APL-2021-00080

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

Court of Appeals

of the

State of New York

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

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents.

APPELLANTS' BRIEF

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Preliminary Statement

The rule of law depends on well-publicized laws of general application being applied fairly and evenly to a citizenry actively engaged in making those laws. To that end, the New York Constitution makes the Legislature elected by its citizens responsible for making laws.[1] And it contains rules for the Legislature to obey in making laws, including several provisions to ensure laws are well-publicized.[2] It follows that any act to amend or modify and existing law must also follow those rules and be well-publicized.

Salaries are fixed for legislators by Legislative Law § 5, for the Comptroller and Attorney General Executive Law §§ 40 and 60, respectively, and for certain other state officials by Executive Law § 169. But effective January 1, 2019, those officials received compensation increases without any changes to the Legislative Law or the Executive Law.

Those increases were based on recommendations made by an unelected committee created under a law passed in a 2018 budget bill.[3] Those changes never were the subject of a bill voted on by

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[1] N.Y. Const., art. III, § 1.
[2] See, e.g., N.Y. Const., art. III, § 10, 13, 14, 15, 16, and 22.
[3] L. 2018, ch. 59, Part HHH ("2018 Law").

the Legislature or presented to the Governor for approval. Instead, an unelected body made policy decisions that became law without the protections for maintaining the rule of law embodied in the Constitution.

Questions Presented

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

Did the Committee on Legislative and Executive Compensation unconstitutionally 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?

Jurisdictional Statement

This Court has jurisdiction over this appeal under C.P.L.R. 5601(b)(1). The Appellate Division's Opinion and Order affirmed Supreme Court and declared that Part HHH, Chapter 59 of the Laws of 2018 was not an unconstitutional delegation of the Legislature's lawmaking authority under Article III of the New York

Constitution.[4] It further declared that the Committee on Legislative and Executive Compensation did not unconstitutionally exceed its legislative authority in setting compensation amounts.[5]

The constitutional questions are preserved. They were the primary causes of action raised in the complaint (R.41). They were briefed in Defendant's motion to dismiss (R.178-220, 307-344, 345-362) and in the Appellate Division.

Statement of the Case

The 2018 budget bill contained a provision, Part HHH, Chapter 59 of the Laws of 2018 ("2018 Law") creating a Committee on Legislative and Executive Compensation ("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."[6]

The Legislature gave the Committee a non-exclusive list of factors to consider limited to determining whether compensation amounts warranted an increase.[7] The Legislature did not make any policy determination whether legislators should be paid full-

[4] R.376.
[5] R.375.
[6] L. 2018, ch. 59, Part HHH, § 2.2.
[7] *Id.*, § 2.3.

time salaries. The Committee, however, charged itself with implementing a comprehensive new compensation scheme intended to ensure "legislator performance."[8]

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.[9] It also concluded that legislator performance could be ensured, and ethics reforms achieved, by limiting allowances and prohibiting and capping legislator outside income.[10]

The 2018 Law did not authorize the Committee to make recommendations for statewide official salaries that superseded Executive Law §§ 40 (Comptroller salary) or 60 (Attorney General salary). Regardless, the Attorney General and State Comptroller salaries went up effective January 1, 2019 and rose to $220,000 on January 1, 2021.[11]

In addition, the Committee granted itself additional legislative power, purporting to re-write Executive Law § 169 to delegate to

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[8] R.54.
[9] *Id.*
[10] *Id.*
[11] 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.

the Governor the Legislature's power to set certain state official salaries. As of January 1, 2019, salary levels for Executive Law § 169 public officials were adjusted upwards and re-grouped into four tiers from six.[12] Two tiers have salary ranges instead of fixed amounts and the Committee granted the Governor discretion to set specific amounts within those ranges.[13]

The Committee published its report on December 10, 2018 (the "Report").[14] The Legislature took no action on the Report.[15] The Report's recommendations had the force of law and superseded inconsistent provisions of Executive law § 169 and Legislative Law §§ 5 and 5-A on January 1, 2019.[16]

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.[17]

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[12] R.64-65.
[13] *Id*.
[14] R.44.
[15] R.31.
[16] L. 2018, ch. 59, Part HHH, § 4.
[17] R.178.

On June 7, 2019, Supreme Court entered its decision and judgment.[18] There being no questions of fact presented by the controversy in question, Supreme Court concluded it could decide the claims presented on the merits.

