Argued by: Cameron J. Macdonald
Time Requested: 15 minutes

Case No. 529556

New York Supreme Court
Appellate Division—Third Department

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' BRIEF

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Preliminary Statement

In recent years, when the Legislature has found itself unable to do the hard, political work of negotiating, drafting, and passing laws, it has created commissions or committees to do its work. Commission or committee "recommendations" become law without any action by the Legislature. No bill. No vote. This is unconstitutional.

Here, the Legislature took a politically charged law-making task—the compensation it pays itself and other public officials—and unlawfully delegated it to a committee. By doing so, the Legislature turned its back on its job under the state Constitution to implement policy decisions in properly passed laws. The Legislature made no major policy decisions. Instead, it gave vague instructions to an unelected group that took it upon itself to overhaul legislative and executive compensation in New York.

The Supreme Court correctly determined that the unelected committee overstepped its authority and declared certain committee actions null and void. The Supreme Court, however, incorrectly concluded that the committee had *any* authority to pass or

fix new laws. All the committee's actions, and the statute that created it, should be declared null and void as an unconstitutional delegation of the Legislature's law-making power.

Even an unelected the committee can make new laws, the Supreme Court failed to nullify committee actions that exceeded the authority the Legislature delegated. Further, the Supreme Court failed to vacate the committee's actions after the committee violated the state's Open Meetings Law by passing new laws without a vote on their final form.

Questions Presented

Was the 2018 law establishing a Committee on Legislative and Executive Compensation (the "Committee") an unlawful delegation of law-making power to an unelected committee that made laws in violation of the New York Constitution?

The Supreme Court erred in determining that the Legislature could delegate its lawmaking power to an unelected committee whose "recommendations" supersede inconsistent provisions of existing laws. Further, the Constitution provides that the compensation determinations the Committee made can only be "fixed by law" by the Legislature.

Did the Committee exceed any authority the Legislature may have lawfully granted it to determine whether compensation of legislators, statewide elected officials, and certain other public officials warranted an increase?

The Supreme Court erred when it declared only part of the Committee's recommendations were null and void as unauthorized by the Legislature. The Committee had no authority to make a policy determination to treat legislators as full-time. It had no authority to amend existing laws to set new salary amounts for statewide elected officials. And it had no authority to grant the Governor discretion to determine compensation amounts for certain public officials.

Did the Committee violate provisions of the New York Open Meetings Law?

The Supreme Court erred when it found insufficient cause to nullify the Committee's actions for violating the Open Meetings Law. The undisputed facts show that the Committee's report became law without the Committee conducting a public meeting to vote on the report, i.e. new law, itself. Alternatively, the Committee voted on the report in private. Either scenario violates the Constitution's transparency requirements for passing new laws

and the resulting report and the Committee's actions should be nullified.

Statement of the Case

The 2018 budget bill contained a provision, Part HHH ("2018 Law")[1] creating a the Committee to "determine whether, on January 1, 2019, the annual *salary and allowances* of members of the legislature, statewide elected officials, and *salaries* of state officers referred to in section 169 of the Executive Law, *warrant an increase*."[2] The Legislature gave the Committee a non-exhaustive list of factors to consider limited to determining whether compensation amounts warranted an increase.[3]

The Legislature did not make any policy determination whether legislators should be paid full-time salaries. It did not authorize the Committee to change the law regarding statewide official salaries. And it did not authorize the Committee to other public official salary tiers or salary determinations. [4]

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1 L. 2018, ch. 59, Part HHH.
2 L. 2018, ch. 59, Part HHH, § 2.2 (emphasis added).
3 L. 2018, ch. 59, Part HHH, § 2.3.
4 L. 2018, ch. 59, Part HHH.

The Committee, however, charged itself with implementing a comprehensive new compensation scheme intended to ensure "legislator performance."[5] The Committee determined "legislator performance" includes on-time budgets passed each year (without any regard to their positive or negative financial impact on the state), which would be being rewarded with a salary increase the next January.[6] It also concluded that legislator performance could be ensured, and ethics reforms achieved, by limiting allowances and prohibiting and capping legislator outside income.[7]

The Law did not give the Committee authority to make recommendations that superseded Executive Law sections 40 (Comptroller salary) or 60 (Attorney General salary). Regardless, the Attorney General and State Comptroller salaries went up effective January1, 2019 and will rise to $220,000 by January 1, 2021.[8]

In addition, the Committee granted itself additional legislative power, purporting to re-write Executive Law § 169 to delegate to the Governor the Legislature's power to set certain state official

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5 Record on Appeal ("R") at 54.

6 *Id.*

7 *Id.*

8 R.61. Notably, the Committee did not make recommendations superseding existing law setting governor and lieutenant governor compensation as asked under the 2018 Law. The Committee itself recognized that those amounts can only be set by the Legislature through a joint resolution.

salaries.[9] As of January 1, 2019, salary levels for section 169 Executive Law public officials were adjusted upwards and re-grouped into four tiers from six. Two tiers have salary ranges instead of fixed amounts and the Committee granted the Governor discretion to set specific amounts within those ranges.

The Committee published its report on December 10, 2018 (the "report").[10] The Legislature took no action on the Report.[11] The Report's recommendations had the force of law and superseded existing statutes on January 1, 2019.[12]

Meanwhile, Plaintiffs filed their declaratory judgment action seeking to have the 2018 Law declared unconstitutional and the Committee's actions in the Report nullified. In April 2019, Plaintiffs filed an amended complaint that the Defendants moved to dismiss.[13] Assembly Speaker Carl Heastie filed an amicus curiae brief in support of the motion to dismiss.[14]

On June 7, 2019, the Supreme Court entered its decision and judgment. As a preliminary matter, the Supreme Court noted that Plaintiffs properly pleaded a claim for declaratory judgment.

