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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' REPLY BRIEF

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Preliminary Statement

Appellants have a straightforward request for this Court. Take the plain language a statute, apply the state Constitution and the rule of law, and declare the law and actions under it unconstitutional. This is not a case that destroys the foundation of the administrative state. Delegation remains available to lawmakers through properly drafted laws. This case only addresses a law that improperly ceded the Legislature's lawmaking power to an unelected committee.

The 2018 budget bill contained a provision, Part HHH ("2018 Law")[1] creating a 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] Salaries are fixed for legislators by Legislative Law § 5 and for the Comptroller and Attorney General Executive Law §§ 40 and 60 respectively.

Elected and other state public officials cannot receive more than the amounts set out in the Legislative and Executive Laws

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1 L. 2018, ch. 59, Part HHH.
2 L. 2018, ch. 59, Part HHH, § 2.2.

without those laws being vacated or superseded by the Legislature. Neither happened. Instead, an unelected committee made recommendations that purported to supersede existing laws. This Court has never addressed the Legislator's ability to cede such power.

Further, policymaking is reserved to the Legislature. An unelected body cannot make policy determinations outside its narrowly defined task to determine whether salary amounts for elected and other public official warrant increases. An unelected committee cannot fill in the details of a broad policy objective when no space for those details exists.

The 2018 Law and the committee recommendations purporting to supersede existing laws should be struck down as unconstitutional. There may be proper ways for the Legislature to delegate authority to execute laws it passes in this area, but it did not occur here. The Legislature needs to start over and implement the salary increases it seeks through legislation, like it had been doing since 1948.

Argument

Point I: This Court Has Not Addressed the Merits of This Case Before Now

The 2018 Law is before this Court to consider critical statutory language not previously addressed by this Court. Defendants do not contest that this Court in *Center for Jud. Accountability, Inc. v. Cuomo*[3] did not address the meaning and effect of a similar 2015 law. There, a commission's recommendations would "supersede, where appropriate, inconsistent provisions of article 7-B of the judiciary law."[4] This Court did not consider the meaning of supersede and its pivotal role in making any salary increases effective despite conflicting statutory provisions in place.

As it stands today, Judiciary Law § 7-B does not reflect the salaries judges are paid. Similarly, 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 laws on the books. The Legislature has neither vacated 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.

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[3] 167 A.D.3d 1406 (3d Dept. 2018).

[4] L. 2015, ch. 60, Part E, § 7.

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.[5] Nor do Plaintiffs quibble with the premise that the Legislature may pass laws setting policies, leaving the executive branch to fill in the details with rules and regulations.[6] There may be times when an administrative body's technical expertise is needed to "flesh out a policy broadly outlined by legislators."[7]

It's undisputed the Legislature's lawmaking functions cannot be delegated.[8] "Because of the constitutional provision that '[t]he legislative power of this State shall be vested in the Senate and the Assembly' (NY Const, art III, § 1), the Legislature cannot pass on its law-making functions to other bodies."[9] Here, however, the 2018 Law's plain words delegate lawmaking to a committee. The

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5 *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976).
6 *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018).
7 *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).
8 Respondents' Brief at 17.
9 *Levine v. Whalen*, 39 N.Y.2d at 515.

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 ..."[10]

Defendants shrug their shoulders and claim that the committee recommendations had to supersede existing laws, otherwise the 2018 law would not work. As part of their explanation how this works, Defendants import new words into the 2018. They suggest the committee's recommendations could have the force *and effect* of law. Presumably, force and effect of law makes the committee's actions more like administrative rulemaking. The 2018 Law, however, provides that the committee recommendations "shall have the force of law, and shall supersede …"[11]

None of the Defendants nor the proposed amici provide any authority for the idea that a body can make rules or regulations that supersede laws passed by the Legislature. Yet the committee's recommendations raised legislator salaries to $110,000 while Legislative Law § 5 shows the amount to be $79,500. Defendants cannot explain how that works, except to suggest the 2018 Law somehow supplanted the pre-existing statutes.[12]

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[10] L. 2018, ch. 59, Part HHH, § 4.2.
[11] *Id.*
[12] Respondents' Brief at 22.

