

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

DAVID SOARES, District Attorney of Albany County,
Representing All Elected District Attorneys; ROBERT J.
MASTERS, an Assistant District Attorney in Queens County,
Representing All Assistant District Attorneys; and the
DISTRICT ATTORNEYS ASSOCIATION OF THE STATE
OF NEW YORK,

Index No.:

Plaintiffs,

-against-

VERIFIED
COMPLAINT FOR
DECLARATORY
AND INJUNCTIVE
RELIEF

THE STATE OF NEW YORK; ANDREW M. CUOMO, in his
official capacity as the Governor of the State of New York;
JOHN J. FLANAGAN, in his official capacity as the
Temporary President of the New York State Senate; ANDREA
STEWART-COUSINS, in her official capacity as the Minority
Leader of the New York State Senate; CARL E. HEASTIE, in
his official capacity as the Speaker of the New York State
Assembly; BRIAN M. KOLB, in his official capacity as the
Minority Leader of the New York State Assembly; and the
COMMISSION ON PROSECUTORIAL CONDUCT,

Defendants.

Plaintiffs, by their undersigned counsel, in support of their Verified Complaint against the
named Defendants, allege, upon information and belief, as follows:

Preliminary Statement

1. The New York State Constitution clearly sets forth the distinct roles and
responsibilities of each branch of state government. It is a bedrock principle of our democracy
that no statute, no matter how noble its ostensible purpose, may violate that constitutional structure.

Yet Article 15-A of the Judiciary Law,¹ which is set to become effective on January 1, 2019, does precisely that in numerous and flagrant ways.

2. Article 15-A will create the Commission on Prosecutorial Conduct (“CPC”), a hybrid body comprised of legislative, judicial, and executive appointees imbued with vast oversight and disciplinary authority over all state prosecutors, including elected District Attorneys. The CPC is modeled on the Commission on Judicial Conduct (“CJC”), a state body tasked with investigating judicial misconduct. Unlike the CPC, however, the CJC’s powers are enshrined in the State Constitution and are necessary to fill a void in the review of judicial misconduct by providing oversight for non-attorney judges otherwise subject to no disciplinary authority.

3. In addition to creating the CPC, Article 15-A also assigns entirely new, non-judicial functions to the Court of Appeals and its Chief Judge, whose powers and jurisdiction are specifically enumerated in the Constitution.

4. Article 15-A is riddled with fatal constitutional defects, as the Governor and State Attorney General’s Office have both concluded.² Specifically, the statute: (1) impermissibly interferes with the constitutionally protected independence and core functions of elected District Attorneys by granting the CPC general oversight and disciplinary authority over the exercise of prosecutorial discretion; (2) violates basic separation-of-powers principles by vesting oversight of an executive function in a hybrid disciplinary body, most of whose members are appointed by the Legislature, and by authorizing the Court of Appeals to suspend District Attorneys; (3) impermissibly expands the powers and jurisdiction of the Court of Appeals and the Chief

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

² A copy of the Governor’s August 20, 2018 memorandum regarding Article 15-A is attached to this Complaint as Exhibit 2. A copy of the State Attorney General’s Office August 13, 2018 memorandum regarding Article 15-A is attached to this Complaint as Exhibit 3.

Judge; (4) unlawfully compels judges to perform non-judicial tasks; (5) impermissibly intrudes upon the exclusive jurisdiction of the Appellate Division over matters of attorney discipline; (6) unlawfully subjects prosecutors to discipline without any governing standards, in contravention of their due process and equal protection rights; and (7) impermissibly creates a commission with administrative and executive duties that operates outside the clear confines of the Constitution's civil department system.

5. Because of these glaring defects, Article 15-A must be declared unconstitutional and the operation of the CPC enjoined. If the law is allowed to stand, the independence of District Attorneys will be threatened, the role of the judiciary impermissibly altered, the performance of law enforcement duties chilled, the due process and equal protection rights of prosecutors violated, the entitlement of voters to a District Attorney responsive to their needs undermined, and the integrity of our constitutional system compromised.

6. Accordingly, Plaintiffs seek: (1) a declaratory judgment that Article 15-A of the Judiciary Law contravenes the New York State Constitution as well as the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution; (2) both a preliminary and permanent injunction prohibiting (a) the creation of and any action by the CPC, and (b) review of CPC determinations by the Court of Appeals; and (3) attorney's fees and costs.

Jurisdiction and Venue

7. This Court has jurisdiction over this action pursuant to Civil Practice Law and Rules ("CPLR") § 3001 and § 3017(b), as well as §§ 6301 and 6311.

8. The 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.

9. Venue is proper in Albany County pursuant to CPLR § 503 because two of the Plaintiffs each maintain their principal office in Albany County. Also, Defendants maintain their principal offices in Albany County.

Parties

10. Plaintiff David Soares is the elected District Attorney of Albany County and the current President of the District Attorneys Association of the State of New York (“DAASNY”).

11. Plaintiff Robert J. Masters is an Assistant District Attorney in Queens County.

12. Plaintiff DAASNY is a New York not-for-profit corporation duly authorized to operate in the State of New York. Its principal place of business is in the City of Albany, New York, and the majority of its members are District Attorneys and Assistant District Attorneys serving in the various counties that comprise New York State.

