APL-2021-00080

To be argued by:
Cameron J. Macdonald
Time Requested: 20 minutes

Court of Appeals

of the

State of New York

Roxanne Delgado, Michael Fitzpatrick,
Robert Arrigo and David Buchyn,

Plaintiffs-Appellants,

– against –

State of New York and Thomas DiNapoli, in his
official capacity as New York State Comptroller,

Defendants-Respondents.

APPELLANTS' REPLY BRIEF

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Introduction

This appeal presents a challenge to Part HHH of chapter 59 of the Laws of 2018 ("2018 Law"), in which the Legislature authorized an unelected committee ("Committee") to make compensation determinations for legislators and public officers that superseded conflicting provisions in existing statutes. It does not challenge the Legislature's authority to set its policy decisions in laws that it grants the executive branch power to administer. That authority is well-established by this Court.

This appeal does, however, challenge whether the Legislature made any policy determination at all. And it challenges the constitutionality of the committee's actions as exceeding whatever authority the Legislature granted.

Argument

The 2018 Law is unconstitutional.

A. This is not a challenge to the Legislature's power to delegate administering its laws to the executive branch.

This appeal is not a challenge to a Legislative delegation of authority of the type that this court has ever considered. Never has this Court examined a law that purports to give a body other than the Legislature the power to make determinations that can supersede, i.e., replace, duly enacted statutes.

This challenge to the Legislature's unlawful delegation of its lawmaking authority is not a challenge to the delegation doctrine. Plaintiffs do not assert the Legislature may not confer authority and discretion to execute its laws to the executive branch.[1] Nor do Plaintiffs dispute the premise that the Legislature may pass laws setting policies, leaving the executive branch to fill in the details with rules and regulations.[2] There may be times when an administrative body's technical expertise is needed to "flesh out a policy broadly outlined by legislators."[3]

Plaintiffs dispute that the Legislature made adequate policy choices when it framed the 2018 Act. But that dispute is not relevant to the threshold question of whether the Legislature can delegate power to another body to write laws that supersede existing statutes.

It is, however, undisputed the Legislature's lawmaking functions cannot be delegated.[4] "Because of the constitutional provision that '[t]he legislative power of this State shall be vested in the

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[1] *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976).
[2] *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018).
[3] *Id.* (It's difficult to imagine how a Legislature capable of setting the required temperature for boiled linseed oil (Agriculture and Markets Law § 154) or describing the metes and bounds where beer can be sold and consumed after a Sunday running race (Alcoholic Beverage Control Law §105-a(2)) needs help setting salaries it's been legislating since 1948).
[4] Respondents' Brief at 17.

Senate and the Assembly' (NY Const, art III, § 1), the Legislature cannot pass on its law-making functions to other bodies."[5] Here, however, the 2018 Law's plain words delegated lawmaking to the Committee. Under the 2018 law, the Committee's recommendations "shall supersede, where appropriate, inconsistent provisions of section 169 of the executive law and sections 5 and 5-a of the legislative law ..."[6]

The Respondents in their brief cite this Court's precedent regarding the Legislature's constitutional authority to delegate its power to the executive branch to "administer the law as enacted by the Legislature."[7] Yet none of the cases Respondents cite speak to the Legislature's authority to delegate to another body the power to make it determinations that override statutes.

For example, in *Boreali v. Axelrod*,[8] *Matter of Sullivan Cty. Harness Racing Association v. Glasser*,[9] *Matter of N.Y. State Health Facilities v. Axelrod*,[10] *Matter of LeadingAge New York, Inc. v. Shah*,[11] *Matter of Big Apple Food Vendors' Assn. v. Street*

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[5] *Levine v. Whalen*, 39 N.Y.2d at 515.
[6] L. 2018, ch. 59, Part HHH, § 4.2.
[7] *Levine v. Whalen*, 39 N.Y. 2d at 515.
[8] 71 N.Y.2d 1 (1987).
[9] 30 N.Y.2d 269 (1972).
[10] 77 N.Y.2d 340 (1991).
[11] 32 N.Y.3d 249 (2018).

