

**Memorandum**

April 6, 2011

**To**  
Citizens Union of the City of New York

**From**  
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**Request for Pro Bono Legal Assistance Re** Constitutionality of Cuomo bill S.3419/A.5388

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In this Memorandum, we analyze the constitutionality of proposed legislation designed to reform the process of reapportionment in New York State. The program bill put forth by Governor Andrew Cuomo, S.3419/A.5388 (the “Cuomo bill”), was modeled on an earlier bill proposed by State Senator Michael Gianaris and Assembly members Hakeem Jeffries and David Valesky, S.2543/ A.3432, which proposed many of the same measures. The Cuomo bill would establish an independent commission to recommend redistricting plans to the Legislature, so that the lines of electoral districts are more likely to be drawn according to clearly defined criteria, rather than be subject to political manipulation to favor or disfavor particular legislators.

We understand that certain legislators have stated publicly that the Cuomo bill would violate the separation-of-powers doctrine embodied in the State Constitution by delegating a legislative function to a non-legislative entity. As we explain more fully below, this contention is incorrect. The Constitution empowers the Legislature alone to enact legislation and make critical policy choices. The independent redistricting commission that would be established by the Cuomo bill would not intrude upon these legislative functions. As a purely advisory body, it would merely *recommend* redistricting plans that the Legislature could choose to enact, or not to enact, into law. The independent commission could not itself *enact* legislation or make any policy choice having the force of law. It is therefore akin to numerous other commissions and similar entities in both state and federal government that analyze issues and make recommendations to the legislative branch. Such commissions perform critically important functions, providing valuable information that the Legislature or Congress may be ill-suited to obtain on its own and, where needed, producing recommendations that are insulated from distorting political influences. Like these other advisory bodies, the independent redistricting commission envisioned by the Cuomo bill is fully consistent with the State Constitution.

Our primary conclusions can be summarized as follows:

- The creation of an independent commission tasked with the development of redistricting plans does not violate the separation-of-powers doctrine because the commission does not itself enact law. The commission is a purely investigatory and advisory body empowered only to

*recommend* plans which the Legislature may adopt, reject, or, ultimately, amend. It is therefore akin to numerous other commissions and similar entities in both state and federal government such as the Law Revision Commission, the Commission on Public Integrity, and the Federal Election Commission. These commissions perform critically important functions, providing valuable information that the Legislature may be ill-suited to obtain on its own and, where needed, producing recommendations that are insulated from distorting political influences.

- The Governor’s role in appointing members of the nominations committee, which selects the candidate pool from which the independent commission is selected, does not impose undue executive influence on the commission’s recommendations or otherwise present an unconstitutional delegation of legislative authority. It is common practice for the Governor to appoint members of advisory commissions that recommend legislation—such as the Law Revision Commission—and even to select members of quasi-legislative bodies that issue regulations or recommendations that may have the force of law without legislative approval—such as the Judicial Pay Commission.
- Similarly, the designation of the commission as a “state agency” solely for purposes of the Public Officers Law and Executive Law raises no separation-of-powers concern. The applicable provisions simply subject the commission’s members and employees to certain professional restrictions, financial reporting requirements, and ethical rules; they in no way interfere with the commission’s duties to the legislature and to the public.
- Finally, the guidelines imposed on the Legislature in amending the commission’s redistricting plan do not run afoul of the separation-of-powers doctrine because these restrictions do not delegate legislative authority to any other entity. These provisions, if enacted, would simply articulate the policies which should guide the redistricting process. And any future legislative action repealing these guidelines would notify the public that the Legislature is departing from significant policies affecting the public interest.