13. Each of the named Plaintiffs has standing to bring this action. *See Aeneas McDonald PBA v. City of Geneva*, 92 N.Y.2d 326, 331 (1998); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 813-14 (2003).

14. The Defendants are the State of New York, and its creation, the Commission on Prosecutorial Conduct, along with the Governor, the Temporary President of the Senate, the Minority Leader of the Senate, the Speaker of the Assembly, and the Minority Leader of the Assembly, all of whom are given the power to appoint CPC members.

Article 15-A of the Judiciary Law

A. Legislative History of Article 15-A

15. On or about June 19, 2018, the New York State Legislature passed a bill (S. 2412-D; A. 5285-C) that would amend the Judiciary Law by creating Article 15-A, which contains sections 499-a through 499-j.

16. On August 20, 2018, the Governor of the State of New York, Andrew M. Cuomo, signed the bill into law, which will become effective on January 1, 2019.

B. Formation of the CPC

17. Article 15-A requires the formation of an eleven-person CPC. Judiciary Law § 499-c(1). Six of the CPC members must be appointed by state legislative officials (specifically the Temporary President of the Senate, the Minority Leader of the Senate, the Speaker of the Assembly, and the Minority Leader of the Assembly). *Id.* Three of the CPC members must be judges appointed by the Chief Judge of the Court of Appeals. *Id.* And the remaining two members must be appointed by the Governor, one of whom must be a prosecutor and the other of whom must be a public defender. *Id.*

C. Powers of the CPC

18. The CPC is empowered to investigate, hold hearings on, and discipline all “prosecutors,” a term that includes District Attorneys and Assistant District Attorneys. *Id.* at §§ 499-b(2), d(1), f(1), f(7). Special prosecutors, the Attorney General, and Assistant Attorneys General are not included in Article 15-A’s definition of “prosecutor.” The CPC is not empowered to oversee the conduct of attorneys who are neither District Attorneys nor Assistant District Attorneys.

19. Article 15-A authorizes the CPC not only to enforce applicable legal and ethical rules of conduct, but also to engage in general supervision of the performance of District Attorneys and their staff. The CPC’s mandate is vast:

- a. It is empowered to investigate—whether on complaint or on its own initiative—the “conduct, qualifications, fitness to perform, or performance of official duties of any prosecutor.” *Id.* at §§ 499-f(1)-(2). As part of this investigative power, it may

“subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that it may deem relevant or material to an investigation.” *Id.* at § 499-d(1). To the extent that the CPC incorporates this evidence (which may include confidential and sensitive information and documents created by prosecutors) into its proceedings, the evidence must then “be made available for public inspection.” *Id.* at § 499-f(7).

- b. It may compel the assistance of other state actors. Specifically, it may “request and receive from any court, department, division, board, bureau, commission, or other agency of the state or political subdivision thereof or any public authority such assistance, information and data as will enable it properly to carry out its functions, powers and duties.” *Id.* at § 499-d(3).
- c. If the CPC “deems it necessary and proper,” it can confer broad transactional immunity from prosecution upon witnesses who appear before it. *Id.* at § 499-d(2).
- d. It may “do all other things necessary and convenient to carry out its functions, powers and duties.” *Id.* at § 499-d(6).
- e. After a hearing, the CPC may publicly admonish or censure a prosecutor, or recommend to the Governor that the prosecutor be removed from office “for cause,” a term which includes, but is not limited to, “misconduct in office, as evidenced by his or her departure from his or her obligations under appropriate statute, case law, and/or New York Rules of Professional Conduct . . . , persistent failure to perform his or her duties, habitual intemperance and conduct, in and outside of his or her office, prejudicial to the administration of justice.” *Id.* at § 499-f(1), f(7).

20. Critically, Article 15-A provides no standards by which the CPC is to decide whether to initiate an investigation, find that a complaint has been sustained, or determine whether or how to impose disciplinary sanctions.

21. A District Attorney's Office may inform the CPC "by affirmation with specificity and particularity" that an investigation by the CPC "will substantially interfere" with an active prosecution or investigation by the District Attorney's Office. *Id.* at § 499-d(1). However, that will not preclude the CPC's review. Rather, the CPC, exercising its own judgment, is then responsible for protecting the District Attorney's prosecution or investigation from interference. *Id.*

22. In order to take disciplinary action, a quorum of eight CPC members is required, with six members in concurrence. *Id.* at § 499-c(6).

D. Review by the Court of Appeals

23. After the CPC imposes disciplinary sanctions against a prosecutor, that determination is final unless the prosecutor, within 30 days, seeks review by the Court of Appeals. *Id.* at § 499-f(7). Article 15-A sets forth no specific standard to guide the Court of Appeals' review.

24. After the Court of Appeals reviews the CPC's findings of fact and conclusions of law, it "may accept or reject the determined sanction; impose a different sanction including admonition or censure, recommend removal or retirement . . . ; or impose no sanction." *Id.* at § 499-f(8).

25. The Court of Appeals may also remove the prosecutor on an interim basis and may suspend the prosecutor's pay. *Id.* at § 499-f(9)(a)-(c).

