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VIA EMAIL

Hon. Charles D. Lavine
Chair, Judiciary Committee
New York State Assembly
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Re: Impeachment Investigation by the Judiciary Committee of the New York State Assembly

Dear Chair Lavine and Counsel:

We represent former Governor Andrew M. Cuomo and write regarding the New York State Assembly Judiciary Committee's ("Committee") "ongoing investigation of allegations" against the Governor in advance of the issuance of your report. We understand you may be issuing your report in the coming weeks.

To update you, as indicated in our September 13, 2021 submission, we will imminently be submitting to the Attorney General's Office an application to amend, correct and supplement the Attorney General's August 3, 2021 "Report of Investigation Into Allegations of Sexual Harassment by Governor Andrew M. Cuomo" (the "Report"). Our submission will point to many material omissions and errors that render the Report flawed, unreliable and misleading.

First and foremost, sexual harassment, by state law, is defined as workplace discrimination for employees and covers gender-based harassment and is unlawful when "it subjects an individual

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to inferior terms, conditions, or privileges of employment”¹ and that consists of more than “petty slights” or “trivial inconveniences.”² The Committee’s report must clarify that the Governor did not sexually harass eleven women in violation of the law, and the Report did not find this. Indeed, even if you were to accept every complaint as fact (which we do not), more than half of the complainant’s allegations do not meet the standard of sexual harassment set forth in law. The Attorney General’s Report (and August 3, 2021 press conference) misled the public and generated scathing headlines that the Governor “sexually harassed 11 women,” which was not true.³ Each time the press repeats the false statement that the Report found that my client sexually harassed eleven women, my client is further prejudiced. If the Assembly is to go along with this false narrative, you will be creating a new standard for sexual harassment that every member of the legislature must be prepared to be judged by.

Our September 13, 2021 submission to the Committee provided just several specific examples of the serious issues with the Report, and our submission to the Attorney General will include many more such instances and more factual details. For example:

- Ms. Commisso’s story evolved over time, and an analysis we will provide illustrates that she has been materially inconsistent in her various descriptions of what occurred. Indeed, there is absolutely no corroboration of Ms. Commisso’s claims regarding “groping” on December 31, 2019 and in November 2020. Our submission will point

¹ N.Y. Exec. L. § 296(1)(h).

² *Williams v. New York City. Housing Auth.*, 872 N.Y.S.2d 27, 41 (1st Dep’t 2009).

³ See, e.g., Luis Ferré-Sadurní, *A 2nd Cuomo Investigation is Expected to Confirm Harassment Claims*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/nyregion/andrew-cuomo-impeachment.html> (“[T]he attorney general’s 163-page report . . . concluded that Mr. Cuomo . . . sexually harassed 11 women”); Ryan Tarinelli, *State Regulator Who Helped Cuomo with Sexual Harassment Allegations Taught Ethics Course at NYU Law*, N.Y. LAW JOURNAL (Sept. 2, 2021), <https://www.law.com/newyorklawjournal/2021/09/02/state-regulator-taught-nyu-law-government-ethics-course-while-helping-cuomo-with-sexual-harassment-allegations/> (“Outside lawyers hired by the attorney general’s office found that Cuomo *sexually harassed at least 11 women.*”) (emphasis added); Melissa Russo, *Cuomo Defiant After AG Probe Says 11 Women Were Sexually Harassed; Biden Calls for Resignation*, NBC NEW YORK (Aug. 3, 2021), <https://www.nbcnewyork.com/news/local/attorney-general-expected-to-release-findings-of-probe-into-cuomo-harassment-allegations/3196087/> (“The report states that 11 women were *sexually harassed* including state employees and a New York State Trooper assigned to the unit to protect the governor.”); Jonathan E. Bromwich, Dana Rubinstein & Brian M. Rosenthal, *5 Things to Know About the Cuomo Sexual Harassment Findings*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/08/04/nyregion/andrew-cuomo-future-takeaways.html> (emphasis added) “Andrew M. Cuomo’s future as the governor of New York is in doubt after the state attorney general released a *report on Tuesday that found that he had sexually harassed 11 women*, including nine current and former employees, in violation of state and federal law.”); Luis Ferré-Sadurní and Jonah E. Bromwich, *How Cuomo and His Team Retaliated Against His Accusers*, N.Y. TIMES (Aug. 5, 2021), <https://www.nytimes.com/2021/08/05/nyregion/cuomo-accusers-alphonso-david-roberta-kaplan.html> (emphasis added) (“[I]n a damaging report from the New York State attorney general this week, which not only *found that Mr. Cuomo sexually harassed 11 women.*”).