## **BACKGROUND**

### **A. The Existing Redistricting Process: The Legislative Task Force on Demographic Research and Reapportionment**

Article III, sections 4 and 5 of the New York State Constitution provide that, after each decennial Federal census, the New York State Senate and Assembly districts must be “readjusted or altered” such that each district “shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact a form as practicable . . . .” N.Y. Const. art. III, § 4; *see also id.* at § 5. Since 1978, the entity tasked with developing redistricting plans for consideration and adoption by the New York State Legislature has been the Legislative Task Force on Demographic Research and Reapportionment (“LATFOR”). N.Y. Legis. Law § 83-m(1), (3); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 354 (S.D.N.Y. 2004), *aff’d without opinion*, 543 U.S. 997 (2004) (“*Rodriguez II*”).

LATFOR is composed of six members, four of whom are legislators and two of whom are non-legislators. N.Y. Legis. Law § 83-m(2). The Temporary President of the Senate appoints one senator, who serves as co-chair,<sup>1</sup> as well as one non-legislator. *Id.*; *Rodriguez II*, 308 F. Supp. 2d at 355 n.4. Similarly, the Speaker of the Assembly appoints one assembly member, who serves as the second co-chair, and one non-legislator. N.Y. Legis. Law § 83-m(2); *Rodriguez II*, 308 F. Supp. 2d at 355 n.4. The Senate Minority Leader and the Assembly Minority Leader each appoint one member from their respective houses of the Legislature. N.Y. Legis. Law § 83-m(2).

LATFOR is directed to “engage in such research studies and other activities as its co-chairmen may deem necessary or appropriate in the preparation and formulation of a reapportionment plan for the next ensuing reapportionment of senate and assembly districts and congressional districts of the state . . . .” *Id.* at § 83-m(3). The Legislative Law empowers the task force to “hold public and private hearings” and otherwise grants it “all of the powers of a legislative committee under this chapter.” *Id.* at § 83-m(10).

While the Legislative Law does not include substantive criteria for LATFOR redistricting plans, certain criteria are established by federal law. The United States Supreme Court has determined that state redistricting plans must maintain “substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.” *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). Thus, as a general rule, redistricting plans may deviate only up to ten percent from absolute population equality; larger disparities in population create “a prima facie case of discrimination.” *Brown v. Thompson*, 462 U.S. 835, 842 (1983).

Additional substantive criteria applicable to New York State redistricting plans are set forth in the State Constitution.<sup>2</sup> Districts are to be altered such that, *inter alia*, each district contains as nearly to equal a number of inhabitants as possible, in as compact a form as practicable, and consists of contiguous territory. N.Y. Const. art. III, §§ 4, 5. Moreover, counties, towns, and city blocks should not be divided in the formation of districts, except that two or more districts may be contained within a county. *Id.*

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<sup>1</sup> Senator Dean Skelos served as LATFOR Co-Chairman for its development of redistricting plans during the 1980, 1990, and 2000 redistricting cycles. *Rodriguez II*, 308 F. Supp. 2d at 356 n.6.

<sup>2</sup> In *WMCA, Inc. v. Lomenzo*, the United States Supreme Court invalidated the State Constitution’s redistricting provisions insofar as the apportionment of congressmen according to *county* runs afoul of the “one-person, one-vote” requirement that districts be apportioned substantially on a population basis. 377 U.S. 633, 653-54 (1964). The Court of Appeals since clarified that Article III, sections 4 and 5 are unconstitutional only insofar as they *mandate* such county-based apportionment. *In re Orens*, 15 N.Y.2d 339, 351 (1965). Thus, other constitutional criteria for drawing districts remain in force. *See id.* Moreover, “the historic and traditional significance of counties in the districting process should be continued where and as far as possible.” *Id.* at 352.

## **B. The Redistricting Process Contained in the Proposed Legislation: The Independent Redistricting Commission**

The Cuomo bill would replace LATFOR with an Independent Redistricting Commission (the “Redistricting Commission” or the “Commission”). *See* A.5388, at 2. The Bill provides that this Commission is “necessary to protect the public’s interest in fair and proper elections, including but not limited to the opportunities for minority voters to participate in the political process and to elect representatives of their choice.” *Id.* The formation and operation of this Commission would differ from the existing process in a number of key respects.