Vendor Review Panel[12] cited by Respondents, this Court only considered whether the law passed by the Legislature was *administered* within the bounds of its terms. None of those cases addressed the Legislature's authority to delegate its power to a body to make determinations that supersede or replace existing laws.

Respondents repeatedly cite the decision in *Center for Jud. Accountability, Inc. v. Cuomo*[13] by the Appellate Division, Third Department as authoritative. That case, however, is only relevant to this appeal to the extent that this Court has never considered the operative language of either law—that the Committee's recommendations "shall have the force of law, and shall supersede, where appropriate, inconsistent provisions" of existing statutes.[14]

Respondents can't describe what the Committee did. At no stage of these proceedings have the Respondents stated precisely what the Committee did when it made its determinations. They admit that it was not rulemaking or promulgating regulations. Yet they cannot describe what the Committee did when it issued its report as anything other than an act that had the "force and effect of law."[15] Respondents must use qualifying language because

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[12] 90 N.Y.2d 402 (1997).
[13] 167 A.D.3d 1406 (3d Dept. 2018).
[14] L. 2018, ch. 59, Part HHH, § 4.2.
[15] Respondents' Brief at 22 and 23.

they cannot explain how the Committee's recommendations can supersede existing laws without being laws themselves.

Nor is there any evidence that the Committee's recommendations have superseded the existing statutes. The committee's recommendations raised legislator salaries to $110,000. Meanwhile, the affected laws are unchanged on the books. State legislative sources and legal research services show New York legislators continuing to receive a $79,500 salary.[16]

As it stands today, none of the salary provisions in the Legislative and Executive Laws today reflect the Committee recommendations under the 2018 Law. Amounts currently paid to legislators and other public officials conflict with the published statutes. The Legislature has neither repealed nor amended Legislative Law §§ 5 and 5-A, or Executive Law §§ 40, 60, and 169. Yet a committee's recommendations purported to supersede those laws.

In 2019 the Legislature and the Governor demonstrated the problem with the 2018 Law. Just months after the Committee issued its report, the Legislature passed a law, which the Governor signed, amending Executive Law § 169(e). [17] That section, however, is a commissioner salary tier that the Committee eliminated

[16] See, e.g., the Senate: https://www.nysenate.gov/legislation/laws/LEG/5.
[17] L. 2019, ch. 56.

in its recommendations that became law effective January 1st that year.[18]

There is no published law or statute setting out or fixing the legislator and public official salaries and allowances determined in the Committee's report. The statutes the Committee's recommendations purport to supersede, confusing even the Legislator and the Governor who passed and signed the 2018 Law.

B. The 2018 Law was an unconstitutional non-final bill that failed to make a policy decision

The 2018 Law requires the Committee recommendations to abrogate the existing laws. The bill implementing the 2018 Law read and passed by the Legislature did not contain those recommendations. The Legislature may only pass final bills.[19] That makes the 2018 Law unconstitutional.

Following Respondents' argument to its logical conclusion, what the Legislature did when it passed the 2018 Law was the functional equivalent of leaving a blank space or a placeholder, "TBD," in amended Legislative Law §§ 5 and 5-a and Executive Law § 169. The Legislature and the Governor agreed to pass and

[18] R.65.
[19] N.Y. Const. Art. III, § 14.

sign a bill that would be completed later, when the Committee issues its report.[20] The Constitution does not permit the Legislature to pass such a non-final bill.

If Respondents are correct the 2018 Law itself, and not the Committee's report, supersede existing statutes, then the 2018 Law could not become final until the Committee issued its report. At that point the conflicting provisions that to be superseded would be identified. Once final, the 2018 Law then purported to become effective law without the Legislature voting on it or presenting it to the Governor. But that is not how laws are made under the Constitution.