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9 *Id*. at 20.
10 R.44
11 R.31.
12 L. 2018, ch. 59, Part HHH, § 4.
13 R.178.
14 R.283.

There being no questions of fact presented by the controversy in question, the Supreme Court concluded it could make a determination on the merits of the claims presented.

First, the Supreme Court concluded the Plaintiffs have standing to pursue their claims under Section 123-b of the State Finance Law.[15] Second, the Supreme Court concluded Plaintiffs did not raise sufficient violations of the Open Meetings Law to require nullifying the Committee's actions.[16] Third, the Supreme Court concluded the Committee was not an agency authorized by the 2018 Law to make rules or final decisions in adjudicatory proceedings subject to the State Administrative Procedures Act.[17]

Next, the Supreme Court concluded the Legislature could delegate the power to the Committee to make certain determinations contained in the Report.[18] The Court, however, determined that the Committee exceeded its authority when it made recommendations prohibiting and limiting outside income.[19] Accordingly, the Supreme Court found that the 2018 Law failed to set appropriate

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15 R.10. The Court's finding of standing under the State Finance Law made unnecessary a determination of standing under *Boryszewski v. Brydges*, 37 N.Y.2d 361 (1975).

16 *Id*.

17 R.12.

18 R.14.

19 R.15.

limits that left the Committee unfettered discretion to make recommendations inconsistent with the Public Officers Law.[20]

The Supreme Court determined the Legislature did not grant the Committee authority to make recommendations that supersede the Public Officers Law.[21] Accordingly, the Court nullified all Committee recommendations relating to Legislator salary increases and bonuses in 2020 and 2021. It left in place changes to the legislator salaries and allowances effective January 1, 2019.[22]

Argument

The legislation delegating compensation determinations violated the New York Constitution. The committee then illegally exceeded the limited authority unconstitutionally delegated to it by the Legislature by implementing its own policies, including raising legislator salaries to compensate for full-time work. Finally, the committee violated the Open Meetings Law by conducting deliberations and producing a final report without holding a public meeting or voting on that report.

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[20] *Id.*
[21] R.18.
[22] R.18-19.

Point I: The Legislature could not delegate its responsibility to set compensation amounts

A. New York's Constitution requires laws to be passed by the Legislature

The 2018 Law delegating compensation determinations to the committee provides "[e]ach recommendation made to implement a determination pursuant to this act shall have the force of law, and shall supersede, where appropriate, inconsistent provisions of section 169 of the executive law and sections 5 and 5-a of the legislative law ..."[23] On its face, the 2018 Law unconstitutionally delegates the Legislature's lawmaking authority.

The people of New York vested legislative power in the Senate and Assembly. Only the Legislature may pass new laws or modify existing laws. [24] The Constitution is specific that "no law shall be enacted except by bill."[25] And "no bill shall be passed or become a law ... except by the assent of a majority of the members elected to each branch of the legislature." The Legislature may only pass final bills. No bill may be amended after its final reading.[26]

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[23] L. 2018, ch. 59, Part HHH, § 4.2.
[24] N.Y. Const. Art. III, § 1.
[25] *Id*. at Art. III, § 13.
[26] *Id*. at Art. III, § 14.

Further, the Constitution gives the Governor the authority to veto any bill.[27] The Committee's Report contained "recommendations" that superseded, i.e. annulled and replaced, existing statutes without the check and balance of the Governor's veto power. Nothing ever went before the Governor to sign or veto. Despite the Constitution's directions and prohibitions, the Committee succinctly stated it's the power the Legislature delegated: "This Committee has been empowered to take any action with respect to compensation that a statute could effectuate."[28]

The 2018 Law's unconstitutionality cannot be saved by characterizing the Committee as some type of quasi-legislative body. Its recommendations "supersede inconsistent provisions of [existing statutes] *unless modified or abrogated by statute prior to January first of the year as to which such determination applies …*"[29] On its face, the 2018 Law allows Committee recommendations to become new laws without a quorum or a majority vote by both houses of the Legislature. Both scenarios violate the Constitution.

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[27] NY Const. Art. IV, § 7.
[28] R.63.
[29] L. 2018, ch. 59, Part HHH, § 4.2.

Assuming for argument's sake the Legislature reconvened in December 2018, the Committee's recommendations could have become law if 75 of 150 Assembly members voted "nay" on a bill to modify or abrogate those "recommendations." As the 2018 Law is written, contrary to *all* Constitutional requirements, a minority of just *one* house can ensure the Commission's "recommendations" become new law by voting no. And they alternatively can do so without a vote by not showing up and denying a quorum.[30] Further, the 2018 Law permitted the Legislature by doing nothing to deny the Governor's constitutional authority to veto any bill.[31]

Earlier this year, for the same reasons argued here, the Niagara County Supreme Court struck down a law in the 2019 budget bill creating a commission to introduce public campaign finance to the Election Law.[32] That law contained the same operative language, giving the commission a late fall deadline to produce a report that would supersede existing laws unless abrogated or modified by the Legislature.[33]

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30 N.Y. Const. Art. III, § 9 ("A majority of each house shall constitute a quorum to do business.")

31 N.Y. Const. Art. IV, § 7.

32 *Hurley v. Pub. Campaign Fin. and Election Commn. of the State of New York*, Sup. Ct., Niagara County, March 12, 2020, Boniello, J., Index No. E169547/2019 (see Addendum).