First, while legislative leaders directly appoint LATFOR members, the Cuomo bill creates an intermediary body in the appointment process—an eight-member Nominations Committee. *Id.* at 2-3. The Temporary President of the Senate, the Speaker of the Assembly, the Senate Minority Leader, and the Assembly Minority Leader each appoint one member. *Id.* at 3. The Governor appoints the four remaining members, two from each of the major political parties. *Id.* These members may not be legislators or hold certain other government positions. *See id.* The Nominations Committee then selects by majority vote a forty-person nominations pool eligible for membership in the Commission, including fifteen Democrats, fifteen Republicans, and ten persons not enrolled as either Democrats or Republicans. *Id.* at 3-4.

Whereas LATFOR is composed of legislators and non-legislators, the nominations pool, and the Commission selected from it, includes only non-legislators. *Id.* at 4. Persons are qualified only if they have not held legislative, political party, or certain other government positions within the last four years and are not related to government employees. *Id.* Further, the nominations pool is to be selected in a manner that “reflects the diversity of the residents of the state with regard to race, ethnicity and gender,” and the Nominations Committee must consult with organizations that protect voting rights in making its selections. *Id.* at 4-5. From this pool, the Temporary President of the Senate, the Speaker of the Assembly, the Senate Minority Leader, and the Assembly Minority Leader each appoint two members. *Id.* at 5. Those eight members in turn appoint the last three members of the eleven-person Commission. *Id.*

As with LATFOR, the Commission is granted “all the powers of a legislative committee pursuant to this chapter.” *Id.* at 6. In addition, for purposes of Public Officers Law §§ 73, 73-a, and 74, and Executive Law § 94, the Commission “is a state agency, its member[s] and employees of which are subject to the provisions thereof.” A.5388, at 6.

While the Legislative Law does not include substantive criteria for LATFOR plans, the Cuomo bill imposes ten requirements on the Commission in drawing districts, which are set forth in the proposed section 98 subdivisions (2)(A)-(E)(I)-(V). *See id.* at 7-8. Many of these criteria simply codify the standards already set forth in the State Constitution and by Federal law—districts should be as nearly equal in population as practicable, subdivision 2(A); districts must consist of contiguous territory, subdivision 2(B); districts cannot be drawn to abridge minority voting rights, subdivision 2(C); and, “to the extent practicable,” counties, county subdivisions, and incorporated villages must not be divided in the formation of districts, except that two or more districts may be wholly contained within one county or county subdivision, subdivisions 2(E)(III), (IV), (V). *Id.* at 7-8. In addition, the Cuomo bill creates

three criteria, “subject to the requirements of state and federal law,” which prohibit partisan gerrymandering, subdivision 2(D); and require that, “to the extent practicable,” district population may vary by only one percent from the mean population of all districts, subdivision 2(E)(I); and districts must unite communities with shared interests, subdivision 2(E)(II). *Id.*

Finally, whereas the Legislative Law does not regulate legislative action upon or amendment of any proposed plan, the Cuomo bill would do so in the following manner. When the Commission submits its redistricting plan, the Legislature must either approve or reject it without amendment. *Id.* at 8-9. If the plan is rejected, the Commission must hold an open hearing at which legislative leaders or their designees testify as to their objections to the plan. *Id.* at 9. The Commission’s second plan must similarly be approved or rejected without amendment and, if rejected, another public hearing must be held at which the legislators testify. *Id.* Only upon the Commission’s submission of its third and final plan may the Legislature amend the plan, provided that any amendment complies with the criteria imposed by subsections (2)(A)-(E)(I)-(V), and does “not affect more than two percent of the population of any district.” *Id.* at 9-10. Following approval by the Legislature, the redistricting plan is submitted to the Governor for signature. *Id.* at 10.

