APL-2021-00080

To be argued by
VICTOR PALADINO
15 minutes requested

State of New York
Court of Appeals

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

Appellants,

v.

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

Respondents.

BRIEF FOR RESPONDENTS

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Supreme Court, Albany County – Index No. 907537-18
Appellate Division, Third Department No. 529556

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CASES (CONT'D) **PAGE(S)**

CASES (CONT'D) **PAGE(S)**

CASES (CONT'D) **PAGE(S)**

CONSTITUTIONS

UNITED STATES CONSTITUTION

NEW YORK STATE CONSTITUTION

STATE STATUTES

STATE STATUTES (Cont'd) **PAGE(S)**

MISCELLANEOUS AUTHORITIES **PAGE(S)**

PRELIMINARY STATEMENT

In 2018, the New York State Legislature enacted a statute (L. 2018, ch. 59, part HHH, the "Enabling Act") that created the 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 detailed 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 outside earned income and employment. Under the terms of the 2018 Enabling Act, 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, among other things, that the 2018

Enabling Act unconstitutionally delegated the Legislature's law-making authority to the Committee and that the Committee exceeded its authority when it made certain recommendations.[1]

Supreme Court, Albany County (Ryba, J.), rejected plaintiffs' unlawful delegation claim, and upheld the salary increases for statewide elected officials and agency commissioners, as well as the 2019 salary increase for legislators. The court, however, declared that the Committee had exceeded its authority when it made recommendations to restrict outside income and employment. It accordingly declared invalid those recommendations together with the associated legislative salary increases for 2020 and 2021, while preserving the legislative salary increase for 2019.[2]

On plaintiffs' appeal, the Appellate Division, Third Department, unanimously affirmed Supreme Court's judgment, but it added a

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[1] Plaintiffs also raised claims under the State Administrative Procedure Act and the Open Meetings Law, which Supreme Court rejected (R11-12). Plaintiffs do not challenge those rulings on this appeal.

[2] Defendants did not appeal that aspect of Supreme Court's ruling striking the outside income and employment restrictions and associated legislative salary raises for 2020 and 2021.

declaration that the Enabling Act had not been shown to be unconstitutional. Because plaintiffs' constitutional claims do not withstand scrutiny, the Appellate Division's order should be affirmed.

QUESTIONS PRESENTED

1. Did the Enabling Act lawfully delegate authority to the Committee to examine and make recommendations regarding adequate levels of compensation for statewide elected officials, agency commissioners, and members of the Legislature which would acquire the force of law unless rejected or modified by the Legislature?

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

STATEMENT OF THE CASE

A. Constitutional and Statutory Background

The New York Constitution contains distinct articles governing compensation for the Legislature, the Governor and Lieutenant Governor, and the Judiciary. *See* N.Y. Const., Article III, § 6 (members of the Legislature), Article IV, §§ 3, 6 (Governor and Lieutenant

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*. 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 a 2015 budget bill, the Legislature created the Commission on Legislative, Judicial and Executive Compensation—the predecessor to the Committee here—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, Inc. v. Cuomo,* the Appellate Division, Third Department upheld the 2015 legislation as a lawful delegation of authority. 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).

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 streamed 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, the base salary of a member of the Legislature had been set at $79,500. *See* Legislative Law § 5(1) (McKinney Supp. 2021). 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.) In making these recommendations, the Committee observed that New York "is in reality considered 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. (R50.) 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 was rejected by Supreme Court, Albany County, s*ee Arrigo v. DiNapoli*,

Albany Co. Index No. 908636-19, Judgment entered Jan. 8, 2021, and the plaintiff's appeal is pending in the Appellate Division, Third Department (Docket No. 532971).

As for the Attorney General and the State Comptroller, raising their salaries fell within the Committee's statutory delegation. (R61). The Committee recommended an increase 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 had been set in section 169 of the Executive Law. Section 169 had 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. 2021). 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 within that range 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. (R64-65.) 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 did not pass a statute modifying or abrogating the recommendations for 2019, 2020, and 2021.

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 (1) by making a policy determination that legislators should be compensated for full-time service; (2) by imposing restrictions on legislators' outside income and activities; and (3) 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 alleged that the Committee violated the Open Meetings Law and the State Administrative Procedure Act (R35-38), claims they do not pursue in this Court. 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 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

By decision and judgment dated June 7, 2019, Supreme Court 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 them and the outside restrictions from the remaining recommendations, and upheld and preserved the 2019 legislative salary increase. (R18, 20-22.)

