COELIG may "adopt the findings of fact and recommendation of the hearing officer in whole or in part, or it may reverse, remand and/or dismiss the hearing officer's finding of fact and recommendation based upon the record produced at the hearing." *Id.*

63. The Act authorizes COELIG to take remedial action for violations of the Covered Statutes. Specifically, when an individual is found to have "knowingly and intentionally"

violated Public Officers §73, Civil Service Law §107, or to have "knowingly and intentionally" failed to file a financial disclosure statement, or who "knowingly and willfully with intent to deceive" makes a false statement in a financial disclosure required by Public Officers Law §73-a, COELIG may assess a civil penalty in an amount not to exceed $40,000 plus the value of any gift, compensation, or benefit received as a result of such violation. Exec. L. §94(10)(n)(i).

64. When an individual is found to have "knowingly and intentionally" violated certain provisions of Public Officers Law §74(3), COELIG is authorized to assess a civil penalty in an amount not to exceed $10,000 plus the value of any gift, compensation, or benefit received as a result of such violation. *Id.* §94(10)(n)(ii).

65. In assessing the amount of the civil penalty, COELIG is directed to "consider the seriousness of the violation, the amount of gain to the individual and whether the individual previously had any civil or criminal penalties imposed pursuant to this section, and any other factors the commission deems appropriate." *Id.* §94(10)(n)(v).

66. On top of civil penalties, COELIG may refer the matter to the respondent's "employer for discipline with a warning, admonition, censure," and (other than statewide elected officials) order "suspension or termination" of employment. *Id.* §94(10)(p)(ii). COELIG instead "may recommend impeachment" for statewide elected officials.[9] *Id.* COELIG further may "refer the matter" to law enforcement if it finds "sufficient cause" for a "potential violation of

[9] The Act confers all but unqualified authority on COELIG to decide not to assess a civil penalty despite finding a violation of law. *See* 19 NYCRR 941.14(b) ("If the alleged violation has been established, and the Commission determines in light of all the circumstances that the violation is not serious enough to warrant assessment of a civil penalty, the Commission, in its discretion, may take such other action as appropriate including, but not limited to, a written admonition or a recommendation that disciplinary action be taken."). Of course, prosecutorial discretion—the power to determine whether to bring an enforcement action—is a quintessentially executive function. *Cf. Kuttner v. Cuomo*, 147 A.D.2d 215, 220 (3d Dep't 1989) ("By giving the [State Ethics] Commission prosecutorial discretion, the Legislature has essentially and improperly infringed upon an executive branch function.").

any criminal law." *Id.* §94(10)(n)(iv).[10] And COELIG must publish a report with its factual findings and legal conclusions "on its website." *Id.* §94(10)(p)(i), (ii).

67. As noted, COELIG is specifically denied authority to penalize or discipline members of the Legislature, legislative employees, or legislative candidates. §94(10)(p)(i) and (ii). Instead, COELIG may only write reports of its findings and give a copy "to the legislative ethics commission" for such individuals. In an obvious effort, however, to help protect members of the Legislature and legislative employees from accountability for their conduct, the Act prohibits COELIG from publishing those findings. *Id.*

E. COELIG's Enforcement Action Against Plaintiff

68. On July 10, 2020, Plaintiff's Special Counsel submitted, in compliance with 19 NYCRR 932.5, a written request to COELIG's predecessor, JCOPE, for approval to author and publish a book.[11] On July 17, 2020, by letter from JCOPE's counsel, JCOPE granted the request for approval.

69. Plaintiff's book, entitled *American Crisis: Leadership Lessons from the COVID-19 Pandemic*, was published on October 13, 2020.

70. On April 9, 2021, JCOPE notified Plaintiff that JCOPE had received information that he may have potentially violated provisions of Public Officers Law §74 in connection with the preparation and publication of the book.

[10] 19 NYCRR 941.14(a): "The Commission's assessment of civil assessments and other penalties made pursuant to Executive Law §94(10) shall not preclude its referral of violations of law to a prosecutor for criminal prosecution in accordance with the provisions of Executive Law 94(10)(n)(iv)."

[11] Pursuant to its authority under former Executive Law §94(17)(a), JCOPE promulgated rules that required statewide elected officials to obtain JCOPE's approval for certain outside activities. 19 NYCRR 932.5.

71. Plaintiff, through counsel, responded on May 10, 2021, denying any violation of law and advancing facts and legal authority supporting his position.