E. Contrast with Article VI, Section 22(a) of the State Constitution

26. Article 15-A was designed to mirror Article VI, Section 22 of the State Constitution, which concerns the Commission on Judicial Conduct (“CJC”), an eleven-person commission tasked with investigating and disciplining judges. The language, structure, and purpose of the two laws are very similar. A critical difference, however, is that—unlike the statutorily created Article 15-A—Article VI, Section 22 is enshrined in the Constitution. Thus, its provisions are, by definition, constitutional. Additionally, whereas the CJC filled a void in the review of judicial misconduct, the CPC fills no such void, as prosecutors are already subject to disciplinary proceedings for misconduct.

27. As discussed below, Article 15-A seeks to achieve by statute what can only be accomplished through constitutional amendment.

Constitutional Infirmities of Article 15-A

28. Article 15-A suffers from numerous constitutional infirmities. These infirmities, individually and collectively, are at the core of Article 15-A, thus making their excision impractical.

29. Article 15-A’s constitutional infirmities can be grouped into seven general categories, which are detailed below.

A. Interference with the Independence and Core Functions of District Attorneys

30. The State Constitution requires that the office of District Attorney be filled by election in each county every three or four years. N.Y. Const. art. XIII, § 13(a). District Attorneys are “constitutional officers charged with the responsibility for prosecuting offenders in the county they represent and possessing broad discretion in determining when and in what manner to do so.”

Matter of Holtzman v. Goldman, 71 N.Y.2d 564, 573 (1988).

31. Where, as with District Attorneys, the Constitution recognizes an office and prescribes how it is to be filled, the Legislature may not deprive the officeholder of “a substantial attribute of the office.” *People ex rel. Wogan v. Rafferty*, 208 N.Y. 451, 456 (1913). Nor may it “interfer[e] with the office in any essential respect.” N.Y. Const. Convention Comm., *Reports*, v. 11, *Problems Relating to Home Rule and Local Government* 122 (1938); *see also id.* (although the Legislature “may modify or enlarge the powers and duties” of constitutional officers, “it cannot substantially impair them”); N.Y. Temporary State Comm’n on the Const. Convention, Report No. 14, *State Government* 199 (1967) (“Since district attorneys are constitutional officers, their office may not be abolished or their duties substantially impaired by legislative action.”).

32. An essential attribute of the office of District Attorney is the exclusive “discretionary power to determine whom, whether and how to prosecute [a criminal] matter’, the responsibility and accountability for which is not freely transferable to anyone else.” *Matter of Haggerty v. Himelein*, 89 N.Y.2d 431, 436 (1997) (quoting *Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 52 (1983)). This discretion includes whether to pursue a matter, *People v. Di Falco*, 44 N.Y.2d 482, 487 (1978), which charges to bring, *see People v. Cajigas*, 19 N.Y.3d 697, 702-03 (2012), and which sentence to seek, *see Matter of Johnson v. Pataki*, 91 N.Y.2d 214, 226 (1997). “The responsibilities attendant the position of [District Attorney] necessitate the exercise of completely impartial judgment and discretion.” *People v. Murray*, 129 A.D.2d 319, 321 (1st Dep’t 1987) (quotations omitted), *aff’d sub nom. People v. Robles*, 72 N.Y.2d 689 (1988).

33. By enacting Article 15-A, the Legislature has substantially interfered with and impaired prosecutorial decision-making and the operation of District Attorneys’ Offices. Indeed, Article 15-A authorizes the CPC (a majority of whose members are legislative appointees) to take or threaten to take disciplinary action against *any* prosecutor for *any* decision of which it

disapproves for *any* reason. A prosecutor may even be disciplined for reasons unrelated to her decision-making. Pursuant to §§ 499-f(1)-(2) and (9)(A), the CPC and Court of Appeals are empowered to investigate and discipline (including suspend without pay) any prosecutor whose *qualifications* they dislike for any reason, thus granting these non-executive-branch entities free reign to review District Attorneys' hiring decisions. Article 15-A also permits the CPC to call and grant transactional immunity to any witness it chooses (so long as it "deems it necessary and proper" to do so (Judiciary Law § 499-d(2))), even if such immunity could thwart ongoing or future criminal prosecutions. Further, Article 15-A grants the CPC virtually unfettered authority to conduct investigations, hold hearings, compel the appearance of any prosecutor or other witness, examine them under oath, and force or threaten to force the disclosure of profoundly sensitive information. *Id.* at §§ 499(d)(1), (f)(7).

34. These features compromise (and present the appearance of compromising) the ability of District Attorneys to exercise their discretionary powers in an independent manner, and are therefore impermissible.

