To be argued by
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10 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

No. 529556

ROXANNE DELGADO, MICHAEL FITZPATRICK, ROBERT ARRIGO, and DAVID BUCHYN,

Plaintiffs-Appellants,

v.

STATE OF NEW YORK and THOMAS DINAPOLI, in his official capacity as NEW YORK STATE COMPTROLLER,

Defendants-Respondents.

BRIEF FOR RESPONDENTS

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PRELIMINARY STATEMENT

In 2018, the New York State Legislature enacted a statute (L. 2018, ch. 59, part HHH) that created a Committee on Legislative and Executive Compensation (the "Committee") and tasked it with examining the pay levels of legislators, statewide elected officials, and commissioners of executive agencies to determine whether they "warranted an increase." After holding four public hearings and considering a wealth of data and public comment, the Committee issued a 27-page report recommending pay increases for certain public officials for 2019, 2020, and 2021. For legislators only, the Committee coupled the 2020 and 2021 salary increases with restrictions on certain activities and limitations on outside earned income. Under the terms of the 2018 statute, the Committee's recommendations acquired the force of law when the Legislature did not reject or modify them within a specified time.

Plaintiffs—three New York residents and one member of the New York Assembly—brought this action for declaratory and injunctive relief against the State and the State Comptroller challenging the constitutionality of the 2018 statute as well as the Committee's

recommendations. They claimed that the 2018 law unconstitutionally delegated the Legislature's law-making authority to the Committee, that the Committee exceeded its authority when it made certain recommendations, and that the Committee violated the Open Meetings Law in performing its official duties.[1]

Plaintiffs appeal from a judgment of Supreme Court (Ryba, J.), entered in Albany County on June 7, 2019, which converted defendants' motion to dismiss to a motion for summary judgment and granted that motion in part and denied it in part (Record [R.] 4-22). Supreme Court rejected plaintiffs' unlawful delegation and Open Meetings Law claims, and upheld the salary increases for statewide elected officials and commissioners, as well as the 2019 salary increase for legislators. Plaintiffs challenge these rulings.

Supreme Court also declared that the Committee exceeded its authority when it made recommendations to prohibit certain activities by legislators and impose limitations on legislators' outside earned

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[1] Plaintiffs also raised a claim under the State Administrative Procedure Act, which Supreme Court rejected (R11-12). Plaintiffs do not challenge that ruling on this appeal.

income. It accordingly declared invalid those recommendations together with the associated legislative salary increases for 2020 and 2021. Defendants do not challenge that ruling here.

As shown below, plaintiffs' unlawful delegation claim is foreclosed by this Court's decision in *Ctr. for Judicial Accountability, Inc. v. Cuomo*, which upheld as a lawful delegation of legislative authority a nearly identical statute insofar as it empowered a commission to recommend salary increases for judges. 167 A.D.3d 1406, 1410-11 (3d Dep't 2018), *appeal dismissed*, 33 N.Y.3d 993, *reconsid. & lv. denied*, 34 N.Y.3d 960-61 (2019), *rearg. denied*, 34 N.Y.3d 1147 (2020). Further, the Committee acted within its lawfully delegated authority in making the recommendations upheld by Supreme Court. Finally, Supreme Court did not abuse its discretion in holding that the alleged Open Meetings Law violation, even if proven, would not warrant annulment of the Committee's recommendations. Accordingly, Supreme Court's judgment, to the extent appealed from, should be affirmed.

QUESTIONS PRESENTED

1. Did L. 2018, ch. 59, part HHH (the "Enabling Act") lawfully delegate authority to the Committee?

2. Did the Committee act within its lawfully delegated authority when it recommended salary increases for statewide elected officials and commissioners of executive agencies in 2019, 2020, and 2021, and for members of the Legislature in 2019?

3. Did Supreme Court providently exercise its discretion in determining that the Open Meetings Law violation alleged by plaintiffs, even if proven, would not constitute good cause warranting annulment of the Committee's actions?

STATEMENT OF THE CASE

A. Constitutional and Statutory Background

Under the New York Constitution, compensation for each of the three major branches of state government—the Legislature, the Governor, and the Judiciary—is governed by a distinct article. *See* N.Y. Const., Article III, § 6 (members of the Legislature), Article IV, § 3 (Governor), Article VI, § 25 (judges and justices). The Constitution also contains a catch-all clause covering state officers named in the Constitution, providing that their compensation shall "be fixed by law." *Id*. at Article XIII, § 7.

Before 1948, "legislative salaries were fixed, primarily on a per diem basis, by the Constitution, and could be changed only by constitutional amendment." *Dunlea v. Anderson*, 66 N.Y.2d 265, 268 (1985). Because of a 1948 amendment to Article III, § 6, legislators now receive for their services "a like annual salary, to be fixed by law." Until the actions complained of here, compensation of members of the Legislature and allowances for members serving as officers or in a special capacity were established in Legislative Law §§ 5 and 5-a. The salaries of state officers holding positions such as Commissioner, Chancellor, Executive Director, and the like were set in Executive Law § 169. Likewise, the State Comptroller's salary was fixed in Executive Law § 40 and the Attorney General's salary was fixed in Executive Law § 60.

As part of the 2015 budget bill, the Legislature created the Commission on Legislative, Judicial and Executive Compensation to make recommendations regarding adequate levels of compensation for members of the legislature, judges, statewide elected officials, and certain state officers. *See* L. 2015, ch. 60, § 1, Part E. The Commission was directed to report its recommendations to the Legislature and, if the Legislature failed to modify or abrogate them by statute within a certain

amount of time, those recommendations became law. As it turned out, the Commission recommended only raises in judicial salaries, which took effect. In *Ctr. for Judicial Accountability,* this Court upheld the 2015 legislation as a lawful delegation of authority, which did not "unconstitutionally delegate legislative power to the Commission." 167 A.D.3d at 1410-11. The Commission dissolved at the end of 2015, but its enabling statute provided that it would be reconstituted in June 2019 and, at that point, would resume its deliberations.

As part of a 2018 budget bill, the Legislature created a similar body, this time called the Committee on Legislative and Executive Compensation, whose recommendations are at issue here. The Legislature tasked it with examining the "prevailing adequacy of pay levels" for members of the legislature, statewide elected officials, and the commissioners of State agencies whose salaries are set in section 169 of the Executive Law, and determining whether their annual salaries "warrant an increase." L. 2018 ch. 59, Part HHH, § 2(1)& (2) (reproduced at R72-74). The Enabling Act set forth a non-exclusive list of factors for the Committee to consider, including:

- the performance and timely fulfillment of statutory and Constitutional responsibilities;

- the overall economic climate;
- rates of inflation;
- changes in public sector spending;
- the level of compensation and non-salary benefits received by executive branch officials and legislators of other states and of the federal government;
- the level of compensation and non-salary benefits received by comparable professionals in government, academia and private and nonprofit enterprise;
- the State's ability to attract talent in competition with private sector positions; and
- the State's ability to fund increases in compensation and non-salary benefits.