No one who publishes New York's statutes got that memo. 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.[13]

The Legislature and the Governor themselves do not know the committee amended the laws. Last year, after the committee's report became effective, the Legislature passed a law, which the Governor signed, amending Executive Law § 169(e).[14] That section, however, is a commissioner salary tier that the committee purported to eliminate in its recommendations effective January 1st that year.[15]

To the extent Defendants are arguing the 2018 Law was later in time and must prevail,[16] that argument must also fail. It fails because the 2018 Law requires the committee recommendations to abrogate the existing laws. The bill read and passed by the Legislature did not contain those recommendations. That would make the 2018 Law non-final and unconstitutional. The Legislature may only pass final bills.[17]

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[13] See, e.g., the Senate: https://www.nysenate.gov/legislation/laws/LEG/5.
[14] L. 2019, ch. 56.
[15] R.65.
[16] Statutes Law § 398 ("Where two statutes are in irreconcilable conflict with each other the later constitutional enactment will prevail.")
[17] N.Y. Const. Art. III, § 14.

This case is distinguishable from *Center for Jud. Accountability, Inc. v. Cuomo* because this Court did not address in that case the issue raised here. Only one New York court has answered the question whether the Legislature can grant a body authority to make recommendations that supersede existing laws unless abrogated or modified by the Legislature.[18] That court answered no and struck down the law.[19]

Point II: "Fixed by Law" Has a Meaning Understood by the People of New York and their Legislators for More Than 70 Years

Plaintiffs established in their Opening Brief the usage and custom identified in case law for the term "fixed by law" in Article III, § 6 of the New York Constitution.[20] 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. [21] Defendants counter by resorting to vague dictionary definitions and cases not on point.

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[18] L. 2019, ch. 59, Part XXX.

[19] *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.

[20] 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.").

[21] Opening Brief at 17.

Defendants offer nothing to suggest the Legislature granted the committee rulemaking or adjudicatory powers to administer and execute the 2018 Law.[22] The Defendants previously conceded the committee did not make rules or regulations.[23] Regardless, Defendants argue the fixed by law requirement can be met by rules and regulations that have the "force and effect of law."[24] This asks the question: if rules and regulations are law within the meaning of fixed by law, why are the qualifying words "force and effect" necessary?

Defendants also rely on *Matter of Mutual Life Ins. Co.*[25] and *U.S. Fid. And Guar. Co. v. Guenther*[26] to extend the meaning of law to rules of action or conduct by any controlling authority that 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

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[22] *Levine v. Whalen*, 39 N.Y.2d at 515.
[23] R.219.
[24] R.27.
[25] 89 N.Y. 530 (1882).
[26] 281 U.S. 34 (1930).

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."[27]

The same Constitution authorizes local governments to adopt local laws and sets the rules for the Legislature and local governments to interact.[28] 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, none of the Defendants nor the proposed amici can answer why salaries to be fixed by law under the Constitution were fixed by statute for 50 years. The Legislature passed nine bills setting legislator salaries between 1948 and 1998.[29] Such legislative precedent supports finding that fixed by law means fixed by statute.[30]

Proposed amicus Governor Cuomo defends the process in the 2018 Law as indistinguishable from a delegation of power Congress made to set legislator salaries at the federal level. The story, however, is more complicated.

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27 *Racine v. Morris*, 201 N.Y. 240, 244 (1911).
28 NY Const. Art. IX.
29 L. 1948, ch. 20; L. 1954, ch. 314; L. 1961, ch. 946; L. 1966, ch. 809; L. 1973, ch. 386; L. 1979, ch. 55; L. 1984, ch. 986; L. 1987, ch. 263; L. 1998, ch. 630.
30 Statutes Law § 75.

Congress did pass the federal Salary Act in 1967 establishing a commission to recommend salary amounts for top-level federal officials to the President. Congress had 30 days after the President made the recommendations to pass legislation rejecting those recommendations. The Salary Act was challenged in *Pressler v. Simon*[31] as violating Art. I, § 6 of the United States Constitution mandating that Congressional salaries must be ascertained by law.

The D.C. District Court upheld the statute against the Constitutional challenge. Months later, the Supreme Court vacated and remanded the decision, citing amendments to the Salary Act passed in early 1977.[32] On appeal after remand, the Supreme Court summarily affirmed.[33]

In his concurrence, Justice Rehnquist cautioned that "such affirmance does not necessarily reflect this Court's agreement with the conclusion reached by the District Court on the merits of the Ascertainment Clause question."[34]

The 1977 amendments that caused the Supreme Court to vacate and remand in the first instance mandated that within 60

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[31] 428 F. Supp. 302 (D.D.C. 1976).
[32] *Pressler v. Blumenthal,* 431 U.S. 169 (1977).
[33] *Pressler v. Blumenthal*, 434 U.S. 1028 (1978).
[34] *Id.*

days "each House shall conduct a separate vote on each of the recommendations of the President."[35] A 1985 fix in the wake of the Supreme Court rejecting legislative vetoes[36] resulted in another challenge before the D.C. Circuit in *Humphrey v. Baker*.[37]