Moreover, the Legislature did not make a policy determination for the Committee to execute. The 2018 Law first asked the Committee to "*examine* the prevailing adequacy of pay levels, allowances pursuant to section 5-a of the legislative law, and other non-salary benefits."[21] The Legislature did not determine that "salaries for members of the Legislature, statewide public officials, and agency commissioners must be 'adequate.'"[22] The Legislature left

[20] Respondents' Brief at 20-21.
[21] L. 2018, ch. 59, Part HHH, § 2.1.
[22] Respondents' Brief at 17.

it up to the Committee to determine whether salaries and allowances warranted an increase.[23]

Further, Respondents concede that the Legislature provided no guideposts to govern the Committee's determination.[24] Respondents admit the Legislature provided the Committee a nonexclusive list of factors the Committee could consider. The Committee was at liberty, which it exercised, to consider any other factors it wanted. As vague as other past delegations of authority that have passed constitutional muster have been (e.g., public interest; public interest, convenience or necessity[25]), none gave the ultimate policy decision over to the executive branch or other public body.

C. This Court has never condoned an unelected body making determinations that supersede existing statutes.

Respondents cast on Plaintiffs an argument they do not make—that legislative authority cannot delegated to bodies for one-time actions before the bodies dissolve. It is the case that courts have held that the Legislature can make such a delegation of authority

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[23] L. 2018, ch. 59, Part HHH, § 2.2.
[24] Respondents' Brief at 18.
[25] See *Sleepy Hollow Lake, Inc.,* 43 A.D.2d at 443-444; *Sullivan Cty. Harness Racing Assn.,* 30 N.Y.2d at 277.

to *administer* its laws. But Respondents cite no authority supporting the idea an unelected body can pass new laws that supersede existing statutes.

As Respondents correctly state, in 2005 the Legislature created a commission to assess hospital capacity in the state. The commission's recommendations could take effect unless the Governor did not transmit the commission's report to the Legislature or the Legislature voted to reject the report's determinations. Courts rejected challenges to the commission's authority.[26]

Respondents' argument, however, ignores that the commission was rescinding capacity authorizations the Department of Health had granted in administering the law in the first place. The Health Commissioner already had the power under the Public Health Law to revoke operating certificates based on the public need for capacity.[27] In other words, that commission was working within the framework of existing administrative law under the statute. It was not making determinations that superseded existing laws.

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[26] *McKinney v. Commissioner of N.Y. State Dept. of Health*, 41 A.D.3d 252 (1st Dept. 2007); *St. Joseph Hosp. of Cheektowaga v. Novello*, 43 A.D.3d 139, 150 (4th Dept. 2007).

[27] *St. Joseph Hosp.*, 43 A.D.3d at 150.

D. Fixed by law had a plain meaning in 1948 that Respondents do not refute.

Respondents in their brief highlight that the word "law" has its own meaning that is clear. A law is the product of a bill passed by the Legislature and signed by the Governor. Rules and regulations may have the "force and effect of law" but they are not laws. Respondents concede as much. [28]

In 1948 New York amended the Constitution to provide that legislator salaries could be fixed by law.[29] The amendment followed from a 1946 committee report that cannot be read in any other way then to conclude that New Yorkers intended legislative salary changes would be subject to the Governor's veto. "It would seem that such extraordinary duties should be recognized not by amending the organic law of the State to provide additional compensation, but by vesting the Legislature with power to adjust salaries by law."[30] Lest anyone be concerned legislators would get carried away with their additional compensation, the committee added: "This, of course, would require the consent of the Governor."[31]

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[28] Respondents' Brief at 22-23.
[29] NY Const., art. III, § 6.
[30] Final Rep. of the Joint Comm. On Legislative Methods, Practices, Procedures and Expenditures, 1946 N.Y. Legis Doc. No. 31 (R.105).
[31] *Id*.

It's a monumental leap to assume that a committee that recommended changing legislative pay raises from requiring a constitutional amendment to requiring legislation subject to the Governor's approval contemplated the Governor pre-approving a blank check to be filled out by an unelected committee. Yet that's the practical effect of the 2018 law. It's worth noting again that no Legislature for almost 70 years thought such an action possible.

Disputes in the federal courts in the 1970s and 1980s regarding how congressional salaries were to be fixed by law did nothing to sway the Legislature, which continued to raise legislator compensation by amounts fixed in statutes. And Respondents cut short their review of the history of congressional salaries and congressional salary determinations.