Id. § 2(3).

The Committee was directed to report its findings, conclusions, determinations and recommendations to the Legislature and the Governor by December 10, 2018. *Id*. § 4(1). Under the statute, those recommendations would "have the force of law" unless the Legislature acted to modify or abrogate them by statute before "January first of the year as to which such determination applies to legislative and executive compensation." *Id*. § 4(2). The 2018 statute specified that the recommendations, upon becoming effective, would "supersede"

inconsistent provisions of Executive Law § 169 and Legislative Law §§ 5 and 5-a. *Id.*

B. The Committee's Recommendations

The Committee held four public meetings that were broadcast live over the Internet and are available on its website. (R44.) During these meetings, the Committee discussed at length the issues related to increasing salaries, considered a wealth of economic data, and heard extensive commentary from members of the public. On December 10, 2018, the Committee issued its report to the Governor and leaders of the Assembly and the Senate. (R44-74.)

The Committee found that the "duties and responsibilities of the Commissioners, the Governor and Statewide elected officials and Legislature are amongst the most complex in the world." (R54, ¶ 5.) Yet the compensation of these officials has "failed to keep pace with the rate of inflation since 1999 when the last pay increase became effective." (R54, ¶ 6.) After considering the statutory factors, including public and private sector wage growth, the State's fiscal condition, levels of compensation in comparable professions, the Committee found that increasing the

salaries for these officials was warranted, as summarized below. (R54-57.)

1. Members of the Legislature

Since 1999, a member of the Legislature's base salary has been set at $79,500. *See* Legislative Law § 5(1) (McKinney 2015). The Committee recommended increasing legislative salaries to $110,000, effective January 1, 2019; $120,000, effective January 1, 2020; and $130,000, effective January 1, 2021. (R49, 58-60.)

The Committee also recommended the elimination of all stipends except for those attached to certain high offices within the Legislature. (R49-50, 58-60.) For 2020 and 2021, the Committee also recommended restrictions on outside income and employment, including a ban on serving as a paid fiduciary and a cap on outside income, set at 15% of base salary. (R49-50, 58-60.).

In its report, the Committee deemed these restrictions to be within its mandate. It said that "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."

(R57, ¶ 13.) The Committee observed that New York "is in reality a more 'full-time' legislature" than other state legislatures. (R56, ¶ 10.) The Committee accordingly decided to raise salaries while simultaneously limiting outside income for 2020 and 2021, "to ensure that Legislators devote the appropriate time and energy to fulfilling their Constitutional obligations and to also minimize the possibility and perception of conflicts." (R57, ¶ 13.)

2. Statewide elected officials

For the Governor and the Lieutenant Governor, the Committee recommended salary increases in 2019, 2020, and 2021. (R.50.) However, the Committee recognized that its recommendation in this instance could not have the force of law, because the New York Constitution requires that the Governor's and the Lieutenant Governor's salaries be fixed by a joint resolution of the Senate and the Assembly. (R60.). *See* N.Y. Const., Art. IV §§ 3, 6. Such a joint resolution was passed on April 1, 2019. A lawsuit challenging the constitutionality of that joint resolution is pending in Supreme Court, Albany County. *See Arrigo v. DiNapoli*, Albany Co. Index No. 908636-19.

As for the Attorney General and the State Comptroller, raising their salaries fell within the Committee's statutory delegation (R61). The Committee recommended increasing their salaries to $190,000 effective January 1, 2019; $210,000 effective January 1, 2020; and $220,000 effective January 1, 2021. (R50, 61.)

3. Commissioners

The Committee recommended salary increases for the various state officers holding positions such as Commissioner, Chancellor, Executive Director and the like (collectively, "Commissioners"), whose salaries were set in section 169 of the Executive Law. Section 169 divided the Commissioners into six groups, each with a designated salary ranging from $90,800-$136,000. *See* Executive Law §§ 169(1), (2) (McKinney's Supp. 2020). The Committee determined that this structure was "out of date and cumbersome" and that the rationale for placing a Commissioner in one of the six groups "may no longer make[ ] sense" and did not "reflect the current sense of the importance of the various agencies governed by these public servants." (R64.)

The Committee decided to simplify the structure into four categories of Commissioners, designated Tiers A through D. (R50-51, 64.)

This simplified structure, it found, would "better reflect [the Commissioners'] scope of responsibility, complexity, budget and workforce based on current data and account for ranges of income." (R61.) For Tier A and Tier B Commissioners, the Committee recommended specified salary increases for 2019, 2020, and 2021. (R50-51, 61.) For Tier C and Tier D Commissioners, the Committee recommended a range of salaries for 2019, 2020, and 2021, with the salary to be authorized in accordance with a plan established by the Governor. (R51, 61-62.) For instance, for Tier C Commissioners, the Committee recommended a 2019 salary range of $140,000-$160,000, with the salary established by the Governor. (R61.) The lowest salary in the Tier C and D ranges still represented a pay increase from the levels established in Executive Law § 169.

The Committee explained that this new compensation structure would offer flexibility by ensuring both a minimum and a maximum salary for each tier and would "best capture the current workload and responsibilities" of the Commissioners. (R.64-65.) But the new structure, the Committee cautioned, "should not be construed to authorize decreases in salaries for such position for the same Commissioner; the

salary must be fixed, and should decrease subject only to an across-the-board reduction applied evenly to all Commissioners." (R65.)

The Legislature passed no statute modifying or abrogating the recommendations for 2019 and 2020.

C. This Action

Plaintiffs brought this action as citizen taxpayers under State Finance Law § 123 in Supreme Court, Albany County, naming as defendants the State of New York and the State Comptroller. In their amended complaint, plaintiffs alleged that the Enabling Act unconstitutionally delegated legislative authority to the Committee. (R26, 38-39.) They also claimed the Committee exceeded its legislatively-delegated authority by making a policy determination that legislators should be compensated for full-time service; by imposing restrictions on legislators' outside income and prohibiting certain activities by legislators; by reclassifying the salaries of state officers under Executive Law § 169 from six to four tiers, and by delegating to the Governor discretion to determine salary amounts in two of the four new tiers. (R32-34, 39-40.) Further, plaintiffs claimed that the Committee violated the Open Meetings Law when it conducted business in executive sessions

closed to the public. (R35-38.) As relief, plaintiffs asked the court to declare invalid the Enabling Act and the Committee's recommendations, and to enjoin any disbursement of state funds under the invalidated law and recommendations. (R41-42.)

