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December 2, 2020

Jaye Johnson, Governor's Counsel
Office of Governor Phil Scott
109 State Street, 5th Floor
Montpelier, Vermont 05609

BY E-MAIL ONLY

Re: Global Warming Solutions Act

Dear Jaye:

I am writing in response to your request for a meeting to discuss the constitutionality of the Global Warming Solutions Act ("GSWA"). As you know, the GWSA is a landmark law that addresses global warming, an existential threat to the health and safety of every Vermonter. Media outlets have reported that the Governor is considering a constitutional challenge to the GWSA. I want to let you know that the Vermont Attorney General's Office ("AGO") will defend the GWSA if the Governor brings such a lawsuit. Given the threatened litigation, a meeting to discuss legal theories, defenses, and other approaches would not be appropriate. Nevertheless, I thought it would be useful to set forth the reasons that the AGO would likely prevail in any litigation brought to challenge the GWSA's constitutionality.[1]

The GWSA provides structure and guidance to achieve meaningful reductions in greenhouse gas emissions. This is accomplished, in part, by developing a Climate Action Plan. This Climate Action Plan is developed by the Climate Council, and consistent with the GWSA's directives and goals, it provides a framework for the Agency of Natural Resources ("ANR") to promulgate rules that will achieve mandated reductions in greenhouse gas emissions. Specifically, by 2050, Vermont will need to achieve greenhouse gas emission reductions not less than 80% below 1990 emissions. 10 V.S.A. § 578. The Vermont legislature overwhelmingly voted in favor of the GWSA, reflecting broad public support for this important law. The initial vote by the Senate was 23-5 in favor and the House was 102-45 in favor.[2] Our democratically elected House and Senate maintained similar majorities to override the Governor's veto.[3]

[1] . The Governor faces a heavy burden if he brings such a challenge. A reviewing court will presume the statute is constitutional absent clear and irrefragable evidence to the contrary. *Athens Sch. Dist. v. State Board of Ed.*, 2020 VT 52, ¶ 37, 237 A.3d 671.

[2] . Vermont Senate Journal, June 6, 2020, at 1078; Vermont House Journal, September 9, 2020, at 1614-1615.

[3] . Vermont House Journal, September 17, 2020, at 1467; Vermont Senate Journal, September 22, 2020, at 1575.

Allegations that the GWSA amounts to an unconstitutional delegation of authority by the legislature or a usurpation of the executive's authority violating the Separation of Powers Doctrine are without merit. A reviewing court would likely uphold the GWSA under prevailing caselaw against either theory asserted by the Governor in letter accompanying his veto of the GWSA. I will address each claim in turn below.

The GWSA does not violate the nondelegation doctrine. Under the nondelegation doctrine, a legislature may not delegate "legislative power" to the administrative branch. This is because the Constitution—both state and federal—gives legislative power to the legislative branch. U.S. Const. art. I, § 1 ("[a]ll legislative Powers herein granted shall be vested in a Congress of the United States"); *Panama Refining Co. v. Ryan,* 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); Vt. Const. ch. II, § 5 ("The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."); *Village of Waterbury v. Melendy*, 109 Vt. 441, 448 (1938) ("Functions of the legislature, which are purely and strictly legislative, cannot be delegated, but must be exercised by it alone.").

However, as long as the delegation has some "intelligible principle" and is not "devoid of any conceivable standard to guide and constrain discretion," a legislature may delegate the power to implement legislative policy through, for example, rulemaking. *See, e.g., J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 409 (1928); *Re: MVP Health Ins. Co.,* 2016 VT 111, ¶ 12 (respectively). The basic inquiry is whether the legislature has provided standards or policy guidance to the agency. *See, e.g., Panama,* 293 U.S. at 415 (whether legislature has "declared a policy" on the subject); *Whitman v. Am. Trucking Assn's, Inc.,* 531 U.S. 457, 473-74 (2001) (whether legislature has provided criteria for the setting of standards); *Melendy,* 109 Vt. at 453 (whether legislature has provided any "policy or plan" or "rule or standard"). This standard recently was re-affirmed by the Vermont Supreme Court. *See Athens Sch. Dist. v. Vt. State Bd. of Educ.,* 2020 VT 52, ¶¶ 37-40 (collecting cases, e.g., "Legislature 'may confide a broad grant of authority to a subordinate agency in intricate matters affecting the general welfare in natural resources, health, education and economics'") (citation omitted).

A court reviewing the GWSA will likely conclude that the GWSA provides sufficient policy guidance and standards to pass constitutional muster. For example:

- It provides multiple GHG-reduction standards that must be met through the rules. 10 V.S.A. § 578 (26% by 2025, 40% by 2030, 80% by 2050).
- It provides the process and timelines for developing the rules. 10 V.S.A. § 593 (utilizing Vermont Climate Action Plan; deadlines of 2022, 2026, 2040, and interim).
- It provides numerous criteria—policy guidance—for development of the rules. The Vermont Climate Action Plan, upon which the rules are based, must include programs to meet specific policy-based requirements and achieve specific policy-based goals. For example:
    - Reduce GHGs from specific sectors based on the relative contribution of the source (transportation, building, regulated utility, industrial, commercial, agricultural);
    - Achieve long-term sequestration on natural working lands;
    - Limit chemicals and products that contribute to climate change;

- Prioritize most cost-effective, technologically feasible, equitable reductions;
- Minimize impacts on rural, marginalized, and lower-income communities;
- Support opportunities for businesses to benefit from GHG solutions; and
- Maximize involvement in interstate and other partnerships.