Supreme Court concluded the Legislature could delegate the power to the Committee to make certain determinations contained in the Report.[19] It, however, determined that the Committee exceeded its authority when it made recommendations prohibiting and limiting legislator outside income.[20] It determined the Legislature did not grant the Committee authority to make recommendations that supersede the Public Officers Law.[21]

Accordingly, Supreme Court nullified all Committee recommendations relating to outside income restrictions and legislator salary increases in 2020 and 2021. It left in place all other compensation changes recommended by the Committee.[22] Appellate Division affirmed and modified the judgment to declare the 2018 Law constitutional.[23] This Court should reverse.

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[18] R.4.
[19] R.14.
[20] R.15.
[21] R.18.
[22] R.21.
[23] R.377.

Argument

The 2018 Law delegating compensation determinations violated the New York Constitution. The Legislature granted an unelected body the power to make compensation "recommendations" that superseded existing statutes. It further failed to fix legislator salaries by law, as the Constitution requires, or make any policy decision on compensation. Further, the Committee unconstitutionally exceeded any authority lawfully delegated to it by the Legislature by implementing its own policy determinations.

The 2018 Law is unconstitutional.

A. The New York 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 ..."[24] 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

[24] L. 2018, ch. 59, Part HHH, § 4.2.

existing laws.[25] The Constitution is specific that "no law shall be enacted except by bill."[26] 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.[27] And the Constitution gives the Governor the authority to veto any bill.[28]

Despite the Constitution's directions and prohibitions, the Committee stated that the Legislature and the Governor granted it the power to re-write the statutes reserved exclusively to the Legislature: "This Committee has been empowered to take any action with respect to compensation that a statute could effectuate."[29]

Indeed, the 2018 Law purported to have the Report's recommendations supersede existing laws, i.e., become laws themselves, without a quorum, a vote, or presentment to the Governor. The process that transformed an unelected body's compensation recommendations into governing law violated all the rules for passing laws under the Constitution.

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[25] N.Y. Const., art. III, § 1.
[26] *Id*. at art. III, § 13.
[27] *Id*. at art. III, § 14.
[28] *Id*. at art. IV, §7.
[29] R.63.

1. Niagara County Supreme Court correctly struck down a different law containing the same operative language.

In early 2020, 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.[30] 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.[31]

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 laws and repeal existing laws. The Legislature reserving itself the right to modify or abrogate the commission's laws did not validate the process.[32]

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. *Id*. The court further noted "to repeal or modify a statute requires a legislative

[30] *Hurley v. Public Campaign Fin. & Election Commn.*, 69 Misc.3d 254 (Sup. Ct. Niagara County 2020).
[31] L. 2019, ch. 59, Part XXX.
[32] *Hurley*, 69 Misc.3d at 261.

act of equal dignity and import. Nothing less than another statute will suffice."[33]

In *Moran v. Laguardia*, this Court rejected the idea that a concurrent resolution of the Legislature could be effective to *modify* or repeal a statutory enactment. Regarding such a concurrent resolution, this Court stated

> A concurrent resolution of the two houses is not a statute. A concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body. It resembles a statute neither in its mode of passage nor in its consequences. The form of a bill is lacking and readings are not required. It does not have to lie on the desks of members of the Legislature for three legislative days. But more important, its adoption is complete without the concurrent action of the Governor, or lacking this, passage by a two-thirds vote of each house of the Legislature over his veto.[34]

The 2018 Law does not contain the mechanisms necessary for legislative equivalency as described in *Moran* and mandated by the Constitution. The only legislative equivalent to the Legislative and Executive Laws being superseded by the 2018 Law could have been the 2018 Law itself.

But if so, then the 2018 Law was not a final bill as required by the Constitution.[35] The 2018 Law required the additional work of

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[33] *Id.* (quoting *Moran v. LaGuardia*, 270 N.Y. 450, 452 (1936).
[34] *Moran*, 270 N.Y. at 452 (citations omitted).
[35] N.Y. Const., art. III, § 14.

the Committee to make compensation determinations, i.e., to decide the superseding numbers in the statutes, to be complete and final.

The Legislature and the Governor abdicated their explicit constitutional responsibilities to fix compensation amounts by law. The 2018 Law called for a committee report creating new legislation to become effective without meeting *any* of the Constitution's requirements for passing new laws. As such, the Court should declare the 2018 Law null and void in its entirety.