In lieu of an answer, defendants moved to dismiss the amended complaint for failure to state a cause of action. (R178.) Supreme Court notified the parties that it intended to treat the motion to dismiss as one for summary judgment. (R6.) The court also permitted Carl Heastie, speaker of the New York State Assembly, to appear as an amicus. (R282.) Heastie submitted a brief arguing in favor of the salary increases for members of the Legislature, while taking no position on the legality of the restrictions on outside income and outside activities. (R283-306.) Heastie argued that the salary increases were severable from the restrictions on outside income and outside activities. (R302-305.)

D. Supreme Court's Judgment

Supreme Court rejected plaintiffs' Open Meetings Law claim, finding that the technical violations alleged by plaintiffs would not, even if proven, constitute good cause warranting annulment of the Committee's actions. (R10-11.)

The court next rejected plaintiffs' unlawful delegation claim, finding that the Enabling Act passed constitutional muster because it (1) set an overarching policy (adequate wages); (2) contained sufficient standards (the enumerated factors); and (3) provided adequate safeguards (the opportunity for the Legislature to modify or reject the recommendations). (R12-14.)

Supreme Court also concluded that the Committee acted within its legislatively-delegated authority in recommending salary increases for statewide elected officials and commissioners, and in recommending a salary increase for legislators beginning in 2019. (R18-20.) But it held that the Committee exceeded its authority by recommending that certain activities be prohibited and that legislators' outside earned income be limited. (R15-18.) Finding that these invalid recommendations were intertwined with the salary increases for 2020 and 2021, the court invalidated the 2020 and 2021 salary increases for legislators, but it severed and upheld the 2019 legislative salary increase. (R18, 20-22.)

Defendants initially appealed the judgment, but then withdrew their appeal under Rule 1250.2(b). *See* NYSCEF App. Div. No. 529556, Doc. Nos. 1, 4 & 5. Plaintiffs attempted to appeal the judgment directly

to the New York Court of Appeals under C.P.L.R. 5601(b)(2). (R1.) After a jurisdictional inquiry, the Court of Appeals transferred plaintiffs' appeal to this Court. *Delgado v. State of New York*, 34 N.Y.3d 986 (2019).

ARGUMENT

POINT I

THE ENABLING ACT LAWFULLY DELEGATED AUTHORITY TO THE COMMITTEE

Like any other statute enacted by the Legislature, the Committee's enabling act enjoys a strong presumption of constitutionality. *Cohen v. State*, 94 N.Y.2d 1, 8 (1999). To overcome that presumption, plaintiffs must establish "beyond a reasonable doubt that it conflicts with a fundamental law." *Matter of County of Chemung v. Shah*, 28 N.Y.3d 244, 262 (2016). Plaintiffs failed to carry that burden here, as Supreme Court correctly found.

A. The Legislature set the basic policy goal and provided adequate guidance and safeguards for the Committee to fill in the details.

The law in this area is well-settled: this Court has specifically rejected an unlawful delegation challenge to a statute that is identical in

all material respects to the statute creating the Committee. *See Ctr. for Judicial Accountability,* 167 A.D.3d at 1410-11.

Even though the Legislature cannot delegate its law-making functions to other bodies, "there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature." *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976); *see Matter of Retired Pub. Empls. Assn., Inc. v. Cuomo*, 123 A.D.3d 92, 97 (3d Dep't 2014). The principle that the Legislature may not delegate all of its law-making power to the executive branch "has been applied with utmost reluctance." *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987). So long as the Legislature makes the basic policy decisions and provides adequate safeguards and standards, "there need not be a specific and detailed legislative expression authorizing a particular act" by the body to whom the Legislature has delegated authority. *See Dalton v. Pataki*, 5 N.Y.2d 243, 262-63 (2005) (internal quotation and citation omitted).

Here, the Legislature made the basic policy decision, determining that salaries for members of the Legislature, statewide public officials, and commissioners must be "adequate." L. 2018, ch. 59, part HHH, § 1

(reproduced at R72). The same policy goal was upheld in *Ctr. for Judicial Accountability*, where this Court held that the Legislature, in empowering a compensation commission to examine judicial salaries, sufficiently articulated the basic public policy decision when it determined that judicial salaries must be "appropriate and adequate." 167 A.D.3d at 1410.

It is, of course, "incumbent upon the legislative authority to set forth standards to indicate to an administrative agency the limits of its power." *Sleepy Hollow Lake, Inc. v. Public Service Comm'n,* 43 A.D.2d 439, 443 (3d Dep't), *lv. denied,* 34 N.Y.2d 519 (1974). Those standards, however, may be quite broad. Thus, in *Sleepy Hollow,* this Court held that the "public interest" provided a constitutionally sufficient standard for guiding the exercise of administrative power to order that wiring be placed underground. *Id.* at 443-44. And in *Levine,* the Court of Appeals found that "protection and promotion of the health of the inhabitants of the state" was a constitutionally sufficient standard for revoking a hospital's operating certificate. 39 N.Y.2d at 516-17.

The statutory standards that guided the Committee in exercising its discretion are substantially identical to the standards upheld in *Ctr.*

for Judicial Accountability, 167 A.D.3d at 1411. The statute at issue there directed the compensation commission to examine judicial and other salaries based on factors specified by the Legislature, including "the overall economic climate; rates of inflation; changes in public-sector spending; the levels of compensation and non-salary benefits received by executive branch officials and legislators of other states and of the federal government; the levels of compensation and non-salary benefits received by professionals in government, academia and private and nonprofit enterprise; and the state's ability to fund increases in compensation and non-salary benefits." L. 2015, ch. 60, § 1, part E, § 2(3). The statute at issue here specifies those same factors, plus an additional factor: "the parties' performance and timely fulfillment of their statutory and Constitutional responsibilities." L. 2018, ch. 59, part HHH, § 2(3). Consequently, the "factors established by the Legislature provide adequate standards and guidance for the exercise of discretion by the [Committee]." *Ctr. for Judicial Accountability*, 167 A.D.3d at 1411.

Finally, the statute contained a safeguard that allowed the Legislature an opportunity to review the Committee's work: it required the Committee to submit its report directly to the Legislature, so the

Legislature would have sufficient time, before the recommendations became effective, to exercise its prerogative to modify or reject them. L. 2018, ch. 59, part HHH, § 4(1),(2). This safeguard was found constitutionally adequate in *Ctr. For Judicial Accountability*, 167 A.D.3d at 1411.

Plaintiffs do not attempt to distinguish *Ctr. for Judicial Accountability*, but instead argue that it was wrongly decided. If accepted, their arguments would eviscerate the delegation doctrine. This Court should decline to disturb its prior decision and its affirmance of this settled doctrine.