33 L. 2019, ch. 59, Part XXX.

The Niagara County court concluded that the Legislature transgressed the line between administrative rule-making and legislative action. It noted the Constitution reserves solely to the Legislature the power to create new law and repeal existing law. The Legislature reserving itself the right to modify or abrogate the commission's laws did not validate the process. And the Legislature's vote to pass the 2019 Law could not be deemed to ratify blindly the commission's recommendations that could not be known when the 2019 Law was passed.[34] The court further noted "to repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice."[35]

Here, the Legislature and the Governor similarly abdicated their explicit Constitutional responsibilities to fix compensation amounts by law. The statute called for a committee report creating new legislation to become effective without meeting *any* of the

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[34] *Id*. at 7.

[35] *Id*. (quoting *Moran v. LaGuardia*, 270 N.Y. 450 (1936)). Note that on the heels of the Niagara County decision the Legislature promptly used the commission's recommendations to implement a public campaign finance scheme in this year's budget bill (L. 2020, ch. 58, Part ZZZ), but it has not taken similar measures to put the Committee's nullified salary and outside income recommendations into law.

Constitution's requirements for passing new laws. As such, the Court should declare the Law null and void in its entirety.

B. The Supreme Court failed to address the operative statutory provision in dispute in this case

The Legislature may not cede its lawmaking responsibility under the Constitution.[36] While it may delegate some authority to administer its laws, the Legislature here did not even pretend to be granting the Committee rulemaking or adjudicatory powers to administer and execute the Law.[37] The Appellees admitted as much.[38] And he Supreme Court correctly concluded the Legislature did not authorize the Committee "to make rules or final decisions in any adjudicatory proceedings."[39]

The Supreme Court regardless concluded the Legislature could delegate authority to administer the 2018 Law if circumscribed by reasonable safeguards. To get there, the Supreme Court relied on reading "shall supersede, where appropriate, inconsistent provisions of [existing laws]" out of the Law. It also relied on this Court's decision in *Center for Jud. Accountability, Inc. v. Cuomo*

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36 *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976).

37 *Id.* ("The delegation of power to make the law, which necessarily involves a discretion as to what it shall be, cannot be done, but there is no valid objection to the conferring of authority or discretion as to a law's execution, to be exercised under and in pursuance of it.")

38 R.219.

39 R.12.

involving a similar unelected commission on judicial compensation in 2015 that did not address the same provision the Supreme Court read out of the 2018 Law.[40]

Here, the Supreme Court skipped over the operative language of the 2018 Law, concluding Committee recommendations "'shall have the force of law, … **unless modified or abrogated by statute prior to January first of the year as to which determination applies to legislative and executive compensation**.'"[41] The contents the ellipsis represent are critical. The missing words are "shall supersede, where appropriate, inconsistent provisions of section 169 of the executive law, and sections 5 and 5-a of the legislative law." They have only one effect: The Legislature empowered the Committee to annul and replace existing statutory provisions. That is the only source for the recommendations to have the force of law.

This Court in *Center for Jud. Accountability* did not address the same critical language in the law creating the 2015 commission on judicial compensation. Specifically, this Court did not address language in the 2015 law stating that, in addition to having the force of law, the commission's determinations would "supersede, where

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[40] 167 A.D.3d 1406 (3d Dept. 2018).
[41] R.8 (emphasis in original).

appropriate, inconsistent provisions of article 7-B of the judiciary law."[42] Like the Supreme Court in this case, this Court paraphrased the 2015 law and left out the words that made that commission a law-making body. Neither the 2015 commission or the Committee in 2018 was a body administering laws promulgated by the Legislature.[43]

This Court concluded that the 2015 commission was an administrative body and conducted its analysis accordingly.[44] Here, the Supreme Court reached the same conclusion.[45] Both courts erred by reading the same critical operative language out of the subject laws. Each body's recommendations could only have the "force of law" by superseding provisions of existing laws. Left in, "shall supersede , as appropriate, inconsistent provisions of [existing law]" can *only* mean the Legislature delegated its lawmaking power.

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[42] L. 2015, ch. 60, Part E, § 7.

[43] *Center for Jud. Accountability,* 167 A.D.3d at 1410.

[44] *Id*.

[45] R.13-14. To be sure, over the years the courts have approved actions taken by administrative agencies as delegated tasks occurring within the bounds of laws passed under the Legislature's plenary power. In none of those cases did the Court condone agency actions purporting to make laws that superseded existing laws. *See*, *e.g.*, *Matter of Levine v. Whalen*, 39 N.Y.2d 510 (1976); *Matter of LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249 (2018); *Matter of City of N.Y. v. State of N.Y. Comm'n on Cable Television*, 47 N.Y.2d 89 (1979); *Sleepy Hollow Lake, Inc. v. Public Service Comm'n*, 43 A.D.2d 439 (3d Dept. 1974).

C. Compensation to be "fixed by law" means a law must be passed by the Legislature

If the Law somehow did not delegate lawmaking to the Committee but instead gave it some undefined quasi-legislative, quasi-rulemaking power, it remains unconstitutional. The Constitution mandates that certain compensation amounts must be "fixed by law."[46] Section 1 of Article III vests the Senate and Assembly with the exclusive power to make laws generally. "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."[47] "When language of a constitutional provision is plain and unambiguous, full effect should be given to "the intention of the framers * * * as indicated by the language employed" and approved by the People."[48]

1. "Fixed by law" as understood by the people of New York requires the Legislature passing a law

Under the New York Constitution, certain salaries and compensation must be "fixed by law."[49] As used by the framers of current

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[46] NY Const. Art. III, § 6; NY Const. Art. XIII, § 7.
[47] *Racine v. Morris*, 201 N.Y. 240, 244 (1911).
[48] *Matter of King v. Cuomo*, 81 N.Y.2d 247, 253 (1993)(citations omitted).
[49] See, e.g., NY Const., Art III, § 6.