2. Appellate Division and Supreme Court erred in upholding the 2018 Law as constitutional.

a. Supreme Court and Appellate Division failed to address directly the operative statutory provision in dispute in this case.

The Legislature may not cede its lawmaking responsibility under the Constitution.[36] "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."[37] While it may delegate some authority to administer its laws, the Legislature here did not even pretend to

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

be granting the Committee rulemaking or adjudicatory powers to administer and execute the Law.

The Defendants admitted as much (R.219). And Supreme Court correctly concluded the Legislature did not authorize the Committee "to make rules or final decisions in any adjudicatory proceedings" (R.12). In other words, the Committee was not appointed to *execute* the 2018 Law. Its only role was to *make* law under its auspices.

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 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**'" (R.8 [emphasis in original]).

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, not merely to administer and execute the 2018 Law.

Supreme Court also relied Appellate Division's decision in *Center for Jud. Accountability, Inc. v. Cuomo*[38] involving a similar unelected commission on judicial compensation in 2015 that did not address the same supersession provision. Appellate Division in *Center for Jud. Accountability* 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 appropriate, inconsistent provisions of article 7-B of the judiciary law."[39] Instead, Appellate Division paraphrased the 2015 law and left out the supersession provision that made that commission a law-making body.

In its Opinion and Order, Appellate Division cited *Center for Jud. Accountability* where it "upheld a nearly identical delegation of authority regarding judicial compensation."[40] In *Center for Jud. Accountability*, however, Appellate Division Court concluded that the 2015 commission was an administrative body and conducted

[38] 167 A.D.3d 1406 (3d Dept. 2018).
[39] L. 2015, ch. 60, Part E, § 7.
[40] R.372.

its analysis accordingly, without addressing the supersession provision.[41]

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.[42]

Here, Appellate Division confused law-making and law administering. There is no dispute that in certain circumstances the Legislature can make a policy decision in a law and provide another body with authority to execute the law. Executing the law can include promulgating regulations with the force of law. A body can administer the law in that manner if there are reasonable safeguards to constrain the body's authority.[43]

Under the 2018 Law, however, the Committee was not promulgating regulations with the force of law. It was making recommendations that would be *the law*. Those recommendations were self-executing. They only would not become law, superseding existing

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[41] *Center for Jud. Accountability*, 167 A.D.3d at 1409-1412.
[42] *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).
[43] R.371-372.

statutes, if the Legislature passed a *new* statute modifying or abrogating them.[44]

Appellate Division misstates the 2018 Law regarding its safeguard being the Legislature reviewing the Committee's recommendations "after which it could either modify them or grant them the force of law."[45] The 2018 Law required no such positive act by the Legislature. Again, the recommendations would not have the *force* of law, they would *be* the law.

Appellate Division's word choices in other places in its Opinion and Order belie its conclusion the Legislature did not unlawfully delegate its lawmaking authority. Regarding the Governor's veto power, Appellate Division concluded the Governor consented to a process in the 2018 Law that "allowed [the Committee's] recommendations to acquire the force of law."[46] According to Appellate Division, legislative salaries were fixed by law because the Committee's recommendations "acquired the force of law on January 1, 2019."[47]

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[44] L. 2018, ch. 59, Part HHH, § 4.2.
[45] R.372.
[46] R.373.
[47] R.374.

"Force of Law" or "force and effect of law" are terms associated generally with rule-making that the Legislature itself uses to describe the rule-making or regulatory authority of executive agencies.[48] The Committee was not authorized to make rules. Its only mandate was to make recommendations that supersede existing laws.

b. Legislative inaction was not a safeguard.

The 2018 Law does not contain the mechanisms the Constitution requires for the Report's recommendations to become new laws that supersede existing laws. They would supersede existing laws as of January 1, 2021, without any action by the Legislature.

The 2018 Law was unconstitutional on its face. The 2018 Law contained no provision for putting the Report's recommendations into a written bill, convening a quorum, and conducting a vote as the Constitution requires. Instead, the 2018 required the Legislature to pass a statute modifying or abrogating the self-executing Committee recommendations that would supersede conflicting provisions of existing laws.

[48] See, e.g., State Administrative Procedures Act § 402(3); Civil Service Law §§ 6(1) and 20; Agriculture & Markets Law §§ 147-i and 160-b.