72. On August 10, 2021, Plaintiff resigned from office. On March 15, 2022, over seven months later, JCOPE formally charged Plaintiff with violating Public Officers Law §74(3) by issuing a Notice of Substantial Basis Investigation and Hearing (NSBIH), a 37-page "charging document" that states findings of purported fact. *See, e.g.*, NSBIH at 12 n.17, 36 (asserting that the evidence that Plaintiff violated Public Officers Law §74 is "substantial[,]" "overwhelming[,]" "beyond dispute[,]" and "incontrovertible"). These findings were made without any hearing or semblance of due process.

73. When JCOPE ceased to exist as the governing ethics agency on July 8, 2022, the effective date of the Act, all pending enforcement proceedings initiated under JCOPE's authority ceased as well. But on September 12, 2022, COELIG's deputy director informed counsel for Plaintiff that COELIG, in its first meeting and with only seven appointed members, authorized COELIG staff to prosecute the charges brought by JCOPE.[12] Without making any modifications, COELIG adopted JCOPE's "charging document" in full. On October 6, 2022, in its second meeting and still with only seven members, COELIG determined that any matter or inquiry that was pending before JCOPE would be "continued . . . and pursued by the

[12] According to COELIG Resolution 22-01, at the September 12, 2022 meeting, COELIG appointed JCOPE's former executive director, Sanford N. Berland, as "interim" Executive Director of the Commission. The Commission purported to delegate certain authority to Mr. Berland "to provide for the day-to-day administration of Commission operations," as well as specific powers related to investigations and enforcement, including the power to: (i) receive complaints and referrals of alleged violations of the State ethics and lobbying laws; (ii) negotiate and enter into settlement agreements for cases subject to a civil penalty; and (iii) to subpoena witnesses and compel the production of records that Mr. Berland deems "relevant or material" to any investigation.

Commission and Commission staff." Resolution 22-02.[13] COELIG further determined that any of the letters, notices, or other documents issued by JCOPE in connection with an enforcement action "shall remain valid and effective." *Id.*

74. Plaintiff's adjudicatory hearing is currently scheduled to commence on June 12, 2023.

THE ACT IS BLATANTLY UNCONSTITUTIONAL

75. The Act suffers from glaring constitutional infirmities which, individually and collectively, reflect the Legislature's declared goal of creating an ethics agency, equipped with quintessentially executive powers of investigation and enforcement, that is "truly independent" of the Governor—*i.e.*, in violation of the separation of powers as well as the express requirements for officers and civil departments set forth in Article V of the New York Constitution.

A. The Act Violates the Separation of Powers

76. The separation of powers "is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions." *Maron*, 14 N.Y.3d at 258 (2010). "The legislative department makes the laws, while the executive executes and the judiciary construes and applies them. Each department is confined to its own functions and can neither encroach upon nor be made subordinate to those of another without violating the fundamental principle of a republican form of government." *In re Davies*, 168 N.Y. 89, 101–02 (1901).

[13] As of April 25, 2023, COELIG has ten sitting members. *See* Independent Review Committee for Nominations to the Commission on Ethics and Lobbying in Government, https://www.ny.gov/independent-review-committee-nominations-commission-ethics-and-lobbying-government.

77. The separation of powers "is a *structural safeguard*" inherent in both the New York and United States constitutions and is "necessary for the preservation of liberty itself." *Maron*, 14 N.Y.3d at 258, 260 (emphasis in original); *see also* Federalist No. 51 (Madison observing that the "separate and distinct exercise of the different powers of government" is "essential to the preservation of liberty").

78. To achieve the requisite separation of state power, each branch "should be free from interference, in the discharge of its peculiar duties, by either of the others." *Maron*, 14 N.Y.3d at 258; *see also People v. Viviani*, 36 N.Y.3d 564, 576-78 (2021) (legislature may not "deprive" executive branch officials of "an essential function of their constitutional office"); *Tremaine*, 252 N.Y. at 43 ("[to] engraft executive duties upon a legislative office [would] usurp the executive power by indirection") (citing *Springer v. Philippine Islands*, 277 U.S. 189 (1928)).