out in great detail the extent to which Ms. Commisso's story changed over time and the inconsistencies of that story.

- The Report strikingly omits the specific details of the testimony of Brittany Commisso, and Executive Assistants #2 and #3 regarding what Ms. Commisso told them during conversations on March 1, 3, 6, and 7 when Ms. Commisso described to them how the Governor purportedly acted inappropriately with her. *See* Report at 29–31. Based on what is presented in the Report, it is clear that Ms. Commisso never mentioned to Executive Assistants #2 and #3 over the course of those four conversations that, on December 31, 2019, the Governor allegedly rubbed her butt for five seconds during a selfie such that she was so nervous that the photos were blurred as Ms. Commisso now claims. The Report's failure to include the testimony about what each of them said about each conversation is indicative of the fact that Ms. Commisso's allegations against the Governor evolved and changed over time. The Report notes that, while the selfie of the Governor and Ms. Commisso sitting on the couch does exist, the blurry photos she claimed supported her assertion of being "nervous" do not exist, and in fact could not be recovered by Investigators.
- Ms. Commisso never mentioned the breast groping incident at the Mansion until she was having drinks on Saturday, March 6 with Executive Assistant #2 and #3, and again during a meeting with Executive Assistant #2's boyfriend, Executive Assistant #2 and Executive Assistant #3 on Sunday, March 7. What Executive Assistants #2 and #3 reported to Special Counsel to the Executive Chamber on Monday, March 8, 2021 that Ms. Commisso told them is materially inconsistent with what Ms. Commisso told investigators during her informal March 12 interview and during her "anonymous" interview with the *Times Union* published on April 7, 2021. Specifically, Executive Assistants #2 and #3 reported that Ms. Commisso told them that the Governor pushed her up against a wall in his Mansion office, groped her breast and then kissed her. Because Ms. Commisso did not tell the *Times Union* or investigators in her initial informal interview that the Governor pushed her up against a wall and kissed her, Ms. Commisso denied to the Investigators in her formal testimony those details that she told to both Executive Assistants #2 and #3. The Investigators chose to credit Ms. Commisso and simply conclude with no analysis or detail that Executive Assistants #2 and #3 "mistakenly reported" the other details that they recalled Ms. Commisso telling them. Report at 31.
- Ms. Commisso testified that the inappropriate interactions with the Governor left Executive Assistant #1 so nervous that she sometimes left with hives on her neck, a symptom she usually experiences when stressed or nervous. To corroborate this, she claimed after one such instance, "she ran into a member of the Executive Mansion's staff after leaving the Governor's office while feeling wide-eyed and while her hives

were still present...Executive Assistant #1 recalled that the staff member asked whether she was okay.” Report at 22 n.143. But the Report concluded, “we were not able to corroborate this interaction from interviews of Executive Mansion staff.” *Id.* This Committee must address this inconsistency, what everyone told the Investigators, and Ms. Commisso’s evolving story—something the Report did not touch upon. The Committee must release all the details to the public and certainly the Governor.