Article III, § 6, "fixed by law" means legislation passed in the ordinary course, subject to the Governor's veto power.[50] A joint legislative committee in 1946 supported that meaning in urging a constitutional amendment to vest "the Legislature with power to adjust salaries by law."[51] That committee acknowledged any legislative salary change "of course, would require consent of the Governor."[52] That joint committee further assumed that "empowered to determine the rate of its own compensation, the Legislature would be extremely conservative," and that "[i]n revising legislative salaries the Legislature and the Governor would necessarily always be guided by public opinion."[53]

The next 70 years proved the 1946 joint committee correct. The people of New York amended the Constitution to allow the Legislature to fix its salaries by law and the Legislature has been conservative to the point of not passing a law adjusting salaries since *1998*. The Legislature passed a law in 1998 to amend Legislative Law § 5 to raise annual salaries for members to $79,500.[54] After

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50 R.97(1946 NY Legis Doc No. 31).
51 R.104(1946 NY Legis Doc No. 31., p. 170).
52 *Id*.
53 *Id*.
54 L. 1998, ch. 630.

1998, Legislators introduced bills to raise the legislative salary on multiple occasions, but none became law.[55]

Despite decades of acrimony and debate, no one for almost 70 years conceived that "fixed by law" could mean set by a committee appointed by the Legislature absent a constitutional amendment granting such power to a committee or commission. There's a reason for that. Fixed by law in the Constitution means that the Legislature must pick a number, write it in a bill, debate the bill, vote, and then vote again, if necessary, to override the Governor's veto.

2. "Fixed by law" as understood by its plain meaning requires the Legislature passing a law.

The phrase "fixed by law" has a plain meaning—to set permanent by statute. Cases, laws, and legislative history distinguishing the words "law" and "regulation" underscore that "fixed by law" requires a statute. The Constitution reserves the power to pass laws exclusively to the Legislature. The Constitution further sets out the process for only the Legislature to enact statutes (and for the Governor to have a say through the veto power).

"Fixed by law" historically has meant fixed by statute, and not by regulation or some other mechanism. For example, as held in

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[55] *Matter of Maron v. Silver*, 14 N.Y.3d 230, 245 (2010).

Sutliffe v. City of New York "The amount of recovery will then be prima facie the amount of salary or compensation *fixed by law or regulation . . . .*"[56] Or in *Matter of Lewis v. Graves*, "The hour of opening and closing the schools is not *fixed by law, but is subject to regulation* by the board of education . . . ."[57]. And in *Montana v. McGee*, "The minimum and maximum sentence is fixed by law and imposed by the court. The allowance for good behavior is *fixed by law or regulation under law*."[58].

Certain statutes and Constitutional provisions contain similar language. Under federal law regarding public officials, "No * * * person whose salary, pay, or emoluments are fixed by law or regulations shall receive any additional pay, extra allowance, or compensation * * * for any other service or duty whatever . . ."[59] That federal statute has been updated and today reflects fixed by law to mean fixed by statute: "An employee or a member of a uniformed service whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty . . ."[60]

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[56] 132 A.D. 831, 836 (1st Dept 1909) (emphasis added).
[57] 127 Misc. 135, 137 (Albany County Sup. Ct. 1926).
[58] 16 N.Y.S.2d 162, 167 (Bronx County Sup. Ct. 1939) (emphasis added).
[59] *Landram v. United States*, 16 Ct. Cl. 74, 79 (1880) (quoting R.S.L. 1765).
[60] 5 U.S.C. § 5536.

The 2018 Law violates the explicit meaning and intent of the subject compensation clauses of the Constitution. It unconstitutionally provides a non-legislative committee the power to supersede existing statutes merely by issuing a written report not subject to a legislative vote or the Governor's veto power.[61] Fixed by law does not mean, as done here, providing an unelected committee a blank slate to write a report containing recommendations purporting to change existing laws that can't be found on the books. (See, for example, Legislative Law sections 5 and 5-a as of the date of this brief.)

Point II: The Committee exceeded any authority the Legislature lawfully granted.

A. The Committee had no authority from the Legislature to change legislator job descriptions

The Committee made a policy decision to make legislators full-time employees. The debate regarding legislators as part-time or full-time is more than a century old.[62] Over that time, however, legislators have always been considered part-time because the Constitution contemplates them receiving outside income.[63]

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61 L. 2018, ch. 59, Part HHH, § 4.2.

62 R.93 (Constitutional Convention of 1915, Doc. No. 20).

63 *See* Const. Art. III, § 7; *Maron,* 14 N.Y. at 260 ("Moreover, legislators are part-time and may supplement their income through committee assignments, leadership positions and other outside employment.").

While the 2018 Law was silent, the Committee went ahead and changed the legislative job from part-time to full-time. Allegedly addressing the "performance" of the Legislature, the committee found that it addressed performance by limiting stipends (or allowances) and outside earned income to "advance the full-time nature of today's legislative duties."[64] The Committee based its salary increase decision on its conclusion that New York "is in reality considered a more 'full-time legislature.[']"[65] By its own choice of words, the Committee highlighted that treating legislators as full-time had not been settled by the 2018 Law before the Committee issued its Report.