## DISCUSSION

Certain legislators have argued that the proposed Cuomo bill violates the separation-of-powers doctrine for four reasons: i) that it is an unconstitutional delegation of the legislative function to empower the Redistricting Commission to draft redistricting plans and recommend them to the Legislature, such that the Legislature may, at least initially, vote only to approve or reject the plan; ii) that the Cuomo bill allows the Executive Branch to invade the function of the Legislature by requiring the Governor to appoint members of the Nominations Committee; iii) that the Cuomo bill allows the Executive Branch to invade the function of the Legislature by classifying the Commission as a “state agency” for purposes of the enumerated sections of the Public Officers Law and the Executive Law; and iv) that it is a violation of the separation-of-powers doctrine to prescribe “guidelines” governing the Legislature’s amendment of a proposed redistricting plan. This legislative process, however, does not offend the separation-of-powers doctrine or its corollary, the “non-delegation” principle.

As with the United States Constitution, the separation-of-powers doctrine in the State Constitution “is implied by the separate grants of power to each of the coordinate branches of the government”—the Executive, the Legislature, and the Judiciary. *Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985). Each of these branches “possesses ‘distinct and independent powers,’ designed to operate as a check upon those of the other two co-ordinate branches,” and no branch may encroach upon or be made subordinate to another. *Urban Justice Ctr. v. Silver*, 66 A.D.3d 567, 568 (1st Dep’t 2009); *see also Lorie C. v. St. Lawrence Cnty. Dep’t of Soc. Servs.*, 49 N.Y.2d 161, 170 (1980). Article III section 1 of the State Constitution provides that “[t]he legislative power of this state shall be vested in the senate and assembly.” In exercising this power through the enactment of legislation, the Legislature necessarily “make[s] the critical policy decisions, while the executive branch’s responsibility is to implement those policies.” *Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 (1995). To safeguard this distribution of power, the Legislative branch may not delegate “all of its law-making powers” or “policymaking choices” to the

Executive branch. *Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 78 N.Y.2d 398, 410 (1991); *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987).

While the non-delegation principle is firmly rooted in the New York system of government, it is applied with “the utmost reluctance” because the separation-of-powers principle does not demand—or even support—the rigid compartmentalization of the three branches. *Boreali*, 71 N.Y.2d at 9. “[T]he duties and powers of the legislative and executive branches cannot be neatly divided into isolated pockets,” and “[s]ome overlap” of the branches “does not violate the constitutional principle of separation of powers.” *Bourquin*, 85 N.Y.2d at 784; *Clark*, 66 N.Y.2d at 189. Because lawmakers today must regulate widely disparate and increasingly specialized subject matters, “common sense and the necessities of government” require a more flexible approach to classification of governmental functions. *Clark*, 66 N.Y.2d at 189. Accordingly, the Legislature may “declare its policy in general terms by statute, [and] endow administrative agencies with the power and flexibility to fill in details and interstices and to make subsidiary policy choices consistent with the enabling legislation.” *Citizens*, 78 N.Y.2d at 410.

Similarly, the Legislature may charge independent commissions with investigatory and advisory functions without violating the separation-of-powers doctrine. As the Supreme Court of the United States has explained:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information which not infrequently is true recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted.

*Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

#### **A) The Independent Redistricting Commission Does Not Violate the Non-Delegation Principle**

The Commission created by the Cuomo bill does not upset the separation of powers because the Commission *does not enact law*; rather, the Commission is charged with providing a recommendation to the Legislature that it may accept, reject or, ultimately, amend. Unlike *enacting* legislation, *proposing* legislation is not a legislative function, and does not become one merely because the Legislature is required by statute to act upon the proposal.

Cases that consider advisory commissions have held that the separation-of-powers is not upset by such bodies. For example, in *St. Joseph Hospital of Cheektowaga v. Novello*, 15 Misc. 3d 333 (N.Y. Sup. Ct. 2007), *aff'd*, 43 A.D. 3d 139 (4th Dep’t 2007)—a trial court ruling affirmed by the Fourth Department—the court was asked to determine whether the actions of the Commission on Healthcare Facilities in the 21st Century (the “Healthcare Commission”) violated due process. In a design,

arguably, involving greater delegation than that in the Cuomo bill, the members of the Healthcare Commission were appointed by the Governor and the Legislature, and were tasked to make recommendations which would take effect and have the force of law unless the Governor failed to transmit the recommendation to the Legislature or the Legislature rejected the recommendation. *Id.* at 336. When assessing the function of the commission, the court concluded that “[t]he delegation to the Commission was not a legislative function. The Commission *is not called upon to enact rules*, but instead, to recommend which hospitals were to be closed and which hospitals would have to close or merge certain departments” subject to legislative action. *Id.* at 343 (emphasis added).