E. The Appellate Division Affirms the Judgment

On plaintiffs' appeal, amicus briefs were submitted by Speaker Heastie; Andrea Stewart-Cousins, the Majority Leader of the New York State Senate; and then-Governor Andrew M. Cuomo, all in support of respondents. The Appellate Division, Third Department, unanimously rejected plaintiffs' contentions. Because Supreme Court had dismissed the constitutional claims rather than issuing declaratory relief, the Appellate Division modified Supreme Court's judgment by adding a declaration that the Enabling Act had not been shown to be unconstitutional, and, as so modified, affirmed the judgment. 194 A.D.3d 98 (3d Dep't 2021). By notice of appeal dated April 19, 2021, plaintiffs have appealed as of right to this Court under C.P.L.R. 5601(b)(1).

ARGUMENT

POINT I

THE ENABLING ACT LAWFULLY DELEGATED AUTHORITY TO THE COMMITTEE

To overcome the strong presumption of constitutionality that the 2018 Enabling Act enjoys as a duly enacted state statute, *Cohen v. State*, 94 N.Y.2d 1, 8 (1999), 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 the Appellate Division and Supreme Court correctly concluded.

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

Article III, § 1 of the New York Constitution vests the legislative power in the Senate and the Assembly. Although the Legislature may not 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). 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 choices 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.3d 243, 262-63 (2005) (internal quotation and citation omitted).

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. For instance, in *Levine,* this Court found that the "protection and promotion of the health of the inhabitants of the state" was a constitutionally sufficient standard to guide an agency's decisions whether to revoke a hospital's operating certificate. 39 N.Y.2d at 516-17. Similarly, the "public interest, convenience or necessity" was found to be a sufficient standard for regulating harness racing, *see Matter of Sullivan Cty. Harness Racing Association v. Glasser*, 30 N.Y.2d 269, 277 (1972), and "public interest" was found to be a sufficient standard for guiding the exercise of administrative power to order that wiring be placed underground, s*ee Sleepy Hollow Lake, Inc.*, 43 A.D.2d at 443-444.

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

HHH, § 1 (reproduced at R72). The Enabling Act gave the Committee detailed guidance on how it should determine adequate compensation by setting forth eight nonexclusive factors: "the parties' performance and timely fulfillment of their statutory and Constitutional responsibilities; 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 comparable professionals in government, academia and private and nonprofit enterprise; the ability to attract talent in competition with comparable private sector position; and the state's ability to fund increases in compensation and non-salary benefits." L. 2018, ch. 59, part HHH, § 2(3). Thus, the "basic policy decision[]" that statewide officials should receive "adequate" compensation, as guided by relevant factors, was "made and articulated by the Legislature." *Matter of N.Y. State Health Facilities Ass'n v. Axelrod,* 77 N.Y.2d 340, 348 (1991).

As the Appellate Division aptly observed, the 2018 Enabling Act is essentially identical to the statute upheld in *Ctr. for Judicial Accountability, Inc. v. Cuomo*, 167 A.D.3d at 1410-11. There, the

Appellate Division rejected an unlawful delegation challenge to a statute that empowered a 2015 Commission to recommend salary increases for judges. The statute in *Ctr. for Judicial Accountability* contained the same operative standard (that salaries be adequate), set forth essentially the same enumerated factors, and provided essentially the same safeguard as the 2018 statute at issue here. *Compare* L. 2015, ch. 60, § 1, part E, *with* L. 2018, ch. 59, part HHH. The 2018 Enabling Act set forth two additional factors not found in the 2015 statute, namely, "the parties' performance and timely fulfillment of their statutory and Constitutional responsibilities" and "the ability to attract talent in competition with comparable private sector positions" (L. 2018, ch. 59, part HHH, § 2[3]), thus providing even greater guidance than the 2015 statute did.

Plaintiffs argue that the Legislature made no policy determination but "left the policy determination completely in the hands of the Committee" and supposedly gave the Committee "total discretion" to determine whether the salaries of public officials warranted an increase (Br. at 27-28). This argument ignores the enumerated factors the Enabling Act directed the Committee to consider in determining whether salary levels warranted an increase. In delegating authority, Legislature

need not give "rigid marching orders." *Matter of LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018). The discretion conferred by the Enabling Act was broad but not boundless, and fell well within the "considerable latitude" afforded the Legislature in setting standards to guide the Committee's work. *See Matter of Big Apple Food Vendors' Assn. v. Street Vendor Review Panel*, 90 N.Y.2d 402, 407 (1997).

Nor is there any merit to plaintiffs' argument (Br. at 16) that the safeguard in the Enabling Act is inadequate. By requiring the Committee to submit its report to the Legislature sufficiently in advance of the date on which the recommendations would acquire the force of law, the statute gave the Legislature a meaningful opportunity to review the Committee's recommendations and make an informed decision on whether to exercise its prerogative to modify or reject them. L. 2018, ch. 59, part HHH, § 4(1),(2). This same safeguard was found constitutionally adequate in *Ctr. for Judicial Accountability*, 167 A.D.3d at 1411.