While the 2018 Law gave the committee a narrow task to determine whether salaries and allowances warranted increases, the Committee viewed its duties as holistic, and not limited simply to setting salary levels.[66] Accordingly, the Committee further determined to adopt the outside income restrictions of a full-time legislative body—the United States Congress.[67] Removing any doubt regarding its position, the Committee plainly stated its policy determination in its report. "In all cases, where employment is not

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64 R.54.
65 R.56.
66 R.62.
67 R.56.

prohibited, a hard cap of 15% of legislative base salary shall be imposed on outside earned income to ensure that *the primary source of earned income is from the state*."[68]

The Supreme Court left in place the 2019 legislator salary increase while nullifying increases and outside income rules set to take effect in 2020 and 2021. The Committee, however, based the 2019 increase on defining legislator jobs as full-time. That was a policy decision outside the scope of whatever lawful mandate the Committee possessed. It too, should be nullified.

B. The Committee Exceeded Its Authority under the Factors Established by the Court of Appeals

As discussed, the Legislature may not cede its policymaking responsibility under the Constitution.[69] At the same time, a body conferred power to implement a legislative mandate cannot use that mandate "as a basis for engaging in inherently legislative activities."[70]

In *Boreali v. Axelrod*, the Court of Appeals supplied four factors for courts to consider in determining whether a non-legislative body exceeds the scope of its authority, including whether (1) the body is acting solely on its own ideas of sound public policy; (2) is

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[68] R.59 (emphasis added).

[69] *Matter of Medical Socy. of State of N.Y. v Serio*, 100 N.Y.2d 854, 864 (2003).

[70] *Boreali v Axelrod*, 71 N.Y.2d 1, 9 (1987).

creating its own comprehensive set of rules without legislative guidance; (3) is acting in an area in which the Legislature repeatedly tried and failed to reach an agreement; and (4) the body is utilizing any special expertise or technical competence in the field.[71]

Nothing in the enabling legislation supports the Committee's finding 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."[72] Nothing in the enabling legislation directs the committee to eliminate legislative stipends to "create more equity amongst all 213 Legislators, more stability and transparency regarding legislative compensation and address certain ethical concerns associated with stipends."[73]

Regarding legislator compensation, the Committee designed its entire compensation scheme, including the 2019 making the salary increase and eliminating and increasing stipends, based solely on its own ideas of sound public policy. Regardless of the relative

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[71] *Id.* at 13.
[72] R.56.
[73] *Id.*

merits of that public policy decision, it departs radically from the Committee's mandate to determine whether annual salaries and allowances of members of the Legislature warrant an increase.[74]

Similarly, without any guidance from the Legislature, the Committee re-wrote Executive Law § 169 and implemented its own idea of public policy. Instead of maintaining six tiers of public official compensation with a specific salary amount designated for each tier, the Committee re-wrote the law to organize the affected public officials into four tiers, A through D, substantially increasing salaries for all public officials who are subject to that statutory provision.[75] The Committee assigned specific salary amounts to tiers A and B, but it designated tiers C and D to salary ranges to be refined further by the Governor.[76] Not only did the Committee substitute its public policy choice for that of the Legislature, it then went on to delegate the Legislature's authority to fix certain salaries to the Governor.

Further, the Legislature provided no guidance to the committee regarding the comprehensive compensation changes determined by the Committee. The Committee determined a legislative salary

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[74] L. 2018, ch. 59, Part HHH, § 2.2.
[75] R.61.
[76] R.64.

increase of 64% over two years, contingent on the Legislature passing on-time budgets each year, based on its independent determination legislators should be paid as if they are full-time. The Committee eliminated certain stipends to justify an increase to all legislator salaries (and implement its own policy determination), making those choices without any guidance from the Legislature.

The Committee only existed due to the inability of the Governor and the Legislature to find common ground on legislation. Legislators had not passed a salary increase in twenty years for a reason.

The Court of Appeals encountered a similar scenario in *Boreali* regarding smoking regulations:

> Unlike the cases in which we have been asked to consider the Legislature's failure to act as some indirect proof of its actual intentions, in this case it is appropriate for us to consider the significance of legislative inaction as evidence that the Legislature has so far been unable to reach agreement on the goals and methods that should govern in resolving a society-wide health problem. Here, the repeated failures by the Legislature to arrive at such an agreement do not automatically entitle an administrative agency to take it upon itself to fill the vacuum and impose a solution of its own. Manifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends.[77]

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[77] *Boreali*, 71 N.Y.2d at 13 (citations omitted).

The situation here is analogous. The Legislature failed to address a public policy problem by making difficult political choices.[78] The Committee then took it upon itself to fill the vacuum. It purported to settle a hundred-year old debate on the role of legislators and independently determined they should be paid full-time salaries. In so doing, it imposed outside income limits not contemplated by the 2018 Law. It removed allowances, despite being directed only to determine whether they warranted increases.

The Supreme Court nullified most of those determinations regarding legislator compensation. It erred, however, when it left in place the 2019 legislator pay raise predicated on the Committee's policy decision. It also erred when it left in place the changes to Executive Law § 169 containing the Committee's policy determinations to create new tiers and to grant the Governor discretion in setting certain salary amounts.