79. Of course, some admixture of the executive, legislative and judicial powers is both unavoidable and salutary. *Tremaine*, 252 N.Y. at 39. But clear boundaries between the branches exist, and even a slight "erosion" of those boundaries could "erode the genius of that system" of government. *Rapp*, 44 N.Y.2d at 167. For that reason, the Court of Appeals has cautioned that vigilance is required, exhorting the judiciary to "be alive to the imperceptible but gradual increase in the assumption of power properly belonging to another department." *Id.*

80. The perceived public policy benefits of intrusions into the powers and duties of another are of no moment in assessing their constitutionality. *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."). Nor does the acquiescence of a branch in an unconstitutional encroachment immunize it from scrutiny.

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497 (2010) ("[T]he separation of powers does not depend on . . . whether the encroached-upon branch approves the encroachment.") (quotations omitted).

81. The New York Constitution provides that "[t]he executive power shall be vested in the governor"—and the Governor alone—and places upon her the responsibility to "take care that the laws are faithfully executed." N.Y. Const. art. IV, §§1, 3; *accord Tremaine*, 252 N.Y. at 39 (the Governor is "supreme within [the] field of [executive] action"). As James Madison put it, speaking on the floor of the First Congress: "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing and controlling those who execute the laws." 1 Annals of Cong. 481 (1789).

82. The New York Constitution imbues the Governor with the exclusive authority and obligation "to oversee . . . the administration of the various entities in the executive branch." *Rapp*, 44 N.Y.2d at 162. The same principle applies in federal constitutional law. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021) (reaffirming that "the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate"); *Free Enter. Fund,* 561 U.S. at 492 ("Article II confers on the President the general administrative control of those executing the laws.") (quotation omitted).

83. Without these structural safeguards, "there can be no democratic accountability for executive action," and individuals cannot be assured of their "right to be subjected only to *lawful* exercises of executive power." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988–89, 1990 (2021) (Gorsuch, J., concurring in part and dissenting in part).

COELIG Performs Quintessential Executive Functions

84. "[I]n this State the executive has the power to enforce legislation and is accorded great flexibility in determining the methods of enforcement." *Rapp*, 44 N.Y.2d at 163; *Bourquin v. Cuomo*, 85 N.Y.2d 781, 785 (1995) (recognizing the "'great flexibility' to be accorded the Governor in determining the methods of enforcing legislative policy"). "[N]o function cuts more to the heart of the executive's constitutional power than its discretion to seek the imposition of penalties." *Avignone v. Valigorski*, 70 Misc.3d 905, 912 (Cohoes City Ct. 2022).

85. The Act makes COELIG responsible for the enforcement of the Covered Statutes and grants COELIG "great flexibility" to "determine[e] the methods of enforce[ment]," *Rapp*, 44 N.Y.2d at 163. COELIG has discretion to investigate potential violations of the Covered Statutes, Exec. L. §94(10)(a)–(f), and to issue final determinations—not mere advisory opinions or recommendations—declaring whether a Covered Statute has been violated, *id.* §94(10)(p).

86. The Act even authorizes COELIG to impose civil penalties, a function that "cuts . . . to the heart" of the Governor's constitutional power. *Avignone*, 70 Misc.3d at 912; *see Seila Law*, 140 S.Ct. at 2200 ("[T]he Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power[.]"). These civil penalties range from $10,000 to $40,000 per violation (depending on the statute) and can reach up to the amount of any benefit which COELIG deems attributable to the violation. Exec. L. §94(10)(n)(i) and (ii). In determining the amount of the penalty, the Act provides that COELIG may broadly consider "any other factors the commission deems appropriate." *Id.* §94(10)(n)(v).

87. The Act allows COELIG to choose from an array of different remedial options, none of which are mutually exclusive,[14] including ordering censure, suspension, termination, or "other appropriate discipline," *id.* §94(10)(p)(ii); referring the matter to criminal law enforcement authorities, *id.* §94(10)(n)(iv); and seeking judicial enforcement of its orders, *id.* §94(5)(a) and (14). These functions are quintessential executive powers. *See Forti v. New York State Ethics Comm'n*, 75 N.Y.2d 596, 616 (1990) (referring to the decision to seek criminal prosecution as necessary "to ensure 'that the laws are faithfully executed'"); *Buckley*, 424 U.S. at 138 (referring to the executive's "discretionary power to seek judicial relief" as "the ultimate remedy for a breach of the law").