35. The framers of the State Constitution sought to ensure that elected District Attorneys, and only elected District Attorneys, would possess the power to determine whom, whether, and how to prosecute within their jurisdiction. *See Matter of Soares v. Carter*, 25 N.Y.3d 1011, 1013 (2015) (prosecution of criminal actions "is solely within the broad authority and discretion of the district attorney's executive power"); *Matter of Hoerger v. Spota*, 21 N.Y.3d 549, 553 (2013) ("The state has a fundamental and overriding interest in ensuring the integrity and independence of the office of district attorney."); *see also People ex rel. McEwen v. Keeler*, 64 How. Pr. 478, 482-83 (N.Y. Gen. Term 1883) ("A power so great the constitution provided should be intrusted only to an officer chosen by the people, . . . and those who framed that instrument may

well have feared to give that power over the persons of citizens to any one not chosen by them.”) (commenting on county sheriffs). Article 15-A violates that clear intent by permitting the CPC to: (1) influence prosecutorial decisions (including hiring decisions) through disciplinary proceedings and the threat of such proceedings; and (2) grant immunity to those who prosecutors might otherwise prosecute.

36. Relatedly, by allowing the CPC to influence prosecutorial discretion, and by allowing the Court of Appeals to suspend elected District Attorneys for possessing qualifications it dislikes (contrary to the will of the electorate), Article 15-A also compromises the constitutional right of voters in each county to elect a District Attorney responsive to their needs. *See Donnaruma v. Carter*, 41 Misc. 3d 195, 214 (Sup. Ct. Albany Cty. 2013) (“Our State Constitution makes district attorneys answerable to the people of their county, before whom they stand for election to serve as guardian of the public trust.” (quotations and alterations omitted)), *aff’d sub nom. Soares v. Carter*, 113 A.D.3d 993 (3d Dep’t 2014), *aff’d*, 25 N.Y.3d 1011 (2015).

37. Further, by enabling the CPC to obtain and publicly disclose “any . . . evidence that it,” and it alone, “may deem relevant or material to an investigation,” Judiciary Law § 499-d(1) (emphasis added), Article 15-A not only impairs prosecutorial decision-making, it creates a host of other problems.

- a. First, such disclosure interferes with District Attorneys’ deliberative processes. Candid and thorough analysis in internal deliberations is essential to effective law enforcement. Compelled public disclosure of prosecutors’ documents—and the threat of such disclosure—chills this analysis and harms the public interest. *The New York Times Co. v. City of New York Fire Dep’t*, 4 N.Y.3d 477, 488 (2005) (explaining that FOIL exemption for intra-agency deliberative material is necessary

“to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure”); *Sea Crest Const. Corp. v. Stubing*, 82 A.D.2d 546, 549 (2d Dep’t 1981) (“to conduct [the deliberative] process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions”).

- b. Moreover, to the extent the disclosed documents constitute attorney work product, disclosure also vitiates the legal privilege attached to such work product. Similarly, to the extent the disclosed documents relate to grand jury proceedings or sealed wiretap communications, disclosure violates the confidentiality and secrecy of this information; threatens the privacy and safety of witnesses, cooperators, undercover officers, and victims; and interferes with law enforcement efforts. *See* C.P.L. § 190.25(4) (requiring grand jury secrecy); C.P.L. § 700.65 (limiting disclosure of wiretap communications).
- c. And because Article 15-A provides no appellate review of the CPC’s discretion to obtain evidence, incorporate evidence into the public record, grant immunity, or conduct investigations that may interfere with active prosecutions, the statute will inevitably cause a flood of collateral litigation under CPLR Article 78 by prosecutors alleging unlawful, arbitrary, and/or capricious conduct by the CPC. *See, e.g., Nicholson v. State Comm’n on Judicial Conduct*, 100 Misc. 2d 62, 64 (Sup. Ct. N.Y. Cty.) (Article 78 available to witnesses in CJC proceeding because it “is the only method of obtaining a judicial declaration as to their rights” due to lack of appellate review regarding those rights), *aff’d as modified*, 72 A.D.2d 48 (1st Dep’t 1979), *aff’d as modified*, 50 N.Y.2d 597 (1980).

38. Lastly, it is important to note that although prosecutors are accountable to attorney grievance committees and supervising courts for unlawful or unethical conduct, such professional accountability is constitutionally permissible and fundamentally different from the general review of prosecutorial discretion imposed by Article 15-A.

B. Violation of the Separation of Powers

39. The Separation of Powers Doctrine “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 v. Silver*, 14 N.Y.3d 230, 258 (2010). “The separation of the three branches is necessary for the preservation of liberty itself, and it is a fundamental principle of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others.” *Id.* (quotations and alterations omitted). “[T]he Separation of Powers Doctrine is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified.” *Id.* at 260 (emphasis in original).

40. The separation of powers prohibits legislative or judicial “encroachment on the power of the executive branch, as represented specifically by the State’s prosecutors, to ensure ‘that the laws are faithfully executed.’” *Forti v. New York State Ethics Comm’n*, 75 N.Y.2d 596, 616 (1990) (quoting N.Y. Const., art. IV, §3). *See also Murray*, 129 A.D.2d at 321 (“Indeed, respect for the basic separation of powers lodged in the executive, legislative and judicial branches of our government compels this court not to interfere with the prosecutor’s authority.” (quotations and citations omitted)).

41. As the chief law enforcement officers of their respective counties, district attorneys and their staffs are members of the executive branch of government. *Holtzman v. Goldman*, 71

N.Y.2d 564, 573 (1988). Prosecuting crime is an exclusively executive function. *Matter of Soares v. Carter*, 25 N.Y.3d 1011, 1013 (2015).