There was no workable constitutional safeguard in place. 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.[49]

Moreover, a final bill passed by the Legislature must be presented to the Governor for approval. Appellate Division concludes the presentment requirement was met when the Governor signed the 2018 Law, which required the Report to be submitted for the Governor's review.

The Governor, however, had no ability to act on the Report before it became law. The Governor's approval process is a constitutional obligation. It's not a privilege that can be prospectively waived.

[49] NY Const. art. III, § 9 ("A majority of each house shall constitute a quorum to do business.")

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

If the 2018 Law did not delegate lawmaking to the Committee but instead gave it some undefined quasi-legislative, quasi-rule-making power, it remains unconstitutional. The Constitution mandates that certain compensation amounts must be "fixed by law."[50] Section 1 of Article III vests the Senate and Assembly with the exclusive power to make laws generally.[51]

"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."[52] "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."[53]

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."[54] As used by the framers of current

[50] NY Const. art. III, § 6; NY Const. art. XIII, § 7.
[51] NY Const. art. III, § 1.
[52] *Racine v. Morris*, 201 N.Y. 240, 244 (1911).
[53] *Matter of King v. Cuomo*, 81 N.Y.2d 247, 253 (1993)(citations omitted).
[54] 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. 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."[55] The committee acknowledged any legislative salary change "of course, would require consent of the Governor."[56]

The 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."[57] Twenty-five years later a temporary commission recognized that "because legislators themselves are the ones who must vote on and approve their own salaries, their actions are always open to popular misinterpretation and unwarranted criticism."[58]

The people of New York amended the Constitution to allow the Legislature to fix its salaries by law. The Legislature did so in

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[55] R.105 (Final Rep. of the Joint Comm. On Legislative Methods, Practices, Procedures and Expenditures, 1946 N.Y. Legis Doc. No. 31 at 171).
[56] *Id.*
[57] *Id.*
[58] R.172 (Commission on Legislative and Judicial Salaries, "Report on the Compensation of New York State Legislators and Judges," April 30, 1973 at 50).

passing statutes for the next 50 years, starting the first session after the amendment, in 1948.[59] It passed eight subsequent laws raising legislator salaries.[60]

This Court has recognized that weight should be given to contemporaneous construction of a new constitutional provision in the years following its adoption.[61] Noting that the legislative procedure for legislative allowances had not varied since 1948, this Court stated in *Steingut* that "[g]reat deference is certainly due to a legislative exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provision, and may be supposed to result from the same views of policy, and modes of reasoning which prevailed among the framers of the instrument propounded."[62]

Legislative salaries had an additional twenty-two-year history after *Steingut*, including three raises passed by statute, evincing that an annual salary "fixed by law" in the 1948 amendment means an amount put in a bill passed by the Legislature. Nothing

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[59] L. 1948, ch. 20.
[60] See 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.
[61] *New York Pub. Interest Research Group v. Steingut*, 40 N.Y.2d 250, 258 (1976).
[62] *Id.* (quoting *People ex rel. Joyce v. Brundage*, 78 N.Y. 403, 406 (1879)(cleaned up).

in the Constitution or the law changed after the last legislative salary increase in 1998.

2. The 2018 Law is unconstitutional, not innovative.

The Legislature passed a law in 1998 to amend Legislative Law § 5 to raise annual salaries for members to $79,500. [63] After 1998, legislative pay was a contentious issue for many years, but no changes were made.[64] Thus, it's peculiar that only in the past decade did the Legislature and the Governor figure out that an unelected committee could fix salaries in some form of quasi-legislative role.

And it's not like others elsewhere had not tried and failed. Appellate Division noted without discussion two federal cases from the 1970s where similar issues arose from the Salary Act passed by Congress in 1967.[65] It established 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.

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[63] L. 1998, ch. 630.
[64] *Matter of Maron v. Silver*, 14 N.Y.3d 230, 245 (2010).
[65] *Pressler v. Simon*, 428 F. Supp. 302, 305 (D. D.C. 1976) and *Pressler v. Blumenthal*, 434 U.S. 1028 (1978).