The Act Completely Deprives the Governor of Appointment Authority

88. The Act improperly denies the Governor the power to appoint COELIG members, who are officers of the executive branch performing primarily executive functions. *See* Exec. L. §94(1)(a) (establishing COELIG "within the department of state"). Appointing executive branch officers who perform primarily executive functions is a power reserved for the Governor or another executive branch official subordinate to the Governor. *See Springer*, 277 U.S. at 202 ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or *appoint* the agents charged with the duty of such enforcement. The latter are *executive* functions.") (citation omitted, emphasis added); *Free Enter. Fund*, 561 U.S. at 492 (the power of "*appointing* . . . those who execute the laws" is "in its nature Executive"); *Myers*, 272 U.S. at 117 ("As [the President] is charged specifically to take care that [the laws] be

[14] Exec. L. §94(10)(p)(ii) (authorizing COELIG to impose a penalty "in addition to" taking disciplinary action); 19 NYCRR 941.14(a) ("The Commission's assessment of civil assessments and other penalties made pursuant to Executive Law §94(10) shall not preclude its referral of violations of law to a prosecutor for criminal prosecution in accordance with the provisions of Executive Law 94(10)(n)(iv).").

faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws."). By giving the IRC—and not the Governor—the final say on COELIG appointments, the Act impermissibly interferes with the Governor's ability to "take care that the laws are faithfully executed." N.Y. Const. art. IV, §3.

89. That the Act consigns the Governor to nominating a mere minority of COELIG's members (3 of 11) is an independent violation of the separation of powers that compounds and exacerbates the constitutionally defective role of the IRC, especially because six of the nominees, and thus a majority of the members, are nominated by the legislative leaders. Accordingly, legislative agents—the members appointed on nomination of the legislative leaders—control the full complement of COELIG's enforcement powers, including the power to seek penalties, and can exercise them (or determine to not exercise them in any given case) regardless of whether the three members appointed on nomination of the Governor agree or disagree with the legislative agents' enforcement decisions or actions. Thus, however one views the Governor's power to nominate a minority of COELIG's members, the Act renders this power subordinate to the power of the Legislature.

90. Not only does the Act violate the separation of powers by depriving the Governor of appointment authority, but it impermissibly vests that authority in private persons. Simply put, the Legislature has no power under the New York Constitution to outsource appointment authority—especially the executive branch's appointment authority—to private persons.

91. But that is precisely what the Act does by vesting appointment authority over COELIG's members in the IRC—a committee of private individuals who have no connection with any branch of government, who are in no way accountable to the people of the State, and

who need not have familiarity with, let alone expertise on, the subject matter of the Covered Statutes. *See* Exec. L. §94(3)(l) (IRC members "shall neither be public officers nor be subject to the requirements of the public officers law."); *id.* §94(3)(i) (authority to remove IRC member resides in IRC); *id.* §94(2)(c) (IRC members to be comprised of law school deans).

92. And it is both emblematic of the Act's manifold defects and all the more egregious that those private persons are given *carte blanche* to exercise the appointment authority without any guiding principles or standards, let alone intelligible ones. *See id.* §94(3)(g). The blank check given to the IRC exacerbates the lawlessness of the Act's appointment process. And the Act's requirement that the IRC's selection process be confidential further shields the IRC's appointment decisions from accountability. *Id.* §94(3)(i).

93. To be sure, several state bodies have two-tier appointment structures, in which the Governor's appointment power is subject to the recommendation of others, including legislative members. And a few state bodies allow private entities to make appointments. Unlike COELIG, however, none of those bodies is authorized to perform core executive functions.

The Act Deprives the Governor of Removal and Oversight Authority

94. The Act provides no mechanism by which the Governor, or anyone else within the executive branch, can remove COELIG members. To the contrary, under the Act, COELIG's members may be removed only by a majority vote of the members themselves, and only on specified grounds. Exec. L. §94(4)(c).[15] That is plainly unconstitutional.

[15] Public Officers Law §33, which allows the Governor to remove an officer whom he appointed (except as otherwise provided by law), does not apply here, because the Governor does not appoint any COELIG members (given the IRC).

95. The power to remove executive branch officers who perform primarily executive functions is reserved for the Governor or another executive branch official subordinate to the Governor. *Matter of Guden*, 171 N.Y. 529, 531 (1902) ("In this country, the power of removal is an executive power, and in this state it has been vested in the governor by the people."); *Matter of Richardson*, 247 N.Y. 401, 410 (1928) ("the removal of a public officer" is "an executive act"); *see Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183 (2020) (holding that the "power to remove" officers of "an independent agency that wields significant executive power" belongs to the President); *Free Enter. Fund*, 561 U.S. at 493 (because the executive power is vested by Article II in the President, "the President . . . must have some power removing those for whom he cannot continue to be responsible") (quotation omitted); *Bowsher v. Synar*, 478 U.S. 714, 720 (1986) (stating that non-executive branch officials "may not retain the power of removal over an officer performing executive functions"); *see also Collins v. Yellen*, 141 S. Ct. 1761, 1796 (2021) ("It is the power to supervise—and, if need be, remove—subordinate officials that allows a new President to shape his administration and respond to the electoral will that propelled him to office.").