42. Under the State Constitution, the Governor is the head of the executive branch and possesses the exclusive authority to remove District Attorneys from office. *See* N.Y. Const. art. XIII, §13(a). District Attorneys, in turn, possess the authority to appoint and terminate Assistant District Attorneys. *See* N.Y. County Law § 702(1).

43. Article 15-A violates the Separation of Powers Doctrine in at least two respects. First, it impermissibly vests executive power (namely, the oversight of executive officers) in a hybrid disciplinary body, the majority of whose members are appointed by the Legislature. *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010) (holding that granting federal regulatory body “executive power without the Executive’s oversight . . . subverts the President’s ability to ensure that the laws are faithfully executed” and is “incompatible with the Constitution’s separation of powers”); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (“[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” (quoting 1 Annals of Cong. 463 (1789))). Second, it unlawfully grants the Court of Appeals the authority to remove prosecutors, preventing them from exercising their executive authority. These usurpations of power residing wholly within the executive domain are unconstitutional. *See Larabee v. Governor of State*, 65 A.D.3d 74, 91 (1st Dep’t 2009) (“Courts are empowered to determine the constitutional boundaries of each branch of government and whether an action is within the purview of legitimate legislative activity.” (citations omitted)), *aff’d as modified sub nom. Maron v. Silver*, 14 N.Y.3d 230 (2010).

C. Expansion of the Powers and Jurisdiction of the Court of Appeals and the Chief Judge

44. The Court of Appeals is a court of limited jurisdiction, as set forth in the State Constitution, and the Legislature may not expand that jurisdiction. N.Y. Const. art. VI, §3. Similarly, the limited powers of the Chief Judge are specifically enumerated in the Constitution. *Id.*

45. The Court of Appeals' jurisdiction does not include reviewing determinations by commissions such as the CPC, suspending prosecutors, or issuing recommendations regarding the removal of prosecutors. By granting the Court these powers, Article 15-A impermissibly expands the limited jurisdiction of the Court of Appeals.

46. Similarly, the Chief Judge's enumerated powers do not encompass appointing individuals to a non-judicial commission such as the CPC. Nor is the power of appointment inherent in the office of Chief Judge, as that power is executive in nature. *See* N.Y. Const. art. V, § 4. By granting the Chief Judge the authority to appoint members of the CPC, Article 15-A impermissibly expands the constitutionally prescribed power of the Chief Judge.

D. Assignment of Non-Judicial Duties to Judges

47. "The function of [] judges is to determine controversies between litigants." *Matter of Richardson*, 247 N.Y. 401, 411 (1928) (quotations omitted). Judges may not be assigned functions that are not "reasonably incidental to the fulfillment of judicial duties." *Id.* at 410. Nor may judges "hold any other public office or trust except an office in relation to the administration of the courts, member of a constitutional convention or member of the armed forces of the United States or of the state of New York." N.Y. Const. art. VI, § 20(b)(1). "The policy at the root of [this] constitutional prohibition . . . is to conserve the time of the judges for the performance of

their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.” *Matter of Richardson*, 247 N.Y. at 420.

48. Article 15-A alters the constitutional role of the judiciary by assigning judges non-judicial responsibilities.

49. The non-judicial functions unconstitutionally assigned to judges appointed to the CPC include: (1) reviewing and initiating complaints in connection with the general oversight of executive officers; (2) conducting investigations (including holding hearings, subpoenaing witnesses, compelling witnesses’ attendance, examine witnesses under oath or affirmation, and requiring the production of documents) into prosecutors’ qualifications and performance of their executive duties; (3) conferring immunity upon witnesses involved in CPC investigations; (4) issuing determinations and sanctions in connection with the oversight of executive officers; and (5) recommending the removal of prosecutors from office.³

50. The non-judicial functions unconstitutionally assigned to the Court of Appeals include: (1) overseeing prosecutors’ qualifications and performance of their executive duties; (2) removing prosecutors on an interim basis; and (3) issuing recommendations regarding the permanent removal of prosecutors. *See In re 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.”).

³ Notably, if a sitting judge agrees to serve on the CPC, he or she may be subject to discipline for violating the Code of Judicial Conduct, which states in pertinent part that a “full-time judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy in matters other than the improvement of the law, the legal system or the administration of justice.” Canon 4, Code of Judicial Conduct, Rule 4(c)(2)(a), 22 N.Y.C.R.R. 100.4(c)(2)(a).

51. The non-judicial functions unconstitutionally assigned to the Chief Judge include appointing individuals to the CPC, a non-judicial commission which exercises executive power.

52. Although judges possess the power to review attorney conduct for compliance with professional standards, they are not permitted to broadly monitor the performance of executive officers' duties, as Article 15-A requires. *See Matter of Richardson*, 247 N.Y. at 410-12 (holding that judge's power to conduct investigation is non-judicial, and thus unconstitutional, when undertaken to aid in executive oversight).