Point III: The Report and its recommendations should be nullified under the Open Meetings Law

The committee conducted four public meetings and acknowledged at the first meeting that the Open Meetings Law[79] applied.[80] Among other things, at the fourth and final public meeting

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[78] See *Maron*, 14 N.Y.3d at 245.
[79] Public Officers Law § 100-111.
[80] R.35.

on December 6, 2018, the committee conducted minimal deliberations and voted on certain issues to be included in its report.[81] The committee did not deliberate or vote on a draft report at any public meeting, including the meeting where it conducted votes.[82] The committee issued its final report on December 10, 2018, which contains materials and determinations, presumably agreed to by the committee, that were not part of any public meeting.[83]

No report was on the table at the final meeting. Four days after that meeting the committee issued a final report. Either it was not voted upon, or there was a meeting within the meaning of the Open Meetings Law that took place in violation of the Open Meetings Law.

If the final report was not voted upon, then the committee did not vote on the details of provisions relating to allowances and state officer salary levels. The December 6, 2018 meeting contained no discussion of the Legislators who would continue to receive allowances. The Report identifies several roles continuing to receive allowances not subject to a vote. That detail was to be left for the Report.[84]

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81 R.36.
82 R.37.
83 R.37-38.
84 R.342.

Similarly, with state officers under section 169 of the Executive Law, the committee discussed redefining six tiers of commissioners into four tiers. The committee did not identify the state officers who would fall into each of the four categories, especially the positions collapsed into tiers C and D.[85] Presumably those determinations occurred and became final later, prior to the Report being final since there is no record from the meeting of the details being subject to a committee vote.

The Supreme Court declined to exercise its discretion to nullify the Committee's Report for violating the Open Meetings Law. This, however, was not a village board's open meetings foot fault in not properly invoking an executive session or providing notice of minor amendments to a proposed law. The Report purports to create new state law that should not be subject to the wide latitude for transparency abuse the Supreme Court granted.

The Open Meetings Law can be traced to the Constitution's transparency mandate. Among other things, the Constitution provides that the houses of the Legislature keep their doors open and maintain a journal of the proceedings, except when secrecy is required.[86] Bills must be printed and on members desks in final

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[85] *Id.*
[86] NY Const. Art. III, § 10.

form before final passage.[87] Unless there is a message of necessity the final printed bills must be on a member's desk three calendar legislative days before the vote.[88] Upon the last reading of a final version of the bill the vote must be taken immediately and recorded in the journal. None of those elements was present here, and the Supreme Court should have exercised its discretion to nullify the Report.

Conclusion

The Legislature did not make a policy decision that it left to an administrative body to manage through a rule-making process. Rather, it left the entire question of whether legislative salaries and allowances and public official salaries should be increased to an unelected committee. The Committee in its decision-making then exceeded its unlawful authority to make its own policy determinations and re-write the laws while violating the Open Meetings Law.

The entire process violated the New York Constitution where the people gave 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

[87] NY Const. Art. III, § 14.
[88] *Id*.

Committee's purported revisions of sections 40, 60, and 169 of the Executive Law.

Dated: Albany, New York
July 15, 2020

Respectfully submitted,

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ADDENDUM

Hurley v. Pub. Campaign Fin. and Election Commn. of the State of New York,
Sup. Ct., Niagara County, March 12, 2020,
Boniello, J., Index No. E169547/2019

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

LINDA HURLEY and REV. REX STEWART, Duly Registered Voters in the State of New York; DAVID BUCHWALD, ROBERT CARROLL, HARVEY EPSTEIN, ROBERT JACKSON, WALTER MOSLEY, and PHIL STECK, Individually and as Qualified Candidates for Public Office Under the Laws of the State of New York; ANITA THAYER and JONATHAN WESTIN, Individually and as Co-Chairs of the New York State Committee of the Working Families Party and Members of the Executive Board of the New York State Committee of the Working Families Party; THE NEW YORK STATE COMMITTEE OF THE WORKING FAMILIES PARTY; and THE EXECUTIVE BOARD OF THE NEW YORK STATE COMMITTEE OF THE WORKING FAMILIES PARTY

Plaintiffs,

vs.

Index No. E169547/2019

THE PUBLIC CAMPAIGN FINANCING AND ELECTION COMMISSION; MYLAN DENERSTEIN, JAY JACOBS, DeNORA GETACHEW, JOHN NONNA, ROSANNA VARGAS, CRYSTAL RODRIGUEZ, HENRY BERGER, DAVID PREVITE, and KIMBERLY GALVIN, as Commissioners of the Public Campaign Financing and Election Commission; THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; PETER S. KOSINSKI, DOUGLAS A. KELLNER, ANDREW J. SPANO, AND GREGORY P. PETERSON, as Commissioners of the Board of Elections of the State of New York; THE GOVERNOR OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE SPEAKER OF THE ASSEMBLY; THE MINORITY LEADER OF THE ASSEMBLY; THE SENATE OF THE STATE OF NEW YORK; THE MAJORITY LEADER OF THE SENATE; and THE MINORITY LEADER OF THE SENATE

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DECISION & ORDER

Boniello, III, J.

By Notice of Motion, Defendants The Assembly of the State of New York; the Speaker of the Assembly of the State of New York Hon. Carl E. Heastie; The New York State Senate, the Senate Majority Leader Hon. Andrea Stewart-Cousins; The Public Campaign Financing and Election Commission; Mylan Denerstein, Jay Jacobs, Denora Getachew, John Nonna, Rosanna Vargas, Crystal Rodriguez, Henry Berger as Commissioners of the Public Campaign Financing and Election Commission; The State of New York; and Douglas A. Kellner and Andrew J. Spano as Commissioners of the Board of Elections of the State of New York (hereinafter and collectively, the "Moving Defendants") moved to dismiss the Plaintiffs' Complaint pursuant to various provisions of CPLR § 3211. In response, Defendants David Previte and Kimberly Galvin as Commissioners of the Public Campaign Financing and Election Commission, Assembly Minority Leader Hon. William A. Barclay (replacing Brian Kolb) and Senate Minority Leader Hon. John J. Flanagan (hereinafter and collectively, the "Minority Defendants") have cross-moved for Summary Judgment on their Cross-Claims which was adopted and joined in by Defendants Peter S. Kosinski and Gregory P. Peterson as Commissioners of the Board of Elections of the State of New York and Plaintiffs herein seeking a declaratory judgment, as a matter of law, that Part XXX of the Laws of 2019, Chapter 59 (hereinafter, the "Statute") is unconstitutional in all respects. In addition, the Court granted the Government Justice Center, Inc.'s application for leave to participate in this proceeding as *amicus curiae* on December 10, 2019.