First, plaintiffs argue (Brief for Appellants [Br.] at 13-15) that the Enabling Act impermissibly delegated law-making power because it declared that the Committee's recommendations, unless abrogated or modified by the Legislature, shall "supersede" inconsistent provisions of various statutes. L. 2018, ch. 59, part HHH, § 4(2). Plaintiffs concede (Br. at 15) that the 2015 statute this Court upheld in *Ctr. For Judicial Accountability* contained the same superseding language. *See* L. 2015, ch. 60, § 1, part E, § 7. Plaintiffs maintain, however, that Supreme Court in this case and this Court in *Ctr. for Judicial Accountability* both "erred by

reading the same critical operative language out of the subject laws" (Br. at 15).

Not so. The "superseding" language makes no difference in the analysis, much less presents a "compelling reason" for this Court to depart from its prior decision. *Roman Catholic Diocese of Albany v. Vullo*, 185 A.D.3d 11, ___, 2020 WL 3579481, at *3 (3d Dep't July 2, 2020) (the principle of stare decisis is "decisive" unless party presents a "compelling reason" to depart from an earlier decision). Because the Legislature made the basic policy decisions and provided adequate standards and safeguards, under settled delegation principles it could constitutionally confer on the Committee the power to make recommendations that would acquire the "force and effect of law," including the effect of superseding inconsistent statutory provisions. *See General Elec. Capital Corp. v. New York State Div. of Tax Appeals*, 2 N.Y.3d 249, 258 (2004); *Molina v. Games Mgt. Servs.*, 58 N.Y.2d 523, 529 (1983).

The Legislature plainly understood that for any recommendations of the Committee to take effect, they would have to supersede existing statutory provisions. In passing the Enabling Act, the Legislature recognized that if the Committee determined that public officers' salaries

warranted an increase, then its recommendations would necessarily conflict with existing statutes that fixed those salaries at lower levels. For the recommended salary increases to meaningfully have the force and effect of law, the Legislature simply made explicit what was already implicit in the enabling statute: the recommendations would supplant inconsistent statutes. Thus, it was not the Committee that supplanted the pre-existing statutes but the Legislature itself, acting through the Enabling Act.

Plaintiffs' position, if accepted, would render the delegation largely meaningless by preventing any recommendations from superseding pre-existing statutes. Since the Legislature could constitutionally empower the Committee to raise the salaries of public officers, then by necessary implication the Legislature had the concomitant authority to provide that the Committee's recommendations would supersede provisions of law that provided different salaries.

Second, plaintiffs maintain that the Legislature cannot constitutionally empower an independent body with authority to raise salaries of public officers because it is a sensitive or "politically charged" issue (Br. at 1). They suggest that delegating authority to independent

bodies to address difficult or sensitive political issues would enable the Legislature and the Governor to escape political accountability (Br. at 1, 12). That claim does not withstand scrutiny. It is not hidden from electorate that the Legislature and the Governor enacted the law that created the independent body, imbued it with authority, and allowed the body's recommendations to acquire the force of law. If voters do not like what the members of the Legislature and the Governor have wrought, they may vote against them in the next election, just as they may do whenever they disagree with the policies and official actions of the political branches. Nor have plaintiffs proposed any intelligible, workable principle for determining when an issue is sufficiently sensitive so as to debar the Legislature from delegating authority.

Third, plaintiffs are equally misguided in their argument that the delegation of legislative authority should not be allowed for one-time actions by independent bodies that render their determinations and then cease to exist. Similarly-structured one-time commissions have been held constitutional. For example, the Legislature created an independent commission to address the problem of excess hospital capacity. The commission was charged with recommending which hospitals statewide

should be closed, merged, or downsized. 2005 N.Y. Laws, ch. 63, Part E, § 31. The Department of Health was required to implement whatever recommendations the commission made, unless the Governor failed to transmit the final report or a majority of each house of the Legislature voted to reject them. *Id.* § 31(9)(a)-(b).

When taxpayers challenged the statute, the Appellate Division, First Department "reject[ed] plaintiffs' argument that the subject legislation unconstitutionally delegated the Legislature's lawmaking power." *McKinney v. Comm'r, N.Y. State Dept. of Health,* 41 A.D.3d 252, 253 (1st Dep't), *appeal dismissed*, 9 N.Y.3d 891, *lv. denied,* 9 N.Y.3d 815 (2007). Having made the "basic policy choice" that some hospitals needed to be closed and others needed to be restructured, the Legislature "permissibly authorized the Commission" to "fill in details" and make "subsidiary policy choices consistent with the enabling legislation." *Id; see also St. Joseph Hosp. v. Novello*, 43 A.D.3d 139 (4th Dep't) (upholding the same statute), *appeal dismissed,* 9 N.Y.3d 988 (2007), *lv. denied,* 10 N.Y.3d 702 (2008).

Nothing less than a complete reevaluation of the delegation doctrine would be required for plaintiffs to prevail. But the Court of

Appeals has given no indication that it is interested in upsetting decades of precedent. Just the opposite is true. The plaintiffs in *Ctr. for Judicial Accountability* attempted to appeal as of right to the Court of Appeals from this Court's decision, arguing that it wrongly decided the delegation-of-authority claim. Although this Court had squarely addressed that claim, the Court of Appeals summarily dismissed the appeal because "no substantial constitutional question [was] directly involved." *Ctr. for Judicial Accountability, Inc. v. Cuomo,* 33 N.Y.3d 993, 993-94 (2019). Plaintiffs' unlawful delegation claim here is likewise insubstantial.

B. The Legislature may constitutionally delegate pay-setting authority for legislative salaries and salaries of state officers named in the Constitution, just as it did with judicial salaries.

Plaintiffs contend (Br. at 16-20) that the Legislature may not delegate to an independent body its pay-setting authority for members of the Legislature and state officers named in the Constitution because Article III, § 6 and Article XIII, § 7 require that the salaries be "fixed by law." They maintain that this phrase can only mean one thing: that salaries are specified in a statute. That is not so.