E. Intrusion Upon the Exclusive Jurisdiction of the Appellate Division Over Matters of Attorney Discipline

53. Article VI, Section 4(k) of the State Constitution states that "the appellate divisions of the supreme court shall have all the jurisdiction possessed by them on the effective date of this article and such additional jurisdiction as may be prescribed by law."

54. When this provision was adopted in its present form in 1961, it was well-settled that the Appellate Division had exclusive jurisdiction over matters of professional conduct regarding all attorneys. *See Erie Cty. Water Auth. v. Western N.Y. Water Co.*, 304 N.Y. 342, 346 (1952) ("The members of the profession of the Bar in this State are officers of the New York Supreme Court and the Appellate Division of that court has exclusive jurisdiction to say what constitutes professional misconduct on their part. Moreover, the punishment that is to follow must be determined by the Appellate Division and is not subject to revision even in this court." (internal citations omitted)). *See also Erlanger v. Erlanger*, 20 N.Y.2d 778, 779 (1967) (explaining that "jurisdiction to discipline an attorney for misconduct is vested exclusively in the Appellate Division").

55. Prosecutors in New York are subject to the same Rules of Professional Conduct that govern all attorneys who practice in the state. Accordingly, the conduct of prosecutors, like

that of all attorneys, is only reviewable in disciplinary proceedings initiated and conducted by the Appellate Division of the Supreme Court. Furthermore, prosecutors are subject to Rule of Professional Conduct 3.8, which is specifically addressed to the “Special Responsibilities of Prosecutors and Other Government Lawyers.”

56. Article 15-A intrudes upon the exclusive jurisdiction of the Appellate Division by granting the CPC concurrent authority to review the conduct of prosecutors and impose discipline. This intrusion violates Article VI, Section 4(k) of the Constitution.

57. Moreover, Article 15-A’s grant of authority to the CPC not only intrudes upon the Appellate Division’s exclusive jurisdiction, it also diminishes it by creating a separate disciplinary process for a specific category of attorneys. This diminution violates the constitutional prohibition against legislation that contracts the Appellate Division’s jurisdiction. *See People v. Pollenz*, 67 N.Y.2d 264, 270 (1986) (holding that N.Y. Const. art. VI, § 4(k) prohibits the Legislature from contracting the Appellate Division’s jurisdiction).

58. Finally, by granting the CPC concurrent authority to investigate and discipline prosecutors, Article 15-A creates the risk of parallel disciplinary proceedings (one by the CPC and another by the Appellate Division) for the exact same conduct with contradictory results. The possibility of such repugnancy undermines the Appellate Division’s authority and the legitimacy of the attorney disciplinary process.

F. Lack of Due Process of Law and Violation of Equal Protection

59. Article 15-A fails to identify any standards by which the CPC is to decide whether to initiate an investigation, find that a complaint has been sustained, or determine whether or how to impose disciplinary sanctions against a prosecutor. The absence of such standards violates the federal and state constitutional right to due process of law. *See* U.S. Const. art. XIV, § 1; N.Y.

Const. art. I, § 6; *In re Ruffalo*, 390 U.S. 544, 550 (1968) (holding that attorneys are entitled to due process in disciplinary proceedings).

60. By contrast, under the Uniform Rules of Attorney Discipline adopted by the Appellate Division of the Supreme Court, “probable cause” must exist before formal disciplinary proceedings are initiated, 22 NYCRR § 1240.7[d][2][vi], and formal disciplinary charges may only be sustained, after a hearing, when “a fair preponderance of the evidence” is found to support each essential element of the charges, 22 NYCRR § 1240.8[b][1]. The absence of such standards in Article 15-A means that only prosecutors, among all the attorneys of New York, are subject to discipline without due process. This unequal treatment violates the federal and state equal protection rights of prosecutors. *See* U.S. Const. art. XIV, § 1; N.Y. Const. art. I, § 11; *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (holding that procedural rights afforded only to certain individuals violates the Equal Protection Clause).⁴

61. In short, Article 15-A deprives Plaintiffs of the rights, privileges, and immunities secured to them by the United States Constitution and the New York State Constitution.

G. Operation of the CPC Outside the Constitution’s Civil Department Structure

62. The State Constitution requires that the executive and administrative functions of the state be organized into no more than twenty “civil departments.” N.Y. Const. art. V, § 2. It further requires that the heads of these departments “shall be appointed by the governor by and with the advice and consent of the senate.” N.Y. Const. art. V, § 4. The exception to this rule is

⁴ If this Court were to strike down Article 15-A’s unconstitutional assignment of appellate review to the Court of Appeals, but allow the CPC to operate, that would create a separate equal protection problem. It would leave prosecutors—alone among New York attorneys—subject to discipline without access to appellate review. *See Lindsey*, 405 U.S. at 77.

that the Legislature may create “temporary commissions for special purposes” without the need for gubernatorial appointments. N.Y. Const. art. V, § 3.

63. The constitutional limitations regarding civil departments were designed “to bring greater economy and efficiency to government and confer greater power and, concomitantly, greater accountability upon the Governor,” and to prevent the Legislature from creating new administrative bodies “haphazardly without regard to any existing structure.” *Matter of Capelli v. Sweeney*, 167 Misc. 2d 220, 227-28, 232 (Sup. Ct. Kings Cty. 1995), *aff’d on op. below*, 230 A.D.2d 733 (2d Dep’t 1996).