See 10 V.S.A. § 592(b) & (d).

The allegation that the GSWA amounts to an unconstitutional usurpation of the executive's authority is equally without merit. There is no usurpation because it is the responsibility of ANR to implement the GWSA, not the Climate Council. Vermont's Constitution provides for the separation of powers between the branches of government. Vt. Const. ch. II, § 5. This framework is designed to create a structure of government to prevent one branch consolidating power over another. *Hunter v. State*, 2004 VT 108, ¶ 21, 177 Vt. 339. Nevertheless, it is recognized that "'a certain amount of overlapping or blending of the powers exercised by the different departments'" is needed "to respond to the complex challenges and problems faced by today's state government." *Id.* (citations omitted). The Vermont Supreme Court has addressed the question of usurpation in the context of the judiciary over the executive. *See In Re: DL*, 164 Vt. 223 (1995) (holding that the inquest process does not amount to judicial encroachment over the executive). It has also addressed executive encroachment over the legislature. *See Hunter v. State*, 2004 VT 108, ¶ 21-23 (holding the legislative delegation to the Secretary of Administration and Joint Fiscal Committee the authority to prepare and implement a deficit preservation plan did not amount to encroachment by the executive upon the legislature because "it instead involves shared powers at the intersection of the branches of government.")

While there does not appear to be Vermont Supreme Court decisions focused on the issue of the legislature usurping the authority of the executive, the United States Supreme Court has addressed this issue. The United States Supreme Court addressed the alleged usurpation of the executive in a series of cases during the 1980s. In *Bowsher v. Synar,* 478 U.S. 714 (1983)*,* the Supreme Court took up a challenge to the Balanced Budget and Emergency Deficit Control Act of 1985, which required the President to implement budget reductions specified by the Comptroller General. Because Congress retained the authority to remove the Comptroller General and the President had to implement the Comptroller General's budget cuts without any modifications (thus giving the Comptroller General "ultimate authority" to implement the cuts), this was determined to be an unconstitutional intrusion into the authority of the executive. *Id.* at 728, 732-734. Towards the end of the decade the Court addressed Congress' creation of independent counsel in *Morrison v. Olson*, 487 U.S. 654 (1988). Congress had limited the authority of the executive to dismiss the independent counsel to "good cause" by the Attorney General. In determining there was no usurpation of executive power, the court held this provision did not "sufficiently deprive[] the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws." *Id.* at 693. The Court also held the Independent Counsel Act did not otherwise disrupt the balance of power between Congress and the executive, even though it reduced the amount of control the executive had over certain investigations. *Id.* at 695-96. The Attorney General retained authority to decide whether special counsel should be appointed, and the counsel was generally subject to Department of Justice policy. *Id.* at 696. Essentially, the Court analyzed the degree to which executive power was invaded and the degree to which the President retained sufficient power to carry out constitutionally assigned duties. *Id.* at 693-96.

It is likely that a court applying these standards would conclude that the GWSA does not amount to a usurpation of the Governor's powers. Unlike in *Bowsher,* the Climate Council established under the GWSA is not controlled by the legislature and it does not have "ultimate authority" to implement the Act. For instance, the Secretary of Administration is the Chair of the Climate Council and seven other members of the 23-member body are executive agency members. In addition, even for the members that are appointed by the legislature, the GWSA does not provide that the legislature may remove those members at any time, as in *Bowsher.* Administrative, technical, and legal assistance for the Council is statutorily required to come from ANRand the Department of Public Service—executive agencies. Further, ANR is the entity with authority to adopt regulations, not the Council. While ANR's regulations need to be consistent with the Council's Climate Action Plan, nothing in the GWSA requires ANR to adopt the Council's Plan in all respects, without any modifications as in *Bowsher.* Instead, ANR's rulemaking must also be consistent with the objectives of the GWSA and ANR must develop detailed technical, legal, and scientific support for the rules. Public notice, public hearings, and public comment on the rulemaking will also occur. If the Council fails to adopt a plan, ANR must still adopt regulations consistent with the Act. As in *Morrison,* these provisions do not disrupt the balance of power between the legislature and the Governor, nor do they unconstitutionally deprive the Governor of his ability to faithfully execute the laws.

The GWSA is not only constitutional, but it is good policy and good governance. It also reflects the will of the people, as expressed by the overwhelming majorities that supported its passage. Please know if the Scott Administration decides to mount a constitutional challenge, the AGO will aggressively and dutifully defend the GWSA and Vermont's historic effort to combat global warming.

Sincerely,

/s/
Joshua R. Diamond
Deputy Attorney General

cc: House Speaker Mitzi Johnson
Senate President Pro Tempore Tim Ashe
House Majority Leader Jill Krowinski
Senate Majority Leader Rebecca Balint