Just as salaries for members of legislature and statewide public officials named in the Constitution must be "fixed by law," the Constitution requires that judicial salaries be "established by law." N.Y. Const., Art. VI, § 25. Whatever the difference in meaning, if any, between "fixed" and "established," the critical phrase common to both is that salaries must be adopted "by law."[2] For the judicial pay raises at issue in *Ctr. for Judicial Accountability,* the Legislature satisfied this requirement by enacting a statute that empowered a commission to recommend salary increases for judges and justices that acquired the "force and effect of law," but only after the Legislature had the opportunity to modify or abrogate them and declined to do so. That is

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[2] According to dictionaries, "fixed" means "established" or "settled" and "establish" means "to settle on a firm or permanent basis; to set or fix unalterably." *See* WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED (2d ed. 1956). Thus, "fixed" and "established" appear to be synonymous. In Supreme Court, Speaker Heastie argued (R297) that the difference in terminology between "fixed by law" and "established by law" reflects the fact that salaries of members of the Legislature may not be increased or decreased during their terms of office under Article III, § 6 whereas judicial salaries may be increased (but not decreased) during a Judge's or Justice's term of office under Article VI, § 25. However, because plaintiffs' argument turns on the meaning of the phrase "by law" which, as explained above, means controlling authority that has binding effect, this Court need not determine the significance, if any, of the difference between "fixed" and "established."

exactly what occurred here with respect to salaries for members of the Legislature and state officers named in the Constitution.

Contrary to plaintiffs' suggestions, the phrase "by law" is not limited to statutes. Courts have long understood the term "law" to embrace not just statutes but also rules, regulations, and ordinances adopted pursuant to, and within, legislatively-delegated authority. It is well-established that rules and regulations, if reasonable and within the scope of delegated authority, have the "force and effect of law." *Molina v. Games Mgt. Servs.*, 58 N.Y.2d at 529. Similarly, the Court of Appeals has held that an ordinance of a common council, duly passed and "within the scope of the authority conferred upon it by the legislature, is a law." *Matter of Mutual Life Ins. Co.*, 89 N.Y. 530, 533 (1882). At issue in *Mut. life Ins. Co.* was a state statute that authorized the commissioner of public parks of the City of New York "to fix and establish the grades of the streets" within a specified territory "where the same have not heretofore been fixed and established by law." L. 1871, ch. 226, § 4. The court held that the phrase "fixed and established by law," as used in the 1871 statute, encompassed any "competent authority," including a

municipal ordinance. 89 N.Y. at 533. That interpretation of the phrase "by law" remains the governing one in New York.

The United States Supreme Court reached a similar conclusion in *U.S. Fid. and Guar. Co. v. Guenther*, 281 U.S. 34, 37-38 (1930). Citing with approval *Mut. life Ins. Co*., the Supreme Court held that the phrase "fixed by law" as used in an automobile insurance policy unambiguously included the "law" of a "municipal ordinance as well as statutes." 281 U.S. at 37-38. If the insurance policy had used the phrase "fixed by '**a** law'" then the policy might have been ambiguous, as that is "a specific phrase frequently limited in a technical sense to a statute." *Id* at 37. (emphasis added). But the phrase "fixed by law" unambiguously uses the term "law" "in a generic sense, as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force." *Id*.

Thus, the settled, ordinary meaning of "fixed by law" is not limited to statutes but embraces any "controlling authority" that has "binding legal force." *Id*. That describes precisely the Committee's recommendations, which by the terms of the Enabling Act, acquired the "force and effect of law" when the Legislature declined to abrogate or modify them.

Nothing in the 1946 joint committee report cited by plaintiffs (Br. at 17) supports a contrary conclusion. That report recommended what became the 1948 amendment to Article III, § 6, which provided that the salaries of members of the Legislature were to be fixed by law rather than, as before, fixed by the Constitution itself. *See* Final Report of the New York State Joint Legislative Commission on Legislative Methods, Practices, Procedures and Expenditures (1946) (reproduced at R97-105). The joint committee intended to vest the Legislature with the power to adjust the salaries of its members, with the consent of the Governor. (R105.) Nothing in the joint committee's report suggested that the constitutional amendment would preclude the Legislature and the Governor from delegating to an independent body the task of recommending pay levels, which would take on the force of law only if ratified by the Legislature or implemented by the Governor.

The authority to fix salaries of public officials, though vested in the Legislature, is delegable just like any other law-making authority. The only limitations on such a delegation are that the Legislature fix the basic policy goal and establish adequate standards and safeguards, all of which it did here.

POINT II

THE COMMITTEE ACTED WITHIN ITS LEGISLATIVELY DELEGATED AUTHORITY

As an entity created by statute, the Committee "'is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication.'" *Matter of Acevedo v. New York State Dept. of Motor Vehs.*, 29 N.Y.3d 202, 221 (2017) (quoting *Matter of City of New York v. State of N.Y. Comm. on Cable Tel.*, 47 N.Y.2d 89, 92 [1979]). Whether the Committee acted within its "lawfully designated sphere . . . depends upon the nature of the subject matter and the breadth of legislatively conferred authority." *Matter of City of New York*, 47 N.Y.2d at 92-93.

A. The Committee acted within its authority in recommending a salary increase for members of the Legislature beginning in 2019.

As Supreme Court correctly found, the Committee operated within its statutory mandate when it recommended a salary increase for members of the Legislature beginning in 2019. The Legislature established the Committee to "examine, evaluate and make recommendations with respect to adequate levels of compensation, non-salary benefits, and allowances" for, among others, "members of the

Legislature." L. 2018, ch. 59, part HHH, § 2(1) & (2). The Committee was directed to determine whether legislators' salaries "warrant[ed] an increase." *Id.* § 2(2). In making that determination, the Committee was empowered to consider all appropriate factors including rates of inflation, levels of compensation received by legislators of other states and the federal government, the overall economic climate, and the State's ability to fund salary increases. (R72.) *Id.* §2(3).

The Committee's detailed report shows that it considered those factors in concluding that a salary increase for members of the Legislature was warranted beginning in 2019. Among other things, the Committee found that the duties and responsibilities of the members of the Legislature were "amongst the most complex in the world;" that legislators' salaries had failed to keep pace with inflation since 1999, when they last received a pay increase; that the State's fiscal condition was strong; that New York legislators' work product and time was roughly equivalent to that of legislators in Michigan, California and Pennsylvania, but that New York legislators in some instances received lower salaries; and that New York legislators faced relatively high costs of living. (R54-56.) Thus, in recommending a salary increase for members

of the Legislature beginning in 2019, the Committee did exactly what the Legislature authorized it to do.

Plaintiffs argue that the Committee exceeded its authority when it tied the salary increases to limits on outside activities and outside income commencing in 2020 and 2021, and Supreme Court agreed, annulling those limitations along with the associated salary increases for 2020 and 2021. That holding is not at issue here. Plaintiffs maintain that the 2019 salary increase must be annulled too, because the Committee allegedly predicated that increase on a "policy determination" that New York legislators will henceforth be "full-time" (Br. at 22). Plaintiffs misread the Committee's report.