Previously, this case was originally assigned to the Hon. Richard C. Kloch, Sr. Judge Kloch held a preliminary conference on September 9, 2019 and a Scheduling Order was issued. Pursuant to the Scheduling Order, six (6) Defendants filed Answers. The Minority Defendants filed Answers with Cross Claims. The Defendants, the New York State Senate and the Majority Leader of the Senate and the Assembly of the State of New York and the Speaker of the Assembly, in lieu of Answers to the Complaint, filed Motions to Dismiss pursuant to CPLR § 3211. The case was reassigned to this Court on October 1, 2019. On November 12, 2019, at the request of the Plaintiffs and after notice to all parties was given, the Court converted the Motions to Dismiss to Motions for Summary Judgment pursuant to CPLR § 3211(c). Further, the prior Scheduling Order was amended to give the parties an opportunity to submit additional papers to develop an appropriate record. The parties submitted additional papers in support of their position but no pleadings were amended by the Plaintiffs nor did the Moving Defendants submit verified Answers. The oral argument on the motions was rescheduled from November 12, 2019 to December 12, 2019.

Initially, the Court finds that The Public Campaign Financing and Election Commission of the State of New York (hereinafter, the "Commission") lacks the capacity to be sued and therefore, must be dismissed from this suit (*see*, *Cmty. Bd. 7 v Schaffer*, 84 NY2d 148 [1994]). Further, the Court finds that Kimberly Glavin and David Previte from the Commission as well as New York State Board of Election Commissioners Peter S. Kosinski and Gregory P. Peterson lack capacity and standing to assert their Cross-Claims in this action (*see*, *Cmty. Bd. 7 v Schaffer*, *supra*; *Pooler v Public Service Com.*, 43 NY2d 750 [1977]; *Matter of State Univ. of N.Y. v Town of Amherst*, 81 AD3d 1476 [4th Dept 2011]). Further, Assembly Minority Leader Hon. William

A. Barclay and Senate Minority Leader Hon. John J. Flanagan failed to establish that there was nullification of their votes or usurpation of their power and thus, they also lack standing to sue (*see, Silver v. Pataki*, 96 NY2d 532 [2001]; *Matter of Colton v Town Bd. of Town of Amherst*, 72 AD3d 1638 [4th Dept 2010]). As result, the Court must dismiss, as a matter of law, the Cross-Claims asserted by the Minority Defendants (joined in by the New York State Board of Election Commissioners Peter S. Kosinski and Gregory P. Peterson as well as the Plaintiffs).

The record reflects that on April 1, 2019, the New York State Legislature (hereinafter, "Legislature") approved a budget that included the passage of the Statute which established the Commission. Thereafter, on July 3, 2019, the Governor announced the appointment of nine (9) commissioners. The Commission consisted of two members appointed by the Governor; two members appointed by the Senate Majority Leader; two members appointed by the Speaker of the Assembly; one member appointed by the Senate Minority Leader; one member appointed by the Assembly Minority Leader; and the final appointment was jointly made by the Governor, the Senate Majority Leader and the Speaker of the Assembly. The qualifications and affiliations of each of the members of the Commission are set forth on pages 1 and 2 of the Commission's report.

The Commission was tasked with making recommendations which have the force of law and which would supersede existing law. The Statute empowered the Commission to "examine, evaluate and make recommendations for new laws with respect to how the State should implement...a system of voluntary public financing for state legislature and statewide public offices...". In addition, the Commission was empowered to review and recommend changes to certain aspects of the State Election Law and the State Public Finance Law. Such

recommendations by the Commission would become law unless modified or abrogated by statute prior to December 22, 2019 by the Legislature. The Commission issued its report on December 1, 2019 and no part of the report was modified or abrogated by statute nor by any other legislative action. Thus, the recommendations by the Commission now have the full force and effect of law.

The Plaintiffs assert that insofar as the Statute explicitly or effectively interferes with the right to fusion voting the Statute is unconstitutional. More broadly, however, the Plaintiffs further allege that both the New York State Constitution (hereinafter, "Constitution") and the Laws of the State of New York (hereinafter, "State") do not permit the creation of any entity for the purpose of making laws other than the Senate and the Assembly nor can any entity other than the Legislature modify or repeal an enactment of the Legislature. As a result, the Plaintiffs have brought this declaratory judgment action against Defendants herein seeking a determination that the Statute enacted by the Legislature creating the Commission and the actions of Defendants are unconstitutional. Specifically, the Plaintiffs are seeking a judgment declaring that (1) the Constitution and laws of the State guarantee the right of fusion voting, and that insofar as the Statute or any action by the Commission which explicitly or effectively interferes with that right is unconstitutional and null and void and that no Defendant may take any action abridging or interfering with the Plaintiffs' right to fusion voting (First Cause of Action); (2) the Constitution and laws of the State do not permit the creation of any entity for the purpose of making laws other than the Senate and Assembly, nor may such entity including the Commission, take any actions which actually or effectively create law; nor will any such action be of legal force and effect (Second Cause of Action); and (3) the Constitution and laws of the State do not permit the modification or repeal of an enactment except by means equivalent to those used to create such

enactment (Third Cause of Action). In response, the Moving Defendants argue that the Complaint is moot when viewed against the recommendations of the Commission and that the Plaintiffs' claims have not been properly pled.