96. By design, the Act divests the executive branch of supervision over COELIG and renders it immune to executive supervision and control. Pursuant to the Act, the Governor has no authority over COELIG members or the Executive Director, who is responsible for carrying out the day-to-day functions of COELIG and to whom the members are expressly authorized to delegate substantial authority, including enforcement authority.[16] Exec. L. §94(6)(b).

[16] On September 12, 2022, COELIG did, in fact, delegate that authority to the Executive Director. *See* Resolution 22-01, *available at* https://ethics.ny.gov/system/files/documents/2022/09/coelig_delegationresolution_as-amended_final-9_12_22.pdf.

97. Nor does the Governor have any authority over COELIG's adjudicatory proceedings, which already place respondents like Cuomo at a distinct disadvantage. For starters, the "independent arbitrator" is chosen by COELIG and on COELIG's payroll; the protections afforded litigants under New York's normal rules of procedure and evidence do not apply; and if COELIG disagrees with the independent arbitrator's factual findings or recommendation of a penalty, COELIG has given itself the right to change them. 19 NYCCR §941.13(c) (permitting COELIG to "reverse" or "dismiss" the "hearing officer's finding of fact and recommendation"). The only avenue to appeal COELIG's determination is in an Article 78 proceeding, which reviews facts under the deferential "substantial evidence" standard of review. CPLR 7803(4). That COELIG may exercise these virtually unfettered powers without any political accountability is a recipe for a separation of powers disaster.

98. Thus, if COELIG abuses its enforcement authority or determines to exercise it in a manner inconsistent with the faithful execution of the laws, the Governor is powerless to take corrective measures to vindicate her constitutional duty. Thus, by depriving the Governor of any authority whatsoever—direct or indirect—to remove COELIG's members, the Act impermissibly interferes with the Governor's fundamental and primary constitutional duty to "take care that the laws are faithfully executed." Art. IV, §3.

The Act Infringes on the Governor's Budgetary Powers

99. The Act includes a provision that purports (1) to require the Governor to "separately state the recommended appropriations for [COELIG]" in her annual appropriations bills; and (2) to preclude the Governor from including in her appropriation bills a provision permitting the "separately stated appropriations" from being "decreased by interchange with any other appropriation." Exec. L. §94(1)(f). Under this provision, a Governor would be precluded

from proposing items of appropriation not to COELIG, but instead to the Department of State, which purportedly houses COELIG and is headed by an appointee of the Governor that could exercise judgment about what portion of the items should be allocated to COELIG. The Governor would also be precluded form including provisions in her appropriations bills authorizing the interchange of items of appropriation directly to COELIG with any other items of appropriation. This provision of the Act is patently unconstitutional. It deprives the Governor of the full exercise of her powers under Article VII, Sections 1 through 6 of the Constitution, powers recognized by the Court of Appeals in *Pataki v. New York State Assembly*, 4 N.Y.3d 75, 83 (2004) (plurality opinion). The Governor cannot be required by the Legislature either to propose a lump sum appropriation or to not propose interchange authority.

The Act Improperly Allows the Legislative Branch to Discipline the Executive Branch

100. Contrary to established separation-of-powers principles, members of COELIG—whether viewed as agents of the legislative branch or agents of a legislatively created body of private individuals—are charged with enforcing the Covered Statutes against executive branch officers and employees, including the Governor and other constitutional officers, through the imposition of civil penalties, sanctions, and other severe disciplinary action.[17] All of that is done without any oversight by an executive branch official.