Plaintiffs do not contend that the Enabling Act gave the Legislature insufficient time to review the Committee's report. Rather, they argue that "legislative inaction" is not an adequate safeguard because "contrary to all constitutional requirements a minority of just one house can ensure

the Commission's [sic] recommendations become new law by voting no" (Br. at 17). This argument just restates the consequence of legislative inaction under the Enabling Act and therefore begs the very question at issue. It is true that a new statute is required to abrogate or modify the Committee's recommendations, and members of one house of the Legislature could defeat a proposed modification by voting against it. But plaintiffs overlook that both houses of the legislature, with the concurrence of the Governor, already voted to adopt the Enabling Act that created the process by which the Committee's report would acquire the force of law.

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. Individual legislators' comments or opinions, especially post-enactment comments, represent only the personal views of the legislators, not the Legislature as a whole. *Bread PAC v. Fed. Election Comm'n*, 455 U.S. 577, 582 n.3 (1982). 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.

B. It was the Enabling Act itself, not the Committee, that superseded any conflicting provisions of the Legislative and Executive Laws.

Contrary to plaintiffs' argument (Br. at 12-16), the Enabling Act did not impermissibly delegate law-making power by declaring 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 13) that the 2015 statute upheld in *Ctr. For Judicial Accountability* contained the same superseding language. *See* L. 2015, ch. 60, § 1, part E, § 7. But they maintain that in both cases the courts ignored "the operative language" of the Enabling Act (Br. at 12-13).

Not so. The "superseding" language makes no difference to the analysis. 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," and thereby supersede any pre-existing 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).

Plaintiffs maintain that superseding pre-existing statutes is an action that can only be done by the Legislature itself. Citing an unreviewed trial court decision, plaintiffs argue that to repeal or modify a statute requires a legislative act of "equal dignity and import" (Br. at 9-10, citing *Hurley v. Public Campaign Fin. & Election Commn.*, 69 Misc.3d 254, 261 [Sup. Ct. Niagara Co. 2020]). Plaintiffs, however, again ignore that it was the Legislature that made just this policy choice to supplant pre-existing statutory salary levels: The supersession provision was an express component of the Enabling Act itself. *See* L. 2018 ch. 59, Part HHH, § 4(2).

In passing the Enabling Act, the Legislature plainly 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 Act: the recommendations would supplant inconsistent statutes. 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 could empower the Committee's recommendations to supersede provisions of law that had established different salaries. The result would be the same if, rather than having the Committee's recommendations "supersede" inconsistent statutory provisions, the Enabling Act had instead provided that inconsistent statutes would be deemed repealed when the recommendations acquired the force of law.

C. The Committee's status as a one-time body does not change the delegation analysis.

Plaintiffs acknowledge that agencies administering legislatively-delegated authority on an on-going basis may, consistent with the Constitution, promulgate rules and regulations that have the force and effect of law (Br. at 11-12). But they contend 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, however. For example, in 2005, 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 the commission's recommendations 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). Likewise, in *Ctr. for Judicial Accountability*, the Third Department found no constitutional infirmity in legislation that authorized a one-time body to determine whether judicial salaries warranted an increase, *see* 167 A.D.3d at 1410-11, and this Court determined that the plaintiff's appeal raised no substantial constitutional question, *see* 33 N.Y.3d 993.

Plaintiffs assert that agencies permissibly make rules and regulations that implement the law and have the force of law, whereas one-time bodies like the Committee impermissibly make "the law" (Br. at 14), but they do not explain the distinction or why it matters when both carry out policies set by the Legislature. For delegation purposes, there is no material difference between the actions of one-time bodies and those of ongoing administrative agencies. And the difference between quasi-legislative agency rulemaking and the actions of the Committee here is more formal than substantive, as the Legislature could have achieved the same result by creating an executive agency tasked with periodically

determining adequate compensation levels for public officers and promulgating regulations to revise these levels as warranted. Under settled delegation principles, the ongoing body's regulations would be valid so long as the enabling statute creating the agency made the relevant policy choices and gave adequate guidance and safeguards. Such agency's promulgated salary levels would enjoy exactly the same force and effect as the actions of the one-time Committee here. Accordingly, the validity of the Legislature's chosen means to ensure adequate public salaries should not turn on the limited duration of the body used to achieve this purpose.

D. The delegation at issue here satisfied the constitutional requirement that the salaries of members of the Legislature and state officers named in the Constitution be "fixed by law."

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 that salaries are specified in a statute. That is not so.

Just as salaries for members of the 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."[3] 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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[3] 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 generic 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, this Court 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.

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" 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 precisely describes the Committee's recommendations, which by the terms of the Enabling Act, acquired the "force of law" when the Legislature declined to abrogate or modify them.