Summary Judgment is, of course, a drastic remedy which should not be granted if there is a possible relevant factual issue (Siegel, NY Prac § 278, at 459-460 [4th ed]). On a motion for summary judgment, the proponent of the motion must set forth evidentiary proof, in admissible form, eliminating any material issue of fact from the suit (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). However, the Court of Appeals has held that an inquiry into the constitutional validity of a statute is purely a question of law (*Cayuga Indian Nation of N.Y. v Gould*, 14 NY3d 614 [2010]).

It is well settled that in an action for declaratory judgment there must be a genuine legal dispute between the parties as declaratory relief will not be granted where it would result only in an advisory opinion (*New York Public Interest Research Group, Inc. v Carey*, 42 NY2d 527 [1977]). The law is clear that "to constitute a 'justiciable controversy,' there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" (*Chanos v Madac, LLC*, 74 AD3d 1007 [2nd Dept 2010]). Further, "a justiciable controversy is one solvable by a court rather than some other forum" (*Schulz v Silver*, 212 AD2d 293 [3rd Dept 1995]). However, a party must present a controversy that is "definite and concrete" and be a "real and substantial controversy admitting of specific relief through a decree of a conclusive character" (*New York State Asso. of Ins. Agents, Inc. v Schenck*, 44 AD2d 757 [4th Dept 1974], quoting *Aetna Life Ins. Co. v. Haworth*, 300 US 227 [1937]). The Court notes that when evaluating whether a justiciable controversy exists there is

a distinction between an administrative action being reviewed and a legislative action which has the full force of law. Moreover, ripeness pertains to an action which is final and produces an alleged harm (*see*, *Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510 [1986]; *Matter of Brighton Grassroots, LLC v Town of Brighton*, 2020 NY Appellate Division Lexis 787 [4th Dept 2020]).

Here, the recommendations of the Commission are now the law of the State and thus, each recommendation is final and binding. Significantly, the Commission's recommendations amended Election Law §1-104 (3) by increasing the threshold for political parties to receive ballot access. The Plaintiffs have challenged the constitutionality of the Statute in the context of the Election Law. Specifically, the Plaintiffs have argued that such action would be unconstitutional and violate New York State's Constitutional prohibition against delegating or granting legislative power to any entity or persons other than the Senate and Assembly. The Plaintiffs also claim that this amendment will indirectly interfere with fusion voting as it will eliminate minor parties from the ballot. Based upon the facts and circumstances, the Court finds that there is a justiciable controversy herein.

The primary legal issue in this case is whether the Legislature improperly delegated its law making powers to the Commission. It is fundamental that the legislative power of this State shall be vested in the Senate and Assembly (*see*, NY Const., Art. III, § 1; *Boreali v Axelrod*, 71 NY2d 1 [1987]). Though the Legislature cannot delegate its authority and pass on its law-making functions to other bodies or communities, New York Courts have recognized that the Legislature may delegate certain matters to administrative agencies (*Boreali v Axelrod, supra*; *Mooney v Cohen*, 272 NY 33 [1936]; *St. Joseph's Hosp. v Novello*, 43 AD 3d 139 [4th Dept 2007]). In

Boreali v Axelrod, the Court of Appeals acknowledged that the Legislature has considerable leeway on delegating its regulatory powers. Notwithstanding, the Court of Appeals also stated that "a legislative grant of authority must be construed, whenever possible, so it is no broader than that which the separation of powers doctrine permits" *Id.*

In this case, the Court finds that the Legislature, clearly and unequivocally, empowered the Commission to legislate new law and repeal existing statutes. The line between administrative rule-making (which can be delegated) and legislative action (which cannot be delegated) has clearly been transgressed. The Legislature established the Commission and delegated to it the authority to create new law and to repeal existing law which is a function reserved solely to the Legislature under the Constitution. The transgression became final when the recommendations of the Commission became law without further action by the Legislature. The Court notes that the fact that the Legislature reserved the right to modify or abrogate by statute the recommendations of the Commission does not validate the process. The legislative function must be followed with proper procedure as mandated by the Constitution and adopted and historically followed by the Legislature. The vote taken by the Legislature to pass the statute cannot be deemed to blindly ratify the recommendations of the Commission especially since such recommendations would not be known at the time of the passage of the Statute on April 1, 2019. The Court further notes that the doctrine of legislative equivalency requires that "to repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice" (*Moran v LaGuardia*, 270 NY 450 [1936]).

Accordingly, the Motions for Summary Judgment Dismissing the Complaint by the Moving Defendants are denied. Although there is a severability clause in the Statute, the Court

finds that the Statute is an improper and unconstitutional delegation of legislative authority to the Commission. The Court awards summary judgment to the Plaintiffs (*see*, CPLR § 3212 [b]; *Estate of Giffune v Kavanagh*, 302 AD2d 878 [4th Dept 2003]).

The signing of this Decision and Order shall not constitute notice of entry under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to service of notice of entry.

This Decision shall constitute the Order of this Court and shall be filed as such.

RALPH A. BONIELLO, III.
Supreme Court Justice

Dated: March 12, 2020
Niagara Falls, New York