Nowhere in the report did the Committee purport to convert the New York Legislature into a full-time body. To the contrary, the Committee merely observed that New York's Legislature operates, in reality, *more like* a full-time legislature compared to other state legislatures, considering its workload and productivity. (R56, ¶ 10.) This was an observation of practical reality, not a distinct recommendation that acquired the force and effect of law. Had the Committee sought to give its observation some legal status, it would have set it forth as a

distinct recommendation and, accordingly, banned outside activities and outside income entirely. It did not do so. Although the Committee attempted to impose limits on outside income and outside activities—which were annulled—it stopped short of prohibiting them entirely, in recognition of the Legislature's part-time status.

Plaintiffs also overlook Supreme Court's severability analysis. The test for severability is whether the Legislature "would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920) (Cardozo, J.); *see also Matter of New York State Superfund Coalition, Inc. v. N.Y.S. Dept. of Envtl. Conservation*, 75 N.Y.2d 88, 94 (1989) (applying this severability test to invalidated regulations). Even in the absence of a severability clause, the "traditional" rule is that an unconstitutional provision should be severed unless the resulting statutory scheme is one that the Legislature would not have enacted. *See Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183, 2209 (2020).

Supreme Court did not err in discerning the Legislature's intent to severe and preserve the 2019 pay raise, as manifested through the

Committee's recommendations and the Legislature's failure to modify or abrogate them within the allotted time. The Committee treated the 2019 pay raise differently from the others: the 2019 raise, unlike those for 2020 and 2021, was not accompanied by restrictions on outside income and outside activities. Further, the Committee's essential task was to determine whether salary increases were warranted, and it specifically found that legislative salaries had failed to keep pace with the rate of inflation since 1999, when they were last increased—suggesting that both the Legislature and the Committee would have wanted the 2019 pay raise to stand regardless of the fate of the other raises. (R54, ¶6.) Supreme Court thus reasonably concluded that the 2019 pay increase should be severed and preserved when it invalidated the 2020 and 2021 pay raises and the associated restrictions for those years.

This conclusion is confirmed by the existence of an express severability clause in the Enabling Act. That clause states unequivocally that the Legislature would have intended to enact the valid portions of the statute even if any invalidated provisions had not been included therein. See L. Chapter 59, Part UUU, § 2. Although the clause applies expressly to the statute, and does not directly address the

recommendations, it supports Supreme Court's conclusion that the Legislature would have wanted the Committee's recommendations treated similarly—preserving some recommendations even if others were invalidated, where severance is reasonable.

B. The Committee acted within its delegated authority in making salary recommendations for Commissioners subject to Executive Law § 169.

The Committee stayed within its delegated authority in its recommendations concerning the Executive Law § 169 Commissioners. Under the six-tier structure of Executive Law § 169, all commissioners or agency heads in the same tier received the same salary. For example, the Commissioner of Corrections and Community Supervision and the Commissioner of Health were both in the first tier and received a salary of $136,000; at the other end of the spectrum, the Executive Director of the Adirondack Park Agency and members of the Workers' Compensation Board were in the sixth tier and received a salary of $90,800. *See* Executive Law §§ 169(1)(a), (f); (2)(a). Commissioners in tiers two through five received salaries ranging between these maximum and minimum levels, as specified in the statute, with all Commissioners in the same tier receiving the same salary. The tiers were apparently

intended to reflect the size and scope of the statutory responsibilities of the various agencies and Commissioners.

In making recommendations for these Commissioners, the Committee recognized that merely proposing a salary increase for the pre-existing six tiers would not fully achieve the Enabling Act's overarching goal: adequate pay levels for public officials. For a salary to be adequate under the Enabling Act, the salary must be commensurate with the Commissioners' "statutory and Constitutional responsibilities." L. 2018 ch. 59, Part HHH, § 2(3). The pre-existing six-tier structure, the Committee found, was "out of date and cumbersome." (R64.) The Committee questioned whether the rationale for placing a commissioner in one of the six groups still "make[s] sense" and opined that it did not "reflect the current sense of the importance of the various agencies governed by these public servants." (R64.) To more fully realize the enabling statute's goals, the Committee simplified the pay structure into four tiers (A through D). (R50-51, 64-65.) For Tier A and Tier B Commissioners, the Committee recommended specific salary increases for 2019, 2020, and 2021, but for Tier C and Tier D Commissioners, the Committee recommended a range of salaries for 2019, 2020, and 2021,

with the precise salary within those ranges to be set in accordance with a salary plan established by the Governor. (R50-51, 61-62.)

Plaintiffs claim the Committee exceeded its authority (1) by simplifying the tiered salary structure in section 169, by reducing the tiers from six to four and (2) by recommending for Tier C and Tier D commissioners a range of salaries for 2019, 2020, and 2021, and giving the Governor discretion to set a precise salary within those ranges. (R.51, 61.) Supreme Court correctly rejected these contentions.

Plaintiffs take the myopic view that the Committee's authority was limited to simply recommending a salary amount for each of the pre-existing six tiers of commissioners. The law on delegation of authority is not so cramped, however. It "does not require that the agency be given rigid marching orders." *Matter of LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018). Rather, the Committee's recommendations may permissibly "go beyond the text of its enabling legislation, so long as [they] are consistent with the statutory language and underlying purpose." *Acevedo*, 29 N.Y.3d at 221 (citing *Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 N.Y.2d 249, 254 [2004]). Because the Committee's actions further the

Enabling Act's basic policy goal of adequate compensation and do not conflict with any of its terms, the Committee was free to make "subsidiary policy choices consistent with the enabling legislation." *McKinney*, 41 A.D.3d at 253 (internal quotations and citations omitted).

Simplifying the tiered salary structure from six to four tiers directly furthered the Enabling Act's overarching goal of adequate pay levels for the commissioners. The simplified structure did not implement a broad new policy; rather, it was a quintessential example of a subsidiary policy choice consistent with the enabling legislation's basic policy goal. The Committee made a factual finding that the pre-existing six-tier structure no longer accurately reflected the differences in the size and scope of the Commissioners' duties and responsibilities, and plaintiffs nowhere dispute that finding. Nor do they contest the finding that the simplified structure better reflects the Commissioners' *current* duties and responsibilities and their "performance" of their "statutory and Constitutional responsibilities." In arguing that the Enabling Act did not specifically authorize a restructuring of the tiers, plaintiffs state the law backwards. The question is whether anything in the Enabling Act *prohibited* the Committee from recommending a restructuring of the tiers

to achieve the Act's basic policy goal. Plaintiffs cannot identify any such restriction.