In *Dalton v. Specter*, 511 U.S. 462 (1994), the U.S. Supreme Court recognized the limited advisory nature of another commission whose recommendations, *unless rejected* by the Legislature, would be given the force of law. There, the Court considered an Administrative Procedure Act (“APA”) challenge to the Defense Base Closure and Realignment Commission’s (the “Military Base Commission”) decision to close the Philadelphia Naval Shipyard. The members of the Military Base Commission were appointed by the President with the advice and consent of the United States’ Senate. *Id.* at 465. The Commission was tasked to produce a report to the President detailing what military bases should be closed, which, if accepted, could be overruled by a resolution of the House of Representatives. *Id.* The Court found that the report of the Military Base Commission could not be challenged under the APA, because it was not a “final action” that had a “direct effect” on military installations. *Id.* at 469. Far from enacting law, “the Commission’s reports serve more like a tentative recommendation than a final and binding determination.” *Id.* (internal quotation-marks and citation omitted). Like the Redistricting Commission, the Military Base Commission merely served an advisory role and did not intrude upon the legislative function to enact laws, even though its recommendations would be given effect unless overruled.

The decision to close particular military bases, like the redrawing of electoral maps, is suffused with political considerations and thus might be analyzed more effectively by an independent commission than by legislators. The Appellate Division, First Department, recently recommended the creation of a different independent commission for just this reason. In *Larabee v. Governor*, 65 A.D. 3d 74, 99 (1st Dep’t 2009), the court addressed whether the Legislature unconstitutionally abused its power through the practice of “linkage” (linking judicial salary increases to legislative salary increases), which had resulted in a failure to increase judicial compensation for ten years. *Id.* at 93-100. The court ordered the Legislature to “proceed in good faith to adjust judicial compensation” while imploring that “judicial compensation should be as far removed as is practicable from political considerations, [and] it makes sound sense to delegate the issue of *judicial compensation to a commission created for that purpose, to analyze and make recommendations to the Legislature.*” *Id.* at 99, 100 (emphasis added). Subsequently, the Legislature did, in fact, establish the “Commission on Judicial Compensation,” whose recommendations will have the force of law, unless rejected by the Legislature. 2010 N.Y. Laws at 2.

As these other examples illustrate, a commission’s functions remain merely advisory—and not legislative—so long as the Legislature itself retains the ultimate power to determine whether the commission’s recommendations will be enacted into law. Moreover, such commissions continue to perform merely advisory roles even when the Legislature must act upon the commission’s proposals to ensure that legislative preferences will be given effect, as with the Healthcare Commission, Military Base Commission, and Judicial Compensation Commission. Accordingly, the Redistricting

Commission envisioned by the Cuomo Bill is an advisory body, which may only recommend, but not ultimately enact, legislation.

As an advisory body, the Redistricting Commission performs a function like numerous other commissions that have been created by statute and empowered to provide recommendations and propose legislation to the State Legislature. For example, the Law Revision Commission was tasked by the Legislature:

[t]o recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law . . . [t]o report its proceedings annually to the legislature . . . [and] to accompany its report with proposed bills to carry out any recommendations.

N.Y. Legis. Law § 72 (McKinney 1934). Likewise, the Commission on Public Integrity, established September 22, 2007, has been directed to, among other things, “prepare an annual report to the governor and legislature summarizing the activities of the commission . . . and recommending any changes in the laws . . . .” N.Y. Exec. Law § 94.