- The Report’s failure to include the details of Ms. Commisso’s testimony and Ms. McGrath’s testimony as to what Ms. Commisso did and did not tell Ms. McGrath about the Governor’s alleged inappropriate behavior, including why Ms. Commisso chose not to confide in Ms. McGrath on March 1, 3, 6, or 7, given how closely Ms. Commisso and Ms. McGrath worked with Executive Assistants #2 and #3. It is particularly telling that Ms. Commisso did not tell Ms. McGrath about the alleged December 31, 2019 incident and the alleged “groping” incident in November 2020 because they are the closest of friends and listed each other as the “emergency contact” in case of any work emergency. Ms. Commisso’s testimony and Ms. McGrath’s testimony must be publicly released, and the inconsistencies addressed by this Committee.
- The Report’s failure to include, or even quote from, all text messages between Ms. Commisso and Ms. McGrath, which the Report claimed “independently corroborated” “many of” Ms. Commisso’s allegations. Report at 32. The Report attaches a handful of text messages between them, but not those that purportedly corroborate “many of” Ms. Commisso’s allegations. We request access to all those messages and that the Committee address those messages.
- The Report’s failure to reconcile Ms. Boylan’s statements from January 2018 with her evolving allegations in late 2020 and 2021. The Report referenced a January 2018 meeting between Ms. Boylan and Alphonso David “about a matter that was related to issues within the Empire State Development Corporation (“ESD”) and unrelated to the Governor.” Report at 73. At this unexplained meeting on an unexplained topic, the Report states that Ms. Boylan “said that she had not been subject to sex discrimination, harassment, or retaliation” by anyone in the Chamber or ESD. *Id.* This is inconsistent with Ms. Boylan’s December 2020 tweet, alleging that Governor Cuomo “sexually harassed me for years. Many saw it, and watched.”⁴ The omission of the topic of that meeting, and what Ms. Boylan told the Investigators about that meeting, is critical to assessing the credibility of Ms. Boylan.
- The Report’s failure to include the request, in September 2018, made by Elizabeth Fine, then-counsel to the ESD and now-counsel to Governor Kathy Hochul, and authorized

⁴ Lindsey Boylan (@LindseyBoylan), TWITTER (Dec. 13, 2020 9:16 a.m.), <https://twitter.com/lindseyboylan/status/1338125549756182529?lang=en>.

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by Howard Zemsky (head of the ESD), that Ms. Boylan be terminated from ESD because of her abusive behavior, bullying of employees, and failure to follow procedures. Ms. Fine and Mr. Zemsky's decision that Ms. Boylan should be terminated from ESD is what ultimately caused Ms. Boylan to resign.

- The Report's failure to include the specific "threatening" and "jarring" message that Ms. Boylan sent to her former boss Mr. Zemsky in February 2021 to caused him to suddenly change his recollection, Report at 71, and to address whether that message related to the topic addressed at the January 2018 meeting with Ms. Boylan. The substance of the threat Ms. Boylan made to Mr. Zemsky, is critical to assessing the credibility of Mr. Zemsky's flip-flop in his recollection and Ms. Boylan. Ms. Boylan's threats were not confined to Mr. Zemsky alone. Indeed, the Report states that Ms. Boylan engaged in other threatening behavior in order to try and get some corroboration for her claims. Specifically, the Report states that "Ms. Boylan reached out to some women who were former colleagues from the Executive Chamber after making public her allegations regarding a toxic work environment and sexual harassment, to seek their support in corroborating her story. A couple of those individuals received communications from Ms. Boylan that they perceived as threatening, after they failed to respond in the way Ms. Boylan wanted them to." Report at 76. However, the Report fails to include the details of those threatening communications. Despite evidence of Ms. Boylan's witness tampering with respect to Mr. Zemsky, Ms. Boylan's threatening behavior, and testimony by witnesses about Ms. Boylan's lack of credibility, the AG inexplicably credited Ms. Boylan's allegations. Any report by this Committee must assess these issues and be transparent with the public on the details of Ms. Boylan's behavior when assessing her credibility.
- In assessing Ms. Boylan's credibility, the Report fails to meaningfully assess the threats Ms. Boylan made to two top staffers to the Governor threatening retaliation in March of 2020, saying "I will find ways to respond. Life is long. And so is my memory. And so are my resources."⁵ The Committee must address Ms. Boylan's overt threats of retaliation against Governor Cuomo and his administration in the months leading up to her allegations when assessing her motivation and credibility.
- The Report's failure to acknowledge or address applicable caselaw, which had been submitted to the Investigators by outside counsel to the Executive Chamber, that the Executive Chamber's release of three memos detailing the circumstances of Ms. Boylan's departure from state service did not constitute unlawful "retaliation." Ms. Boylan, a former employee running for public office, made inaccurate public statements on twitter about the circumstances of her departure from state employment,