For similar reasons, the Committee did not range beyond its statutory mandate when it recommended salary ranges for Tier C and Tier D commissioners, with the specific salary determined by a schedule established by the Governor.[3] Once again, this recommendation rationally furthered the goal of adequate compensation, as that term is used in the Enabling Act. The Act authorized the Committee, in recommending salaries, to consider not only the Commissioners' performance of their statutory and Constitutional responsibilities but also "the ability to attract talent in competition with comparable private sector positions." L. 2018 ch. 59, Part HHH, § 2(3). A single fixed salary could be reasonably seen to limit the talent pool, whereas having a range of salary options affords greater flexibility in hiring and increases the ability to attract talent.

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[3] Because the Commissioners are not state officers named in the Constitution, the Constitution does not require that their salaries be fixed by law. Plaintiffs do not argue otherwise.

For instance, if a judge were limited to paying a law clerk a salary of $60,000, candidates with many years of experience might be out of reach, whereas having the flexibility to offer between $50,000 and $75,000 would increase the potential pool of candidates. Such a range would allow the judge the option to hire either more or less experienced clerks according to the judge's needs. In recommending a range of salaries for Tier C and Tier D Commissioners, the Committee sought to give the Governor, who is responsible for appointing these commissioners, greater flexibility in hiring, with the salary ranges better capturing the Commissioners' current workload and responsibilities. (R64-65.)

Recommending salary ranges for Tier C and D Commissioners and permitting the precise salary within those ranges be set by a schedule established by the Governor fell within the Committee's authority. After all, it is the Governor, as the head of the Executive Branch, who appoints these Commissioners and decides whether they are qualified, loyal, and share the Governor's political philosophy, policies, and mission. The Committee's recommendation setting a salary range and leaving the Governor discretion to calibrate within that range makes logical sense,

and has parallels in other statutes. *See, e.g.,* Executive Law § 169(3) (giving board of trustees of the State University of New York and the City University of New York authority to establish and implement salary plans for chancellors, presidents and senior staffs of state and city universities). (R53.)

Application of the four factors in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987) confirm this conclusion. These factors help courts determine whether administrative agencies have "'crossed the hazy line between administrative rule-making and legislative policy-making." *Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 610 (2015) (internal quotation marks omitted). The four "*Boreali* factors" are whether the agency has (1) resolved a problem by making its own "value judgments entailing difficult and complex choices between broad policy goals," rather than simply balancing costs and benefits under existing standards; (2) written on a "clean slate," rather than filling in the details of a broad policy set by the Legislature; (3) taken upon itself to regulate matters on which the Legislature has tried unsuccessfully to set policy on the issue; and (4) acted outside its area of expertise to develop the challenged regulation. *Matter of NYC C.L.A.S.H. v. New York State Off.*

of Parks, Recreation & Historic Preserv., 27 N.Y.3d 174, 179-80 (2016); *see also Matter of Dry Harbor Nursing Home v. Zucker*, 175 A.D.3d 770, 773 (3d Dep't 2019), *lv. denied in part & dismissed in part*, 35 N.Y.3d 984 (2020).

Although the Committee is not an administrative agency that implements law on an ongoing basis through regulations, it acted pursuant to legislatively delegated authority and, like regulations, its recommendations have the force of law. So the *Boreali* factors are useful here, keeping in mind that they "are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power." *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 612.

The first and second factors favor upholding the Committee's action for essentially the same reason: the basic policy decisions underlying the Committee's recommendations were made and articulated by the Legislature. *See Matter of LeadingAge*, 32 N.Y.3d at 265; *N.Y. State Health Facilities Ass'n v. Axelrod*, 77 N.Y.2d 340, 348 (1991). The Legislature made the policy decision that Commissioners' salaries should be "adequate" in view of specific statutory factors, including "the ability to attract talent," and "performance and timely fulfillment of their

Constitutional and statutory responsibilities." *See* L. 2018, ch. 59, part HHH, § 2(3). Considering these guidelines, the Committee determined that restructuring the salary tiers and having salary ranges for two of the four tiers furthered the statutory goal of adequate compensation by giving the Governor greater flexibility in attracting talent, with the salary ranges better capturing the Commissioners' current workload and responsibilities. (R64-65.) The restructuring of the tiers and the salary ranges, in other words, fills in the details of the Legislature's policy.

This case is thus unlike *Boreali*, where the Public Health Council enacted a comprehensive code to govern smoking in public, containing numerous exceptions, without "legislative guidelines" to determine "how the competing concerns of public health and economic cost are to be weighed." 71 N.Y.2d at 12.

As for the third *Boreali* factor, plaintiffs have failed to show—and they cannot show—that the Legislature has repeatedly tried, but failed, to address the restructuring of Commissioner compensation. Plaintiffs' burden in establishing this factor is particularly heavy because "[l]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences." *NYC C.L.A.S.H.,* 27

N.Y.3d at 184. In *NYC C.L.A.S.H.,* the Court found the third factor did not weigh against the administrative agency even though 24 bills over a 13-year span had been introduced relating to the same general subject matter addressed by the challenged agency regulation. *Id.* at 183-84.

Here, plaintiffs have not identified a single bill that addressed the same subject matter as the Committee's recommendations concerning the restructuring of Commissioner compensation. The inaction plaintiffs identify is thus "not in the same class as the repeated unsuccessful legislative efforts [the Court of Appeals has] deemed indicative of the type of broad public policy issue reserved exclusively to the legislature." *LeadingAge*, 32 N.Y.3d at 266.

Finally, the fourth *Boreali* factor weighs in the Committee's favor, as the Committee's decisions involved special expertise and thorough consideration of the relevant data. *See LeadingAge*, 32 N.Y.3d at 266. In evaluating the adequacy of salary levels, the Committee was directed to consider economic factors like "rates of inflation," compensation levels of executive-branch officials in the federal government and other states, and "the ability to attract talent," among other things. L. 2018 ch. 59, Part HHH, § 2(3). The Committee considered those factors and the

relevant data in determining the appropriate compensation and salary structure for Commissioners. (R.54-56.)

C. The Legislature ratified the recommendations when it allowed them to acquire the force and effect of law.

Even if there were room for reasonable disagreement as to whether the Committee exceeded its mandate, its recommendations should be upheld because the Legislature itself declared that the recommendations would acquire the force of law if it did not modify or reject them. Although legislative inaction is typically ambiguous, *see Rodriguez v. City of New York*, 31 N.Y.3d 312, 321 n.4 (2018), this situation is not typical because the Enabling Act expressly imbued legislative inaction with significant legal consequences, providing that the Committee's recommendations would acquire the force of law unless the Legislature abrogated or modified them by statute by a stated date. L. 2018, ch. 59, part HHH, § 4(2). This Court deemed an identical ratification mechanism to be a constitutionally adequate safeguard in *Ctr. for Judicial Accountability*, 167 A.D.3d at 1411. Under the Enabling Act, the Legislature's inaction thus reflected its approval of the recommendations, including the judgment that they fell within the scope of the Committee's mandate.