Further, under the existing system, LATFOR, which includes non-legislators, develops and recommends redistricting plans. As set forth above, the Legislative Law *requires* that two of LATFOR’s six members be non-legislators. N.Y. Legis. Law § 83-m(2); *see also* <http://www.latfor.state.ny.us/>. Because it includes non-legislators, LATFOR it is not a legislative body and thus, for example, legislative privilege against discovery does not extend to its deliberations in developing redistricting plans. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 102-03 (S.D.N.Y. 2003). As one federal court has noted, LATFOR is an “advisory group”—just like the proposed Commission—and “its workings [are] more akin to a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation.” *Id.*

The existence of advisory commissions is essential to good governance and permissible under both New York and federal law. As long as the Legislature retains ultimately control over whether the recommendations of advisory commissions are given the force of law, such commissions do not usurp the legislative function.

**B) The Appointment of Members of the Nominations Committee by the Governor Does Not Violate the Non-Delegation Rule**

The Governor’s role in choosing members of the Nominations Committee also does not upset the separation-of-powers. We understand that some legislators have argued that, by giving the Governor power to appoint four members of the Nominations Committee, which is responsible for choosing a pool of candidates for the Independent Redistricting Commission, the Executive branch will assert an undue level of influence over the Redistricting Commission’s final recommendations and usurp the authority of the Legislature to enact laws. This argument, however, is inconsistent with New York law.

Notwithstanding the role of the Governor in appointing members of the Nominations Committee, this involvement in the Commission does not usurp legislative power because the Commission itself

does not hold a legislative function. *See supra* Part III(A)(i). Indeed, it is not uncommon for the Governor to appoint members of investigatory or advisory commissions directed by statute to make recommendations to the Legislature. For example, the Governor appoints five members of the Law Revision Commission and seven members of the Public Integrity Commission (without prior nomination). *See* N.Y. Legis. Law § 70 (McKinney 1934); N.Y. Exec. Law § 94.

The Governor also determines the make-up of commissions to which the Legislature has assigned the quasi-legislative task of promulgating regulations or recommendations that may have the force of law without legislative approval. *See, e.g., Booker v. Reavy*, 281 N.Y. 318, 320-321 (1939) (noting that the Legislature “had power to make the Governor one of the Commission or possibly to make him the sole Commissioner” of the State Civil Service Commission, which was tasked to “make rules for the classification of the offices, places and employments in the classified service for the state”); *see also Novello*, 15 Misc. 3d 333 (the Governor and the Legislature appointed members of the Healthcare Commission); *Med. Soc’y of State v. Serio*, 100 N.Y.2d 854 (2003) (the Superintendent of the New York Insurance Department—appointed by the Governor—has power to withdraw, amend, or write regulations consistent with the provisions of the Insurance Law); *cf. Dalton*, 511 U.S. 462 (members of the Military Base Commission were appointed by the President with the advice and consent of the Senate, and tasked by Congress to prepare a report for the President and the House of Representatives recommending military installations that should be closed).

The Governor frequently appoints members of investigatory and advisory commissions as well as regulatory commissions. This practice belies any claim that such Executive involvement upsets the separation-of-powers.

**C) The Classification of the Independent Redistricting Commission as a State Agency Does Not Violate the Separation-of-Powers Principle**

Similarly, the Cuomo bill’s designation of the Commission as a “state agency” raises no constitutional issue. The provision in question states that, “[f]or purposes of sections seventy-three, seventy-three-A and seventy-four of the Public Officers Law and section ninety-four of the Executive Law, the independent redistricting commission is a state agency, its members and employees of which are subject to the provisions thereof.” A.5388, at 6. Although the Cuomo bill’s detractors contend that this designation violates the doctrine of separation-of-powers, the sections of the Public Officers Law and Executive Law which are invoked do not transmute the Commission into an arm of the Executive or impose upon it obligations or loyalties to the Legislature’s co-ordinate branches.