101. Adding insult to injury, and in tacit recognition of the legislative branch's own separation-of-power prerogatives, the Act strips COELIG of any power "to impose penalties or

[17] The unconstitutional conferral of executive enforcement power is exacerbated by the fact that the Covered Statutes apply to public and private individuals. *See Seila Law*, 140 S.Ct. at 2200 (noting CFPB director's "authority to bring the coercive power of the state to bear on millions of private citizens" in contrast to "independent counsel in *Morrison*," whose "power, while significant, was trained inward to high-ranking Governmental actors"). Moreover, Public Officers Law §74, for example, establishes sweepingly broad standards of conduct and covers "areas where distinctions are close, and the differences between right and wrong not always easily ascertainable." *Rapp v. Carey*, 44 N.Y.2d 157, 164 (1978) (internal quotation marks and brackets omitted).

discipline upon members of or candidates for member of the legislature or legislative leaders for any violation" of the Covered Statutes. Exec. L. §94(10)(p)(i). Legislation that respects the separation of powers to the benefit of one branch and at the expense of another turns this crucial doctrine on its head. *See Broderick v. Morton*, 156 N.Y. 136, 144–45 (1898) (separation of powers doctrine envisions "a division of power among the among the three co-ordinate branches of government, each operating as a restraint upon the other, *but still in harmony*") (emphasis added).

B. The Act Violates the Constitution's Civil Department System

102. The structure and composition of New York's civil department system is set forth in Article V of the New York Constitution. These provisions were added to the Constitution as part of the so-called "reorganization" amendments of 1925. Before the amendments, the creation of state agencies and boards was done by the Legislature "haphazardly without regard to any existing structure" and "subject to no direct and effective supervision by a superior authority." *Cappelli v. Sweeney*, 167 Misc.2d 220, 227–28 (Sup. Ct., Kings Cty. 1995), *aff'd*, 230 A.D.2d 733 (2d Dep't 1996). As of 1915, when reorganization was first proposed and debated, there were 152 "departments, bureaus, boards and commissions" within "the executive branch, many with redundant and conflicting responsibilities, and each largely independent of supervision, except by the Governor personally." *Id.* at 226. This system was not only "unwieldy and wasteful," but it prevented the Governor from fulfilling his constitutional duty to "take care that the laws are faithfully executed." Art. IV, §3; *see* New York State 1938 Constitutional Convention Committee Report, Problems Relating to Executive Administration and Powers ("Poletti Report"), at 126 (quoting *Documents of 1915 Convention*, Doc. No. 40, at 2) ("It is

manifestly impossible for the Governor personally to exercise direct supervision over a such a multitude of agencies. They are, therefore, practically free from effective control.").[18]

103. The solution was to reorganize the system of State government and replace it "with an integrated departmental system, headed and controlled by the Governor, as the responsible administrative head of the State." Ex. F at 261. Delegates at the 1915 Constitutional Convention debated *how much* appointment and removal authority should be vested in the Governor—but that such power would generally reside with the Governor was a given. Ex. F at 162. For instance, the initial reorganization proposal, which was rejected at the Convention of 1915, would have given "the Governor the power *to appoint and remove in his discretion* the heads of all State departments whose appointment or election was not otherwise provided for in the Constitution." Ex. F at 162 (emphasis in original).

104. The final version, approved in 1925, reflected a compromise, still in effect today, which gives the Legislature a limited role with respect to the Governor's appointment and removal powers. Art. V, §4 ("[T]he heads of . . . departments[,] . . . excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law."). Exceptions were made for the departments headed by other constitutional officers (the Department of Audit and Department of Law) and departments considered to perform quasi-legislative or quasi-judicial functions (i.e., the Department of Education and Department of Agriculture). *See id.*; *see also* Ex. F at 126, 160–61. But the drafters made it abundantly clear that departments "considered as 'purely executive and administrative' in function"—namely, the

[18] The relevant portions of the Poletti Report are attached to this Complaint as Exhibit F ("Ex. F").

Executive Department and the Department of State—would be subject to the Governor's oversight and control. Ex. F at 276.

105. To maintain this system of executive oversight going forward, the drafters placed strict restrictions on the Legislature's ability to create state agencies outside of this civil department structure. The reorganization amendments forbade the creation of new departments and required any new agency to be placed within an existing department. Although the strict prohibition on creating new departments has since been amended to allow a maximum of twenty civil departments, Art. V, §2 ("There shall be not more than twenty civil departments in the state government."), the structural and substantive requirements of the reorganization amendments remain in force today. While the Legislature is authorized to add to or remove powers of existing departments, *id.*, art. V, §3, any new agency must be placed within an existing department or, provided that the cap would not be exceeded, established as a new standalone department made accountable to the Governor (*i.e.*, appointed by the Governor subject to the Senate's approval and removable by the Governor in a manner prescribed by law), *id.*, art. V, §4. The only exceptions to these requirements for new agencies are for "temporary commissions for special purposes" and "executive offices of the governor," neither of which is relevant here. *Id.*, art. V, §3.