64. The CPC, which is imbued with executive and administrative powers, is not a temporary commission for special purposes, nor is it made part of any existing civil department. Because it operates outside the bounds of the Constitution’s civil department structure, it is unconstitutional. *See People v. Tremaine*, 252 N.Y. 27, 51 (1929) (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).

65. To the extent the CPC could be viewed as a new civil department, it would still be unconstitutional because it is not headed by an individual appointed by the Governor with the advice and consent of the Senate, as required by Article V, Section 4.

Conclusions of the Governor and State Attorney General’s Office

66. Both the State Attorney General’s Office and the Governor have openly acknowledged the unconstitutionality of Article 15-A.

67. In an August 13, 2018 memorandum to Alphonso B. David, Counsel to the Governor (*see* Ex. 3), the Attorney General’s Office advised that the bill that would soon become Article 15-A “suffers from numerous constitutional defects that will likely lead a court to

invalidate it and thus prevent it from serving its intended purpose.” That memorandum discusses some, but not all, of the defects identified in this Complaint.

68. In an August 20, 2018 memorandum accompanying his approval of the final Senate bill (*see* Ex. 2), Governor Cuomo candidly acknowledged several of the constitutional flaws in the bill, but nevertheless signed it into law with an effective date of January 1, 2019. His memorandum states, in pertinent part:

The current bill, however, suffers from several flaws that have been identified by the State’s judiciary, as well as the State’s Office of the Attorney General, that would cause its undoing and would undermine the laudable goal sought to be achieved by its passage into law. First, this bill would run afoul of Article VI of the State’s Constitution by requiring active judges to serve as Commission members, expanding the jurisdiction of the Court of Appeals (the “Court”), and requiring the Court to issue advisory opinions. Second, contrary to the separation of powers doctrine, this bill would create a commission empowered to oversee and discipline executive branch members despite its membership composition consisting of a majority appointed by the Legislature. Third, the bill would make the Commission readily available to anyone intent on disrupting a criminal case. This potential for abuse would be amplified by the fact that this bill would make public all files provided by a prosecutor to the Commission, even while an active investigation is underway; the potential exposure to victims, witness, and a prosecutor’s case would be immeasurable. This intrusion into active investigations would undermine, rather than support, our criminal justice system.

69. Although the Governor apparently anticipated work on Article 15-A to cure some of the constitutional infirmities, the legislation remains unmodified and an upcoming election makes additional work highly unlikely.

70. Moreover, the Governor has only proposed two changes to the law to attempt to cure its unconstitutionality. However, these changes leave the vast majority of the law’s constitutional infirmities untouched. First, the Governor has proposed an amendment that would require the Chief Judge to appoint retired judges to the CPC in order to address the constitutional defect of having active judges sit on the CPC. Second, the Governor has proposed an amendment that would shift the power to review CPC determinations from the Court of Appeals to the

Appellate Division in order to avoid the improper expansion of the Court of Appeals' jurisdiction. Even if enacted, these desired amendments would not cure any of the law's numerous other constitutional defects, including the defects of: (1) impermissibly interfering with the constitutionally protected independence and core functions of District Attorneys; (2) violating the Separation of Powers Doctrine by vesting oversight of an executive function in a hybrid disciplinary body and by authorizing the judiciary to suspend District Attorneys; (3) unlawfully expanding the limited powers and duties of the Chief Judge of the Court of Appeals; (4) impermissibly intruding upon and diminishing the exclusive jurisdiction of the Appellate Division over matters of attorney discipline by granting the CPC authority to review and sanction prosecutorial conduct; (5) violating the due process and equal protection rights of prosecutors; and (6) unlawfully creating a commission that operates outside the bounds of the State Constitution's civil department system.

FIRST CAUSE OF ACTION
(Declaratory Relief)

71. Plaintiffs repeat and reallege the allegations in paragraphs 1 to 70 as if fully set forth herein.

72. Article 15-A of the Judiciary Law is unconstitutional on its face and as applied to Plaintiffs under the New York State Constitution and the 14th Amendment to the United States Constitution for numerous reasons, including, but not limited to, the fact that the statute:

- a. interferes with the constitutionally protected independence and core functions of District Attorneys;
- b. violates the Separation of Powers Doctrine by vesting oversight of an executive function in a hybrid disciplinary body, most of whose members are appointed by

the Legislature, and by authorizing the Court of Appeals to suspend District Attorneys;

- c. expands the limited powers and jurisdiction of the Court of Appeals beyond those enumerated in the State Constitution;
- d. expands the limited powers and duties of the Chief Judge of the Court of Appeals beyond those enumerated in the State Constitution;
- e. compels judges to perform tasks that are not reasonably incidental to the fulfillment of judicial duties, and which amount to a public trust unrelated to the administration of the courts;
- f. intrudes upon and diminishes the exclusive jurisdiction of the Appellate Division over matters of attorney discipline;
- g. subjects prosecutors to discipline without any governing standards, in contravention of their due process rights;
- h. subjects prosecutors—but no other attorneys—to disciplinary proceedings that lack governing standards, in contravention of their equal protection rights; and
- i. creates a commission that operates outside the bounds of the State Constitution's civil department system.