As an initial matter, the Public Officers Law sets forth the qualifications, powers and duties of state officers, including elected officials, “members of the legislature, justices of the supreme court, regents of the university,” and officers appointed by other state officers or by the Legislature. N.Y. Pub. Off. Law § 2. Its provisions govern all three branches of the state government and in no way shoehorn the Commission into the Executive branch. The provisions invoked by the Cuomo bill simply subject the Commission’s members and employees to certain professional restrictions, financial reporting requirements, and ethical rules. N.Y. Pub. Off. Law §§ 73, 73-a, 74. Specifically, Public Officers Law

§ 73 governs the business and professional activities of state officers and employees.<sup>3</sup> Section 73-a requires them to file annual statements of financial disclosure with the State Ethics Commission established under Executive Law § 94,<sup>4</sup> for purposes of which the Commission is also a state agency. *See* N.Y. Pub. Off. Law § 73-a(2)(a), (c); A.5388, at 6. Finally, Public Officers Law § 74 imposes a code of ethics on officers and employees of state agencies, and governs conflicts of interest, independence of judgment, confidentiality, unwarranted privileges, appearance of improper influence, personal investments, pursuits raising public suspicion of violating the public trust, and sales of goods or services to entities regulated by the state agency. *See* N.Y. Pub. Off. Law § 74(2), (3)(a)-(i).

Accordingly, none of the provisions for purposes of which the Commission is deemed a “state agency” creates obligations that would interfere with the Commission’s duties to the Legislature and to the public, or implicate separation-of-powers concerns.

Moreover, under the definition of “state agency” set forth in §§ 73 and 73-a of the Public Officers Law, other commissions that make recommendations to the Legislature—such as the Law Revision Commission and the Commission on Public Integrity discussed above—would also seem to qualify as “state agencies” because they are “commission[s] at least one of whose members is appointed by the governor.” N.Y. Pub. Off. Law §§ 73(1)(g), 73-a(1)(b). Yet, so far as we can determine, neither commission has ever been subject to a challenge on that basis.

The Cuomo bill is not unique in designating a commission serving the Legislature as a state agency. Certain statutory provisions expressly provide that, for their purposes, “state agency” encompasses commissions within the legislative branch or even the Legislature itself. *See, e.g.*, N.Y. Exec. Law § 201(1)(a) (“‘state agency’ means any department of the executive, any bureau, commission, agency, board or other agency [sic], any public authority, and the judiciary and the legislature”); N.Y. State Fin. Law § 179-e(9) (“‘State agency’ means any department, board, bureau, commission, division, office, council, institution, or committee in the executive, legislative, or judicial branches of state government . . .”). And when the Legislature intends to exclude itself and its commissions from the scope of a provision applicable to state agencies, it has done so explicitly. *See, e.g.*, N.Y. Printing & Public Documents Law § 10(1) (“The term ‘state agency’ shall mean any state office, department, division, board, bureau, commission or corporation, provided, however, it shall not include the New York state legislature or any of its standing, special, select and joint committees, subcommittees and legislative commissions.”). These provisions illustrate the fluid definition of “state agency” under New York law and the Legislature’s commitment to clarifying its intended meaning for

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<sup>3</sup> This section prohibits a state officer or employee from, *inter alia*, receiving compensation contingent upon a state agency’s action with respect to any benefit, receiving compensation to render services against the interest of the state agency by which he is employed, selling goods or services to any state agency, soliciting or receiving gifts intended to influence him in connection with his official duties, and practicing before the state agency for two years after termination of his employment. *See, e.g.*, N.Y. Pub. Off. Law § 73(2), (3)(b), (4)(a), (5)(a), 8(a).

<sup>4</sup> The State Ethics Commission has been replaced by the Commission on Public Integrity, which has the same powers and functions. *See* N.Y. Exec. Law § 94(1) & historical notes.

the purposes of specific obligations which it imposes upon government bodies, officers, and employees. Against this backdrop, it cannot be argued that the Commission's designation as a "state agency" for purposes of Public Officers Law §§ 73, 73-a, and 74, and Executive Law § 94, makes it into a state agency under New York law generally.