⁵ See R. Glavin letter to Assembly Judiciary Committee and Outside Counsel dated Sept. 13, 2021, Ex. C at 4.

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i.e., she left because she was sexually harassed by the Governor, and alluding to being asked to sign an NDA upon resignation despite no such request being made of Ms. Boylan. The law is clear that that “an employer is entitled to defend itself against an employee’s charges, even if the employee finds it searingly painful to hear himself criticized.” *Melman v. Montefiore Med. Cent.*, 946 N.Y.S.2d 27, 42 (1st Dep’t 2012).

- The Report’s failure to acknowledge or even consider that the Governor’s conversations and actions with Trooper-1 were not gender-based. Indeed, the Governor had similar conversations with male Troopers on his detail, would joke with them, and regularly patted them on the arm, stomach or back when he would greet them or as he left them. Further, the Governor routinely recruited people he believed to be talented on the spot, a practice that extended to men and women.
- The Report concluded that Ms. Bennett’s testimony should be credited in its entirety, despite the Report’s failure to take into account the fact that Ms. Bennett’s claims against the Governor evolved and changed over time. The Governor never sexually propositioned Ms. Bennett as she has been claiming. The Report failed to consider Ms. Bennett’s history of making allegations of sexual misconduct. Specifically, the Report does not address or touch upon the allegations in a recent federal lawsuit against Hamilton claiming that Ms. Bennett, in coordination with three other women at Hamilton College, made false allegations of sexual misconduct in the spring of 2017 against a male student shortly before graduation and that Ms. Bennett withdrew her allegation after the student was banned from campus and not allowed to attend graduation, *see John Doe v. Hamilton College et al.*, No. 17 Civ. 1202, (N.D.N.Y.), Dkt. 1. The male student alleged that Ms. Bennett had “recorded a conversation between her and [John Doe] sometime in or around the spring of 2014 in which she stated that Doe did not sexually assault her.” *Id.* at ¶ 121. According to Mr. Doe, this 2014 recording “unequivocally proved that [Ms. Bennett’s] allegations against Doe were fabricated.” *Id.* at ¶ 158.

Our submission to the Attorney General’s office will address each of these issues, and many more. Your Committee must consider them and address them as well. Moreover, as stated above, it is incumbent upon the Committee to acknowledge that the Governor’s conduct—assuming *arguendo* the truth of the allegations—relating to many of the complainants does not constitute sexual harassment under state or federal law. If your Committee decides otherwise, a dangerous bar has been set regarding what conduct violates the law and what does not.

Second, new information calls into question whether the Attorney General complied with the Governor’s March 1, 2021 referral letter to Letitia James pursuant to Executive Law § 63(8), specifying that the Attorney General must “select an independent law firm to conduct an inquiry into allegations of and circumstances surrounding sexual harassment claims made against the

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Governor.”⁶ In other words, the review was to be entirely independent, conducted by a law firm with no bias, and that the Attorney General was not to be personally involved in the investigation and Report. According to a recent stump speech given by the Attorney General, that did not occur.