106. Thus, absent any specified exception, the reorganization amendments—coupled with the vesting of the executive power in the Governor—require state agencies to be accountable either to the head of their department or, if organized as a department, directly to the Governor herself. *See Cappelli*, 167 Misc. 2d at 227 (noting that the "heads of departments . . . appointed" under Article V, §4, "constitute the group of advisers on whom the Governor must depend for carrying out the policies of his administration") (quoting Poletti Report at 126); *see*

also Ex. F at 274 ("[I]t must be determined whether the internal structure of each department makes for a direct line of responsibility through the department itself to the head. For if there exists within a department itself an area of unaccountability, in the form of a board or commission, not responsive to the head's control, then the authority of the Governor over the department through him is equally dissipated.").

107. In short, the central purpose of the reorganization amendments was to confer greater power—and, perforce, greater accountability—upon the Governor. *See Cappelli*, 167 Misc.2d at 227–28. As described by the Constitutional Convention Committee of 1938, the reorganization amendments "did a great deal to make the Governor of New York its chief executive in fact as well as in theory. . . . [T]he Governor can now, to a greater degree, assume the responsibility for directing the administrative work of the State, because the units of government carrying on the actual work have been made more susceptible to his control and direction." Ex. F at 300.

108. Here, the Act is nothing more than a transparent end run around the carefully crafted civil department requirements set forth in Article V of the New York Constitution. *See Burby*, 155 N.Y. at 280 ("When the main purpose of a statute, or of part of a statute, is to evade the constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law."). The Act recites that COELIG is "established within the department of states," but that recitation is pure lip service. COELIG is not accountable to the Secretary of State or to the Governor, and neither of the two exceptions in Article V, §3 applies—i.e., COELIG is neither a temporary commission for special purposes nor an executive office of the Governor.

109. Thus, it cannot reasonably be disputed that COELIG, which is imbued with robust executive and administrative powers, exists within the Department of State as "an area of unaccountability . . . not responsive to the head's control" or to "the authority of the Governor." Poletti Report at 274. The Act therefore violates the civil department system mandated by Article V—a violation that cannot be cured by the "meaningless reference" to the Department of State in the text of the Act. *See Soares v. State of New York*, 68 Misc. 3d 249, 279 (Sup. Ct. Albany Cty. 2020) ("It is clear . . . that the enactment of this constitutional provision was not intended merely to require the inclusion of a meaningless reference to some department in the text of legislation, but rather was directed at streamlining state government" and consolidating the various departments and agencies under the "direct and effective supervision by a superior authority.") (citation omitted); *Tremaine*, 252 N.Y. at 51 (holding that the "distribution of administrative functions to members of the Legislature, rather than to the constitutionally created civil departments" violates Article V of the Constitution).

* * *

110. There is no precedent for an agency like COELIG in this State: COELIG is imbued with quintessential law-enforcement power, including the power to subject individuals to monetary penalties and disciplinary actions. The Governor has no direct or indirect power to appoint COELIG's members, remove COELIG's members (even for cause), or oversee the exercise of COELIG's enforcement activities. COELIG is, by design, not accountable to the Governor or any other executive branch official. Its members are selected by a group of private persons, and the Legislature arrogated to itself the power to nominate a majority of the members. COELIG is anathema to the structure of State government adopted by the founders at the time of the reorganization amendments. *Cappelli*, 167 Misc. 2d at 226 (the purpose of the

reorganization of the civil department structure was "to give the power to the Governor to efficiently execute the laws") (citation omitted).

PLAINTIFF'S INJURIES

111. COELIG already has determined to prosecute the charges against Plaintiff brought by JCOPE and authorized COELIG staff to do. The adjudicatory hearing is currently scheduled to commence on June 12, 2023.

112. Plaintiff therefore faces the "'here-and-now' injury of subjection to an unconstitutionally structured decisionmaking process," *Axon Enter., Inc. v. Fed Trade Comm'n*, No. 21-1239, 2023 WL 2938328, at *9 (U.S. Apr. 14, 2023) (Kagan, J.), as well as the actual and imminent threat of suffering any potential remedies that COELIG is authorized to issue.