The Salary Act was challenged in *Pressler v. Simon* 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.[66] On appeal after remand, the Supreme Court summarily affirmed.[67]

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."[68]

The 1977 amendments that caused the Supreme Court to vacate and remand in the first instance mandated that within 60 days "each House shall conduct a separate vote on each of the recommendations of the President."[69] A 1985 fix in the wake of the Supreme Court rejecting legislative vetoes[70] resulted in another challenge before the D.C. Circuit in *Humphrey v. Baker*.[71]

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[66] *Pressler v. Blumenthal,* 431 U.S. 169 (1977).
[67] *Blumenthal*, 434 U.S. at 1028.
[68] *Id*.
[69] 91 Stat. 39 (1977) § 401.
[70] *INS v. Chadha*, 462 U.S. 919 (1983).
[71] 848 F.2d 211 (D.C. Cir. 1988).

The 1985 amendments went back to making the President's recommendations effective after 30 days, unless Congress disapproved them in a joint resolution.[72] 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.[73]

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."[74] The same approval process remains in place, unchanged, today.[75]

The Salary Act's complete history favors a conclusion that New York's Legislature must fix legislative salaries with an amount in a statute. Each court challenge to the federal law 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. Like Congress, the

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[72] 99 Stat. 1185 (1985) § 135(e).
[73] 103 Stat 1716 (1989) § 701(g).
[74] *Id.*
[75] 2 U.S.C. § 359.

New York Legislature needs follow the lead of Congress and obey its duty under the Constitution–by court order, if necessary.

3. "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 *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* . . . ."[76] 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 . . . ."[77]. And in *Montana v. McGee*, "The minimum and maximum sentence is fixed by law and

[76] 132 A.D. 831, 836 (1st Dept. 1909) (emphasis added).
[77] 127 Misc. 135, 137 (Sup. Ct., Albany County 1926).

imposed by the court. The allowance for good behavior is *fixed by law or regulation under law*."[78].

The distinction between fixing compensation by law or by some other body existed in 1947. New Yorkers chose to have their legislators fix their salaries by law. The 2018 Law defies the will of the people embodied in the Constitution.

Regardless, Appellate Division did not accept that salaries fixed by law must be "codified in a published statue passed by the Legislature itself" by declining to interpret the term narrowly.[79] Yet Appellate Division cites no applicable precedent to support its narrow interpretation. In *Molina v. Games Mgt. Servs.*[80] this Court did not address the meaning of "fixed by law." In *Steingut* this Court recognized that fixed by law meant fixing salary amounts by amending Legislative Law § 5 and passing appropriation bills each year fixing legislator allowance amounts.[81]

The other cases Appellate Division cites address "fixed by law" in the context of local ordinances.[82] Municipal ordinances, however, are laws within the meaning of the New York Constitution.

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[78] 16 N.Y.S.2d 162, 167 (Sup. Ct., Bronx County 1939) (emphasis added).
[79] R.373.
[80] 58 N.Y.2d 523 (1983).
[81] *Steingut*, 40 N.Y.2d at 256.
[82] *Matter of Mutual Life Ins. Co. of N.Y.*, 89 N.Y. 530, 533 (1882); *Albert v. City of New York*, 250 App.Div. 555, 556 (1937), *affd* 275 N.Y. 484 (1937);

The people of New York granted the Senate and Assembly the power to make laws in the Constitution. The same Constitution authorizes local governments to adopt local laws and sets the rules for the Legislature and local governments to interact.[83] Thus, local ordinances are laws within the meaning of fixed by law. They are neither rules nor recommendations having the "force of law" or the force and effect of law."

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.

C. The 2018 Law unconstitutionally leaves the policy decisions to the Committee.

The 2018 Law did not contain a policy determination. It only asked questions of the Committee. It tasked the Committee "to examine the prevailing adequacy of pay levels"[84] and to determine

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Hanley v. City of New York, 250 App.Div. 552, 553–554 (1937), *affd* 275 N.Y. 482 (1937).
[83] NY Const., art. IX.
[84] L. 2018, ch. 59, Part HHH, § 2.1.

whether annual compensation amounts "warrant an increase."[85] Whether compensation amounts are adequate and whether they warrant increases are policy decisions.

The 2018 Law provided directions for implementing any increases the Committee may determine, but it left the ultimate decision and predicate for any further prescriptions up to the Committee. Appellate Division mischaracterizes the Legislature's actions when it states that "the Legislature enacted a law making the basic policy choice that the salaries of legislators, statewide elected officials and executive branch commissioners must be 'adequate.'"[86]

The 2018 Law contained no such mandate. The 2018 Law mandated that the Committee examine prevailing adequacy of compensation. But it gave the Committee total discretion to determine whether annual compensation amounts warranted an increase.