73. For the reasons set forth above, this Court should declare Article 15-A of the Judiciary Law unconstitutional.

SECOND CAUSE OF ACTION
(Injunctive Relief)

74. Plaintiffs repeat and reallege the allegations in paragraphs 1 to 73 as if fully set forth herein.

75. Article 15-A of the Judiciary Law is unconstitutional, and its provisions may not be enforced. The harm to Plaintiffs from this unconstitutionality cannot be remedied through monetary relief. Accordingly, an injunction prohibiting Article 15-A from taking effect (including a prohibition preventing the formation of and any action by the CPC and review of CPC determinations) is necessary and proper.

76. In addition, a preliminary injunction is warranted because Plaintiffs will suffer irreparable harm in the absence of such relief, they are likely to succeed on the merits, and the balance of equities tips in their favor.

77. Being subjected to unconstitutional disciplinary proceedings constitutes irreparable harm. Moreover, such harm exists even before Article 15-A goes into effect. Indeed, the prospect of a commission that will review the countless decisions made in the course of criminal investigations and prosecutions threatens to chill and interfere with prosecutors' performance of their law enforcement duties. Prosecutors are painfully aware that every decision they now make will be scrutinized by a hybrid political commission operating without constitutional constraints, and that this commission may sanction them, publicize sensitive material pertaining to their cases, and grant immunity to witnesses with virtually no due process. This may impact (both consciously and subconsciously) prosecutors' decisions about whom, how, and whether to prosecute. It may also chill, and create the appearance of chilling, the investigation and prosecution of parties with close ties to those tasked with appointing CPC members. The harm this poses to Plaintiffs (and the public at large) is drastic, imminent, and irreparable. As the United States Supreme Court has

recognized: “A prosecutor is duty bound to exercise his [or her] best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor’s office would suffer if he [or she] were constrained in making every decision by the consequences in terms of his [or her] own potential liability.” *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976).

78. For the reasons stated above, and under the constitutional provisions and caselaw cited in this Complaint and in the attached memorandum from the State Attorney General’s Office, Plaintiffs are likely to succeed on the merits. Indeed, the constitutional infirmities of Article 15-A are obvious and undeniable.

79. Lastly, the balance of equities weighs entirely in Plaintiffs’ favor. The prejudice to Plaintiffs from a denial of preliminary injunctive relief is overwhelming: without such relief, they will be subject to unconstitutional disciplinary proceedings conducted by an improperly constituted commission. Further, these proceedings, and the threat of such proceedings, will harm the public and the integrity of a constitutional system built on the separation of powers. By contrast, the prejudice to Defendants is non-existent. If a preliminary injunction is granted, they will simply continue to operate as they always have: in a constitutional system where prosecutors are accountable to the executive branch, voters, and rules of professional conduct enforced by the Appellate Division and State Bar.

Prayer for Relief

WHEREFORE, because paragraphs 1 to 79 establish that no provision of Article 15-A of the Judiciary Law remains by which the CPC may be lawfully constituted and begin operation, and because Plaintiffs would be irreparably harmed if the CPC were to begin accepting complaints, initiating investigations, or conducting hearings, Plaintiffs respectfully request that a judgment and order be issued:

A. Declaring that Article 15-A of the Judiciary Law is unconstitutional and that, therefore, the formation and any acts taken by the CPC, and the review of its determinations, are unconstitutional;

B. Preliminarily and permanently enjoining Defendants from creating or forming the CPC;

C. Preliminarily and permanently enjoining the CPC from opening or conducting any investigations of prosecutors;

D. Preliminarily and permanently enjoining the CPC from conducting any hearings into the qualifications or conduct of prosecutors, including a prohibition on ordering any records or papers from prosecutors, or ordering any appearance by witnesses or prosecutors before the CPC, or granting immunity to any person;

E. Preliminarily and permanently enjoining review of the CPC's findings of fact and conclusions of law;

F. Granting attorney's fees and costs pursuant to CPLR § 8601 and 42 U.S.C. § 1988; and

G. Granting Plaintiffs such other and further relief as this Court finds appropriate and equitable, including injunctive and declaratory relief as may be required in the interests of justice, together with their costs and disbursements in this action.

Dated: New York, New York
October 17, 2018

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VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF ALBANY) ss.

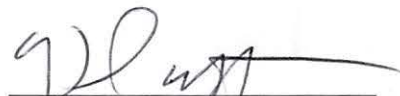
Robert J. Mastens, being duly sworn, states:

I am Robert J. Mastens a member of Plaintiff DAASNY, and as such am duly authorized to make this verification:

I have read the foregoing complaint and know the contents thereof, which are to my knowledge true, except as to those matters alleged on information and belief, and to those matters I believe them to be true. The grounds of my belief as to all matters stated upon information and belief are statements and materials contained in public documents.


[name]

Sworn to before me this
15th day of October, 2018



Notary Public

NANCY TALCOTT
Notary Public, State of New York
No. 02TA6295261
Qualified in Nassau County
Commission Expires Dec. 30, 2021