Specifically, the Attorney General stated on September 30, 2021 at the Ulster County Democratic Committee dinner that she was personally involved in the investigation and made her own personal credibility determinations of the witnesses. With respect to the complainants, Ms. James reportedly stated:

When they came into my office, and they told me about the fact that Albany was toxic . . . how they were harassed. . . I believed them, because they were specific. They gave me concrete examples. And everyone in Albany, every politician that I knew said, “yeah, it was like that Tish,” but it was these young women who marched in, gave me the facts, gave me the evidence, worked with the independent attorneys . . . They’re the heroes, not me, and not Mr. Cuomo . . . There are individuals, and one in particular, and his allies, who are trying to discredit and trying to undermine this investigation, and will argue that I politicized it. No. I put my head down. It was all about the facts, and all about the evidence.⁷

These public comments demonstrate that the Attorney General did not hand the reigns of this investigation to an “independent” law firm to do the investigation, as was required by the terms of the March 1 referral. Rather, the Attorney General—who has made clear in numerous private conversations over the last several months that she plans to run for Governor—was personally involved in and vested in this investigation of a political rival against whom she planned to run for office. Ms. James made her own credibility determinations, which was the foundation of the entire Report that ousted a governor that 3.6 million New Yorkers voted for in 2018. The Governor’s Exec. Law § 63(8) referral—requiring that an independent law firm do the investigation—made clear that the Attorney General was not to be the supervisor or investigator in the harassment investigation of former Governor Cuomo precisely because the Attorney General refused to disavow any intention to run for Governor in 2022. This conflict must be addressed head-on by this Committee before the issuance of any report, because the Attorney General admittedly had a personal role in the investigation and the Report, and a motive to draw every possible inference

⁶ LETITIA JAMES, NY ATTORNEY GENERAL, *Attorney General James Receives Referral Letter to Investigate Allegations of Sexual Harassment Against Governor Cuomo* (Mar. 1, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-receives-referral-letter-investigate-allegations-sexual>.

⁷ Bernadette Hogan, ‘*Stay tuned*’: AG Letitia James tells Dem leaders on when she will decide gov run, N.Y. Post (Oct. 1, 2021), <https://nypost.com/2021/10/01/letitia-james-hints-at-run-for-new-york-governor/>.

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against Governor Cuomo and issue the most damaging report possible—a Report she personally announced in an unprecedented and extraordinarily prejudicial press conference.

The Attorney General’s choice of “independent” law firms was a harbinger of what was to come. Ms. James (a) chose a plaintiff’s lawyer who routinely represents women suing in sexual harassment cases (despite Ms. James having told the Governor she would not choose a plaintiff’s attorney), and (b) an attorney with who supervised criminal investigations involving the Governor for a number of years and personally interviewed the Governor in one of those investigations, none of which found criminal conduct by the Governor. Both attorneys had biases coming into the investigation. Our forthcoming submission regarding the Report will make abundantly clear that the Report was one-sided and entirely consistent with the Attorney General’s conflict and motives, because the Report discarded critical evidence that undermined the findings, and the investigators made the conscious choice to avoid obtaining evidence that might undermine the preordained outcome.

There has been no reason for the Attorney General to refuse our requests for access to the underlying evidence, particularly given our offer to enter into an appropriate agreement to protect certain sensitive information. To the extent that the Attorney General claims some District Attorney’s offices have criminal investigations and that prevents her Office from sharing the “evidence” with us, that is plainly not so. The Attorney General can still provide us with the evidence that is not the subject of any criminal investigation. Some, if not all, of the memos or transcripts from the 179 interviews can be provided to us, and certainly a list of the individuals who were interviewed. Basic notions of fairness require that Governor Cuomo have access to the evidence, and the fact that the Attorney General continues to deny us access speaks volumes. We request that you provide us with access to any evidence that the Attorney General has provided to the Committee.