113. Upon information and belief, COELIG intends to seek a civil penalty in the millions of dollars to cover the entirety of Plaintiff's book proceeds. This is no empty threat. According to the charging document JCOPE issued and that COELIG adopted without modification via Resolution 22-02, the evidence that Plaintiff violated Public Officers Law §74 is "substantial[,]" "overwhelming[,]" "beyond dispute[,]" and "incontrovertible" (NSBIH at 12 n.17, 36)—a factual and legal determination made *before* allowing Plaintiff an opportunity to defend himself and without the testimony of key witnesses for the defense.

114. Plaintiff has no adequate or other remedy at law for these injuries.

FIRST CAUSE OF ACTION
(Declaratory Judgment – Separation of Powers Violation)

115. Plaintiff repeats and realleges the allegations in paragraphs 1 to 114 as if fully set forth herein.

116. Because Plaintiff is subject to an enforcement proceeding brought by COELIG an actual controversy exists between the parties, and a declaration of whether the Act violates separation of powers would resolve this controversy.

117. The Act vests in COELIG the power to exercise executive functions and powers.

118. The Act improperly deprives the Governor of authority to appoint the members of COELIG; improperly confers on the legislative leaders the right to nominate a majority of COELIG members; and improperly relinquishes to private individuals the power to decide COELIG's composition.

119. The Act improperly deprives the Governor of any authority to remove COELIG's members or otherwise control or oversee COELIG's performance of executive functions.

120. The Act improperly deprives the Governor of the full exercise of his budget-related powers under Article VII, Sections 1 through 6 of the Constitution.

121. These provisions of the Act, individually and in tandem, interfere with the Governor's duty to "take care that the laws are faithfully executed." Art. IV, §3. They also contravene the Constitution's "vest[ing]" of the "executive power" in the Governor. *Id.* §1.

122. Accordingly, the Act should be declared unconstitutional as a violation of the separation of powers.

SECOND CAUSE OF ACTION
(Declaratory Judgment – Civil Department System Violation)

123. Plaintiff repeats and realleges the allegations in paragraphs 1 to 122 as if fully set forth herein.

124. Because Plaintiff is subject to an enforcement proceeding brought by COELIG an actual controversy exists between the parties, and a declaration of whether the Act violates the Constitution's civil department system would resolve this controversy.

125. The Act vests in COELIG the power to exercise executive functions and powers.

126. The head of COELIG is not appointed by the Governor with the advice and consent of the Senate. Despite formally being placed in the Department of State, COELIG is not accountable to the Secretary of State (or any other civil department head). Because COELIG is not accountable to the Governor, the Secretary of State, or any civil department head, COELIG operates outside the bounds of the State's civil department system.

127. Accordingly, the Act should be declared unconstitutional as a violation of the civil department structure set forth in Article V of the Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment and order be issued:

(i). Declaring that the Act is unconstitutional;

(ii). Declaring that any actions taken by COELIG in connection with or pursuant to its investigatory and enforcement authority are unconstitutional and void;

(iii). Permanently enjoining COELIG from taking any actions in connection with or pursuant to its investigatory and enforcement authority;

(iv). Granting attorney's fees and costs pursuant to CPLR §8601; and

(v). Granting Plaintiff such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 25, 2023

HOLWELL SHUSTER & GOLDBERG LLP

By: */s/ James M. McGuire*

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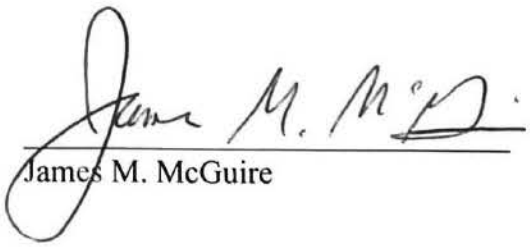
VERIFICATION

I, James M. McGuire, an attorney admitted to practice before the courts of the State of New York, hereby affirms the following to be true, under penalty of perjury pursuant to CPLR 2106:

I am the attorney for Plaintiff in the above-captioned action with offices located at 425 Lexington Avenue, New York, New York 10017. I have read the foregoing Complaint and know the contents thereof, and the same are true to my knowledge, except as to the matters stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

The reason why this verification is not made by Plaintiff is because Plaintiff is not within the County of New York, which is the county where I have my office. I further say that the grounds for my belief as to all matters in the Complaint not stated to be upon my knowledge are based upon documents and information furnished to me by the New York State Joint Commission on Public Ethics and the New York State Commission on Ethics and Lobbying in Government.

Dated: New York, New York
April 25, 2023



James M. McGuire