This conclusion is not undermined by the personal opinions of some individual legislators who have since expressed disagreement with some of the Committee's recommendations. (R32.) The Legislature speaks as a collective body. An individual legislator's comments or opinions "represent only the personal views of [this] [legislator], since the statements were [made] after passage of the Act." *Bread PAC v. Fed. Election Comm'n*, 455 U.S. 577, 582 n.3 (1982) (internal quotations and citations omitted; matter in brackets in original). Such "post hoc observations by a single member of [the Legislature] carry little if any weight." *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978). If the Legislature, as a body, does not like what the Committee has wrought, it retains the authority to override the recommendations by enacting superseding legislation.

POINT III

THE COMPLAINT FAILS TO ALLEGE GOOD CAUSE WARRANTING ANNULMENT OF THE COMMITTEE'S RECOMMENDATIONS UNDER THE OPEN MEETINGS LAW

Supreme Court providently exercised its discretion in finding that the alleged Open Meetings Law violations cited by plaintiffs did not constitute good cause warranting the drastic remedy of annulling the

Committee's recommendations. The Open Meetings Law authorizes a court "in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part." Public Officers Law § 107(1). As the Court of Appeals has explained, "[i]nclusion by the Legislature of this language vesting in the courts the discretion to grant remedial relief makes it abundantly clear that not every breach of the 'Open Meetings Law' automatically triggers its enforcement sanctions." *Matter of New York Univ. v. Whalen*, 46 N.Y.2d 734, 735 (1978).

Courts will grant the drastic remedy of nullification only when there is egregious conduct or a persistent pattern of deliberate violations, *see Matter of Goetschius v. Bd. of Ed.*, 244 A.D.2d 552, 553-54 (2d Dep't 1997); *Oshry v. Zoning Bd. of Appeals of Inc. Vil. of Lawrence*, 276 A.D.2d 491, 492 (2d Dep't 2000), and only when plaintiffs can demonstrate that they have been prejudiced by the violation. *See Town of Moriah v. Cole-Layer-Trumble Co.*, 200 A.D.2d 879, 881 (3d Dep't 1994). Technical or non-prejudicial violations are insufficient to establish good cause. *See Matter of Kloepfer v. Commissioner of Educ. of State of N.Y.*, 82 A.D.2d 974, 975 (3d Dep't 1981), *aff'd*, 56 N.Y.2d 687 (1982); *Kraus v. Suffolk Co.*

Bd. of Elections, 153 A.D.3d 1211, 1213 (2d Dep't 2017). And it is the challenger's burden to show good cause warranting judicial relief. *Matter of Gernatt Asphalt Products, Inc. v. Town of Sardina*, 87 N.Y.2d 668, 686 (1996).

Whether a challenger met that burden is a discretionary determination entrusted to Supreme Court, whose refusal to find good cause is reviewable only for abuse of discretion. *Kradjian v. City of Binghamton*, 104 A.D.2d 16, 19 (3d Dep't 1984), *appeal dismissed*, 64 N.Y.2d 1039 (1985). Here, Supreme Court assumed for argument's sake that an Open Meetings Law violation occurred, yet it found that such a violation, even if proven, would not warrant invalidation of the public body's action. *See, e.g., Oakwood Property Mgt., LLC v. Town of Brunswick*, 103 A.D.3d 1067, 1069 (3d Dep't 2013) (upholding action even if Open Meetings Law had been violated); *New Yorkers for Constitutional Freedoms v. New York State Senate*, 98 A.D.3d 285, 296-97 (4th Dep't) (similar), *lv. denied*, 19 N.Y.3d 814 (2012).

Supreme Court did not abuse its discretion in declining to find good cause to invalidate the Committee's work. The Open Meetings Law violations that plaintiffs allege are at most minor, technical violations

that do not warrant nullification. On the contrary, the Committee allowed extensive public access to its proceedings. Before making its recommendations, the Committee held four public hearings during which numerous interested parties expressed their views and submitted documentation on whether the salaries of public officials warranted an increase. (R66-71 [summarizing the public testimony and actions taken by the Committee].) Plaintiffs acknowledge that plaintiff Delgado attended the first meeting, at which she commented and asked questions. (R24, ¶ 5.) The complaint does not allege that the other plaintiffs attended any of the four meetings or that they sought but were denied permission to speak or submit materials bearing on the Committee's work.

The Committee also held public discussions. For instance, at the first public hearing, the Committee members discussed their mission and the factors they would consider, and provided the public with an overview of the legal framework under which they would conduct their business. (R66.) At the next public meeting, the Committee discussed legislative and executive salaries, including comparative data and estimates of cost-of-living in inflation adjustments, as well as comparative data regarding

legislative stipends. (R67.) The third public meeting included a discussion of comparative data regarding elected official compensation. (R68-69.) The fourth public meeting included discussion of the absence of raises for public officials for over 20 years; the importance of considering rates of inflation and the use of phase-ins; the recommended increases for all categories of salaries; recommended limitations on legislative stipends; and salary adjustments for the commissioners, including restructuring the six salary tiers to four tiers. (R69-70.)

At the final public meeting, the Committee members publicly discussed and voted on the recommendations that would be included in the final report to be sent to the Governor and the Legislature. (R71.) These recommendations included increasing legislative salaries; imposing limits on legislators' outside income and restricting legislative stipends; proposing a joint resolution by the Assembly and the Senate to raise the salaries of the Governor and the Lieutenant Governor; increasing the Attorney General's and the State Comptroller's salaries; and increasing the salaries of the officers listed in Executive Law § 169, together with adjusting the salary tiers contained therein. (R69-71.)

In the face of this significant public input and public discussion by the Committee members, the deficiencies plaintiffs allege may charitably be described as technical. Plaintiffs assert that the Committee did not deliberate or vote on a draft report at any of the public meetings, although they fail to identify any such requirement under the Open Meetings Law (Br. at 27). Plaintiffs also complain that certain details were left out or not explicitly discussed during the public meetings (Br. at 27). They complain, for example, that although the Committee members publicly discussed restructuring the six salary tiers for the Executive Law § 169 Commissioners into four tiers, they did not explicitly identify which commissioners would be placed into each of the four tiers (Br. at 28). From this, plaintiffs speculate that these details must have been discussed at a secret executive session. Even if these allegations established a violation of the Open Meetings Law, and they do not, Supreme Court acted within its ample discretion in finding that the allegations fall far short of establishing intentional, repeated, or egregious Open Meetings Law violations warranting annulment of the recommendations.

CONCLUSION

Supreme Court's judgment, to the extent appealed from, should be affirmed.

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September 14, 2020

Respectfully submitted,

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