Third, as for the allegations concerning preferential treatment in COVID-19 testing, the Executive Chamber’s policy (similar to that of other states during COVID-19) was to test individuals who would be in contact with the Governor professionally or personally. Indeed, numerous state legislators—including members of the state Senate and Assembly, and members of this Committee—received preferential COVID-19 testing for themselves, various staff members and family members. While we understand that priority COVID-19 tests are “no longer ‘a major focus’ of the inquiry”⁸ after the Committee received my September 13, 2021 letter on that issue, we ask that you release the names of all state legislators who received preferential COVID-19 testing, as well as those legislators who obtained preferential testing for family members, given that this had been a focus of your inquiry and you requested a submission from the Governor on that issue.

⁸ Luis Ferré-Sadurní, *A 2nd Cuomo Investigation is Expected to Confirm Harassment Claims*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/nyregion/andrew-cuomo-impeachment.html>.

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Fourth, on the issue of the Governor's book, *American Crisis: Leadership Lessons from the COVID-19 Pandemic*, this is the second book he authored as governor. The book was produced in accordance with input from counsel and JCOPE. Several employees assisted him in reviewing and working on the book, and our understanding is that a review of employee timesheets will show that personal time was taken. We assume you have collected and review those timesheets. We also point out that it is well-known that state employees for legislators often take personal time during the day to participated in political activities such as campaigns or fundraisers, as well as to make phone calls and send campaign-related emails for elected officials. We expect that this practice will be reflected in your report. To the extent this Committee takes issue with employees taking personal time and using email or the phone during work hours to assist with the book, we request that the members of the legislature disclose all staff members who similarly use such resources during the workday in connection with fundraising and campaign activities associated with their employers.

Fifth, this Committee made public statements about the need for an investigation into the safety of the Mario M. Cuomo Bridge.⁹ While it appears you have "abandoned" that line of inquiry given that you "didn't want to slow down what [you] were doing,"¹⁰ you owe it to the public to make a statement on the matter. Indeed, the federal government has addressed this topic, stating unequivocally that the bridge was safe when it opened and that there were no safety concerns.¹¹ This Committee has a responsibility to address this matter honestly so that the public has confidence in the safety of the bridge.

Finally, to the extent this Committee addresses the issue of reporting data concerning nursing home deaths, we request that this Committee properly consider and make public the written submission by outside counsel to the Executive Chamber on this very issue to the U.S.

⁹ Michael Gold, Jeffery C. Mays and Luis Ferré-Sadurní, *Sexual Harassment Report Spurs Quick Action on Cuomo Impeachment Inquiry*, N.Y. TIMES (Aug. 5, 2021), <https://www.nytimes.com/2021/08/05/nyregion/andrew-cuomo-impeachment.html> ("Michael Montesano, the judiciary committee's ranking Republican member, said on Wednesday that the investigation had 'been redirecting' away from the bridge allegations to other areas, which several others close to the investigation confirmed.").

¹⁰ Ferré-Sadurní, *A 2nd Cuomo Investigation is Expected to Confirm Harassment Claims*.

¹¹ David Meyer, 'No Safety Concerns' on Mario Cuomo Bridge Despite Alleged Bolt Fails: Feds, N.Y. POST (Mar. 22, 2021), <https://nypost.com/2021/03/22/feds-report-no-safety-concerns-on-mario-m-cuomo-bridge/> ("The Federal Highway Administration, upon review of technical investigations, last week stated they have no safety concerns with the bridge,' the officials said"); see *Update on Bolt and the Safety of the Gov. Mario M. Cuomo Bridge*, N.Y. THRUWAY AUTHORITY (Mar. 22, 2021), <https://www.thruway.ny.gov/news/pressrel/2021/03/2021-03-22-mcb-statement.html> (concluding "the bridge is completely safe for the traveling public" and that the since the bridge opened in 2017 "it has been regularly and thoroughly inspected as required by National Bridge Inspection Standards. These inspections have not revealed any safety issues with the bridge").