The 1985 amendments went back to making the President's recommendations effective after 30 days, unless Congress disapproved them in a joint resolution.[38] In *Humphrey*, the court invoked equitable discretion to decline to review the case. In *dicta*, however, the court expressed its belief that the Salary Act as amended in 1985 did not violate the Ascertainment Clause. Regardless, Congress amended relevant provision of the Salary Act again soon after, in 1989.[39]

Under the 1989 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 in their entirety."[40] The same approval process remains in place, unchanged, today.[41]

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[35] PL 95–19 at § 401.
[36] *INS v. Chadha*, 462 U.S. 919 (1983).
[37] 848 F.2d 211 (D.C. Cir. 1988).
[38] 99-190 at § 135(e).
[39] 101-194 at 701(g).
[40] *Id.*
[41] 2 U.S.C. § 359.

The precedential value of the federal law, in light of the Salary Act's rocky history, is murky at best. In fact, it arguably cuts against the Governor's position because each court challenge, though not appearing successful in court, resulted in Congress affirming its duty under the United States Constitution and amending the law to require affirmative votes for the President's compensation recommendations to become law.

Point III: The Committee Had Limited Authority That It Unconstitutionally Exceeded

The committee's report cannot be read to mean anything other than containing an intent to make New York legislator's 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."[42] 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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[42] 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."[43] The committee further stated "Limiting outside income in conjunction with increases in salary" fell within its mandate.[44]

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."[45] 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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[43] R.62.
[44] *Id.*
[45] 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.

The Committee had the same limited task for Executive Law § 169 Commissioners—to determine whether their salaries warranted an increase. Defendants concede the committee made a policy decision when it concluded the existing six-tier structure is "out of date and cumbersome."[46] 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."[47] Defendants also concede the committee provided the Governor with a new ability to determine salaries within ranges in two of the tiers.[48]

Again, Plaintiffs are not disputing the delegation doctrine in this case. And it is true that the case law supports the Legislature

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[46] Respondents' Brief at 36.
[47] *Id.*
[48] *Id.* at 37.

not being confined to providing bodies executing its laws "rigid marching orders."[49] Here, however, the Legislature in the 2018 Law gave the committee rigid marching orders. It 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."[50]

To be sure, the Legislature listed a bunch of considerations the committee could make in evaluating compensation levels. But none of them expanded the scope of the task at hand. The Legislature was capable of asking the committee to restructure the tiers in section 169 in plain language. It did not. And, as Defendants concede, the Legislature is capable of passing laws itself that provide discretion to determine salaries within ranges, let alone drafting instructions to the committee to do the same.[51]

Point IV: Nullification Under the Open Meetings Law is Warranted

Defendants cite a broad array of cases demonstrating how inconsequential New York's Open Meetings Law[52] is when invoked by aggrieved parties. Regardless, Defendants do not cite any cases

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49 *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 260.

50 *McKinney v. Commissioner of N.Y. State Dept. of Health*, 41 A.D.3d 252 (1st Dept. 2007).

51 Respondents' Brief at 41 (highlighting Executive Law § 169(3) and SUNY and CUNY salary discretion).

52 N.Y. Public Officers Law §§ 100, et seq.

that square with the facts presented here. The committee purported to pass new legislation amending existing laws. It did so in private, generating the written laws only after it concluded public meetings. Legislation such as what the report purports to be, however, requires a transparent process under the Consitution.

As explained in the Opening Brief, 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.[53] Bills must be printed and on members desks in final form before final passage.[54] 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.[55] 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

This Court should strike the 2018 Law down as unconstitutional. Whatever proper role the delegation doctrine may have to play in governance is not present here. The 2018 Law goes beyond

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53 NY Const. Art. III, § 10.
54 NY Const. Art. III, § 14.
55 *Id.*

the delegation doctrine to the Legislature ceding its exclusive authority to pass laws. Moreover, it improperly delegated tasks reserved exclusively to it to fix salaries by law.

The resulting committee then exceeded its limited authority to determine whether pay increases were warranted and made its own policy decisions. It made its final determinations on those decisions in violation of the state's transparency laws.

Accordingly, the 2018 Law should be struck and the remaining provisions of the committee's recommendations under that law nullified.

Dated: Albany, New York
September 24, 2020

Respectfully submitted,

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