As Plaintiffs established in their Opening Brief, the congressional story ended in 1989 with Congress amending the Salary Act to comply with the U.S. Constitution's Ascertainment Clause.[32] Under the amendments, the President's recommendations "shall be considered approved under this paragraph if there is enacted into law a bill or joint resolution approving such recommendations

[32] 103 Stat 1716 (1989) § 701(g).

in their entirety."[33] The same approval process remains in place, unchanged, today.[34]

Unlike the D.C. Circuit's conclusion that the Ascertainment Clause serves primarily to affix political responsibility on Congress,[35] the purpose of New York's 1948 constitutional amendment was primarily to provide greater flexibility. "Rather than repeat the error of inflexibility by fixing the compensation of legislators and legislative leaders in the Constitution, and thus fail to provide for changing conditions and circumstances, the Committee urges that *** the Constitution be amended to permit the fixing of legislative salaries by law …"[36]

That flexibility came with the check and balance of the Governor's veto. Political responsibility derives from the fallout of a complete legislative process, including subjecting a bill to the Governor's veto power and any legislative override of a veto, if necessary.

Plaintiffs established in their Opening Brief the usage and custom identified in case law for the term "fixed by law" in Article III,

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[33] *Id*.
[34] 2 U.S.C. § 359.
[35] *Humphrey v. Baker*, 848 F.2d 211, 215 (D.C. Cir. 1988).
[36] Final Rep. of the Joint Comm. On Legislative Methods, Practices, Procedures and Expenditures, 1946 N.Y. Legis Doc. No. 31 (R.104).

§ 6 of the New York Constitution.[37] It meant fixed by statute, and not by regulation or some other mechanism. That meaning was consistent with a joint legislative committee's recommendations in 1946 to amend the Constitution to allow legislators to fix their salaries by law. [38] Respondents counter by resorting to vague dictionary definitions and cases not on point.

The Defendants previously conceded the Committee did not make rules or regulations.[39] Regardless, Respondents argue the fixed by law requirement can be met by rules and regulations that have the "force and effect of law."[40] But if rules and regulations are law within the meaning of fixed by law, why are the qualifying words "force and effect" always necessary?

Respondents also rely on *Matter of Mutual Life Ins. Co.*[41] and *U.S. Fid. And Guar. Co. v. Guenther*[42] to extend the meaning of law to rules of action or conduct by any controlling authority that

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[37] Statutes Law § 127 ("In the construction of statutes consideration may be given to usage and custom as indicative of practical construction or as constituting a part of the circumstances surrounding enactment of the statute.").
[38] Opening Brief at 17.
[39] R.219.
[40] Respondents Brief at 29.
[41] 89 N.Y. 530 (1882).
[42] 281 U.S. 34 (1930).

has binding legal force. Those cases related to municipal ordinances, which are laws within the meaning of the New York Constitution.

The people of New York granted the Senate and Assembly the power to make laws in the Constitution. "The federal and state Constitutions alone bound the freedom and power of the Legislature. Its authority while not infracting their provisions is plenary and unchecked, for it is that of the people of the state."[43]

The same Constitution authorizes local governments to adopt local laws and sets the rules for the Legislature and local governments to interact.[44] Thus, local ordinances are laws within the meaning of fixed by law. They are neither rules nor recommendations having the "force and effect" of law.

Moreover, Respondents cannot answer why salaries to be fixed by law under the Constitution were fixed by statute for 50 years. It's hard to imagine prior Legislatures knew that they could delegate fixing their salary amounts and chose not to. Instead, at least one Legislature asked a commission to make recommendations for the Legislature to implement.[45] The Legislature passed nine bills

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[43] *Racine v. Morris*, 201 N.Y. 240, 244 (1911).
[44] NY Const. Art. IX.
[45] Commission on Legislative and Judicial Salaries, "Report on the Compensation of New York State Legislators and Judges," April 30, 1973 (R.106-107).

setting legislator salaries between 1948 and 1998.[46] Such legislative precedent supports finding that fixed by law means fixed by statute.[47]

The Committee exceeded any authority the Legislature lawfully granted.

A. The Committee had no authority from the Legislature to make legislators full-time.

Respondents' argument that the Committee did not make the Legislature a full-time body are belied by the Committee's report itself. The Committee's report cannot be read to mean anything other than containing an intent to make New York legislators full-time. The Committee's recommendation, which purports to be law, states, "In all cases, where employment is not prohibited, a hard cap of 15% of legislative base salary shall be imposed on outside earned income to ensure the primary source of earned income is from the state."[48] Most readers would understand one's primary source of earned income to be a full-time job.