For example, among the factors the Legislature suggested the Committee could consider was "the overall economic climate" and "the state's ability to fund increases in compensation and non-salary benefits."[87] Thus, the Committee could conclude that annual

[85] *Id.* at § 2.2.
[86] R.372.
[87] L. 2018, ch. 59, Part HHH, § 2.3.

compensation amounts were not adequate but the economic climate and the state's inability to fund higher compensation amounts did not warrant an increase. In other words, the Legislature left the policy determination completely in the hands of the Committee.

The Committee exceeded any authority the Legislature lawfully granted.

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

The debate regarding legislators as part-time or full-time is more than a century old.[88] It has never been resolved. In 1973 the Commission on Legislative and Judicial Salaries posited that the "tasks of a legislator are approaching a full-time commitment."[89] Legislators, however, have always been considered part-time because the Constitution contemplates them receiving outside income.[90]

The Committee, however, made a policy decision to make legislators full-time employees. 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

[88] R.93 (Constitutional Convention of 1915, Doc. No. 20).
[89] R.159 (Commission on Legislative and Judicial Salaries at 37).
[90] *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.").

be imposed on outside earned income to ensure the primary source of earned income is from the state."[91] 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 that analysis to simply setting salary levels."[92] The Committee further stated "Limiting outside income in conjunction with increases in salary" fell within its mandate.[93]

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."[94] 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).

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[91] 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.).
[92] R.62.
[93] *Id.*
[94] R.57.

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.

The Committee, however, had just one decision to make. 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.

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

The Committee had the same limited task for Executive Law § 169 Commissioners—to determine whether their salaries warranted an increase. The Committee made a policy decision when it concluded the existing six-tier structure is "out of date and cumbersome."[95] And the Committee made a policy decision to restructure the tiers to "reflect the current sense of the importance of the

[95] R.64.

various agencies governed by these public servants."[96] The Committee further made a policy decision not authorized by the 2018 Law in providing the Governor with a new ability to determine salaries within ranges in two of the tiers.[97]

It is true that the case law supports the Legislature not being confined to providing bodies executing its laws "rigid marching orders."[98] Here, however, the Legislature in the 2018 Law gave the Committee a narrow task–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."[99]

To be sure, the Legislature listed a non-exhaustive list of considerations the committee could make in evaluating compensation levels. But none of them expanded the scope of the task at hand. The Legislature could have asked the Committee to restructure the tiers in section 169 in plain language. It did not. And the Legislature should be capable of passing laws that grant the Governor discretion to determine salaries within ranges.[100]

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[96] *Id.*
[97] *Id.* at 37.
[98] *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 260.
[99] *McKinney v. Commissioner of N.Y. State Dept. of Health*, 41 A.D.3d 252 (1st Dept. 2007).
[100] See, e.g. Executive Law § 169(3) (providing discretion for SUNY and CUNY salary determinations).

C. The 2018 Law cannot be stretched to excuse the Committee's unconstitutional policymaking.

Appellate Division excuses the Committee's overreach by citing one relevant factor the Legislature identified for the Committee to consider in determining whether pay increases were warranted. The Legislature suggested the Committee could consider "the parties' performance and timely fulfillment of their statutory and [c]onstitutional responsibilities."[101] The chief role of legislators in New York, however, is to pass appropriation bills with the state budget in the first quarter of each calendar year.[102]

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."[103] The Legislature, however, did not provide any description of the type of legislator work the Committee was tasked to evaluate.

Moreover, nothing in the enabling legislation directs the Committee to eliminate legislative stipends to "create more equity

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[101] L. 2018, ch. 59, Part HHH, § 2.3.
[102] R.25; NY Const., art. VII.
[103] R.56.

amongst all 213 Legislators, more stability and transparency regarding legislative compensation and address certain ethical concerns associated with stipends."[104] None of the factors listed by the Legislature in the 2018 Law embrace stipend equity, stability, transparency, or ethical concerns.[105]

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. The Committee eliminated certain stipends to justify an increase to all legislator salaries (and implement its own policy determination), making that choice without any guidance from the Legislature. Regardless of the relative 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.[106]

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

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[104] *Id*.
[105] L. 2018, ch. 59, Part HHH, § 2.3.
[106] L. 2018, ch. 59, Part HHH, § 2.2.

an unelected committee empowered to re-write existing laws. The Committee in its decision-making then exceeded its unlawful authority to make its own policy determinations.

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

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