**D. The Guidelines Imposed by the Legislature Do Not Violate the Separation-of-Powers Doctrine**

It is also contended that subdivision 6 of the Cuomo bill violates the separation-of-powers doctrine. This subdivision provides that, if the Commission's redistricting proposal is rejected twice,

[u]pon receipt of such third plan, the implementing legislation with any amendments the legislature shall deem necessary shall be introduced in both houses of the legislature . . . [and] such amendments shall comply with the provisions of subdivision two of this section and shall not affect more than two percent of the population of any district.

A.5388, at 9-10. In amending the Commission's redistricting proposal, the Legislature is subject to the "guidelines" governing the Commission. *Id.* at 8. This subdivision, however, does not upset the separation-of-powers.

This provision does not purport to delegate any power to another branch of government or to any other body. Nor would the Legislature's use of standards originated by the Legislature to guide its use of discretion engender the unconstitutional transfer of any legislative function. Rather, the guidelines are merely standards that the Legislature itself has enacted to guide its own conduct. The Legislature certainly has "the power to determine policy and make laws" applicable to itself as well as to the people of New York. N.Y. Consol. Law § 2. Indeed, its discretion "extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as the determination itself." *Suffolk Cnty v. Water Power & Control Comm'n*, 245 A.D. 62, 64 (3d Dep't 1935). The power to set policy guidelines for redistricting lies well within the Constitutional authority of the Legislature.

We note that some of the guidelines codify provisions of the State Constitution and Federal law, and therefore derive from an authority other than the Legislature itself. Subdivisions 2(A), (B), (E)(III), E(IV), and E(V), *see supra* Part II(B), codify the reapportionment requirements laid out in Article III sections 4 and 5 of the State Constitution. Subdivision 2(C), prohibiting the establishment of districts in such a manner as to deny or abridge minority voting rights, codifies the requirements of the Voting Rights Act. 42 U.S.C. § 1973 ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . ."); *see also Bush v. Vera*, 517 U.S. 952 (1996) (reviewing alleged racial gerrymandering under the Voting Rights Act). Because these proposed subsections merely codify provisions of the State Constitution and Federal law, the Legislature is obligated to adhere to them even if it does not enact the Cuomo bill.

Some guidelines, however, do not originate from Federal law or the State Constitution, while others, arguably, expand upon the requirements of Federal law. These directives presumably could be

overridden by the Legislature should it enact the Cuomo bill and then choose to enact later, inconsistent legislation. *See Farrington v. Pinckney*, 1 N.Y.2d 74, 81 (1956) (“[T]he power to enact necessarily implies the power to repeal, and one Legislature cannot be limited or bound by the actions of a previous one. Hence every Legislature may modify or abolish its predecessor's acts, unless restricted by the Constitution, and the wisdom of doing so is a matter of legislative discretion.”); *see also Pharm. Soc. of State of New York Inc. v. New York State Dep’t of Soc. Servs.*, 223 A.D. 2d 58, 61 n.1 (3d Dep’t 1996) (“[I]t is well settled that no session of the Legislature can bind its successor”) (internal citation omitted).

Yet, to the extent that these guidelines are not repealed, they remain in effect and continue to set forth the existing policy of the State. Accordingly, repealing the guidelines would place the public on notice that the Legislature was altering a significant policy affecting the public interest. *See* N.Y. Consol. Law § 2; *cf. Blue Cross & Blue Shield of Alabama v. Hodurski*, 899 So. 2d 949, 959 (Ala. 2004) (“While it is true that one Legislature cannot bind a future one . . . [t]his provision is nevertheless very significant as an indication of legislative policy, and its continued existence, unrepealed, is fairly persuasive proof that the policy there expressed has been and still is adhered to.”).

## CONCLUSION

The Independent Redistricting Commission established by the proposed Cuomo bill does not violate the separation-of-powers doctrine, or its corollary, the non-delegation principle because the Cuomo bill does not delegate the Legislature’s lawmaking functions to any other entity. As such, it is fully consistent with the State Constitution.