The Committee concluded its directive authorized "a holistic review and analysis of compensation for Legislators without limiting

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[46] Appellants' Brief at 20.
[47] Statutes Law § 75.
[48] R.59 (Prohibited income included a non-specific category of professions that involve fiduciary relationships, which can include fields such as law, accounting, investing, and real estate or insurance sales.).

that analysis to simply setting salary levels."[49] The Committee further stated "Limiting outside income in conjunction with increases in salary" fell within its mandate.[50]

The Committee found that "the consideration of compensation cannot be complete without considering outside income, its role in overall legislative compensation and the ability of Legislators to fulfill their responsibilities to serve the public in a focused and ethical manner."[51] It delayed the outside income limit for a year to allow legislators time to come into compliance. Effective January 1, 2020, the committee expected the outside income limit to be $18,000 (assuming the Legislature gave itself a $10,000 raise by passing an on-time budget).

The Committee concluded that legislative salaries had not kept up with inflation since 1998, but it offered no analysis whether the 1998 amount—$79,500—was an appropriate amount for a part-time legislator then. The driving factor in determining the legislator salary amount was the Committee's desire to make legislative pay each legislator's primary source of income.

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[49] R.62.
[50] *Id.*
[51] R.57.

The Committee, however, had just one job. It was to determine whether legislator salaries and allowances warranted an increase. Instead, it bundled the salary increase into its policy determination to make legislators full-time by eliminating most allowances and outside income. That number—$110,000—cannot be separated from the Committee unconstitutionally exceeding the authority it allegedly possessed.

If the 2018 law contained a severability clause, which it did not, severability could operate to save the 2018 Law from provisions within it deemed unlawful. It would not operate to save unlawful acts done by the Committee that exceeded its authority in executing the law. To allow otherwise is to concede the Committee, through its recommendations, was authoring provisions of the 2018 Law that could be severed. Regardless, the Committee's $110,000 salary amount for legislators cannot be severed from the equation the committee used that included making legislators full-time.

B. The Committee had no authority from the Legislature to re-write Executive Law § 169

The Committee had the same limited task for Executive Law § 169 Commissioners—to determine whether their salaries warranted an increase. Respondents concede the Committee made a

policy decision when it concluded the existing six-tier structure is "out of date and cumbersome."[52] And they acknowledge the Committee made a policy decision to restructure the tiers to "reflect the current sense of the importance of the various agencies governed by these public servants."[53] Respondents also concede the committee provided the Governor with a new ability to determine salaries within ranges in two of the tiers.[54]

Again, Plaintiffs are not disputing the delegation doctrine in this case. And it is true that the case law supports the Legislature not being confined to providing bodies executing its laws "rigid marching orders."[55] Here, however, to the extent the Legislature made a policy determination in the 2018 Law, it gave the committee a very narrow task. The Committee was only to determine whether salaries warranted increases. The Committee had no room to roam "to fill in details and interstices and to make subsidiary policy choices consistent with the enabling legislation."[56]

To be sure, the Legislature listed considerations the Committee could make in evaluating compensation levels. But none of them

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[52] Respondents' Brief at 43.
[53] *Id*.
[54] *Id.* at 44.
[55] *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 260.
[56] *McKinney*, 41 A.D.3d at 252.

expanded the scope of the task at hand. The Legislature could ask the Committee to restructure the tiers in section 169 in plain language. It did not. Further, the Legislature could put the salary tiers together in a statute in the first place. It certainly could pass laws itself that restructure the tiers and provide the Governor discretion to determine salaries within ranges.

Conclusion

The 2018 Law and the entire process that ensued violated the New York Constitution, in which the people have given the Legislature the sole power to make laws. The 2018 Law should be declared unconstitutional. The Committee's actions should be declared unconstitutional. The salary increase the Supreme Court left in place should be nullified, along with the Committee's purported revisions of sections 40, 60, and 169 of the Executive Law.

Dated: Albany, New York
January 7, 2022

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