Attempting to show otherwise, plaintiffs cite several cases from the early twentieth century, but none of them addresses the meaning of "fixed by law" as used in the Constitution's compensation clauses. These

cases mention in dictum phrases such as "fixed by law or regulation," *Sutliffe v. City of New York*, 132 A.D. 831, 836 (1st Dep't 1909), "fixed by law, but is subject to regulation," *Matter of Lewis v. Graves*, 127 Misc. 135, 137 (Sup. Ct. Alb. Co. 1926), and "fixed by law or regulation under law," *Montana v. McGee*, 16 N.Y.S.2d 162, 167 (Sup. Ct. Bronx Co. 1939). As used in these phrases, "law" does refer to a statute. But "fixed by law" as used in the constitutional compensation clauses uses "law" in the generic sense, which means controlling authority that has binding legal force. In this sense, "law" is broad enough to embrace the actions of a body acting pursuant to legislatively delegated authority.

Nothing in the 1946 joint committee report cited by plaintiffs (Br. at 19) supports a contrary conclusion. That report recommended what became the 1948 amendment to Article III, § 6 of the State Constitution, which provided that the salaries of members of the Legislature were to be "fixed by law" (i.e., by statute or delegated statutory authority) 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.

Plaintiffs observe, correctly, that in the period from the 1948 amendment to Article III, § 6 until the passage of the Enabling Act in 2018, the Legislature had fixed the salaries of its members in statutes (Br. at 20). But from this practice plaintiffs draw the erroneous conclusion that that is the only constitutional means of fixing legislative salaries. The authority to fix the salaries of public officials, though vested in the Legislature and the Governor, is delegable just like any other law-making authority. The only limitations on such a delegation are that the statute set the basic policy goal and establish adequate standards and safeguards, all of which it did here as discussed.

The Appellate Division correctly found support for its conclusion that the 2018 legislative and state-wide officials' salary increases were "fixed by law" within the meaning of the State Constitution in case law

interpreting the analogous provision of the federal Constitution (R374, citing *Pressler v. Simon*, 428 F. Supp. 302, 305 [D.C. Cir. 1976], *aff'd sub nom*, *Pressler v. Blumenthal*, 434 U.S. 1028 [1978]). In *Pressler v. Simon*, a member of Congress challenged a 1967 federal statute that authorized the creation once every four years of a commission, and directed the commission to make recommendations to the President concerning the rates of pay of members of Congress, federal judges, and high-ranking officials of the Executive Branch. The President was required to include in the next budget his recommendations with respect to the exact rates of pay he deemed advisable. Those recommendations would become effective unless during the 30-day period following their transmittal Congress either passed a joint resolution disapproving the recommendations or enacted a statute establishing compensation rates other than those proposed by the recommendations.

A three-judge panel rejected the plaintiff's contention that the statutory mechanism created by the 1967 federal statute violated the Ascertainment Clause of Article I, § 6 of the United States Constitution, which requires that the compensation of Senators and Representatives be "ascertained by Law." 428 F. Supp. at 305-306. The court rejected a

contention remarkably similar to the contention of the plaintiffs here, that to be "ascertained by Law" congressional salaries must be fixed "by a law that specifically states the amount to be paid" and that Congress could not delegate that function to another body. *Id*. a 305. Although the 1967 statute did not set congressional salaries in the direct fashion that had been followed historically, the court held that the Ascertainment Clause should not be read inflexibly to require Congress to establish specific salaries in specific legislation; rather, it was constitutional that the "procedures eventuating in the specific figures were set, i.e., ascertained, by law." *Humphrey v. Baker*, 848 F.2d 211, 215 (D.C. Cir. 1988) (explaining holding in *Pressler v. Simon*). Further, in the 1967 statute Congress had not completely delegated final responsibility for setting legislative salaries, but retained sufficient checks in the form of the appropriations process, the disapproval mechanism, and the ability at any time to enact superseding legislation. *Pressler v. Simon*, 428 F. Supp. at 305-306. On direct appeal, the three-judge panel's decision was summarily affirmed by the Supreme Court. *Pressler v. Blumenthal*, 434 U.S. at 1028.

The process upheld in *Pressler* is functionally the same as the process established by the Enabling Act at issue here. In the face of this federal precedent, plaintiffs maintain that subsequent congressional amendments to the federal law support their position that "New York's Legislature must fix legislative salaries with an amount in a statute" (Br. at 23), but just the opposite is true. In 1985, Congress modified the federal law to eliminate the "legislative veto" device in the 1967 law, in light of the Supreme Court's intervening holding in *INS v. Chadha*, 462 U.S. 919 (1983), that such provisions—by which Congress could veto or reject executive action through one-house or concurrent resolutions—violated principles of the separation of powers. The 1985 amendments instead required that legislative disapprobation take the form of a joint resolution passed by both houses and presented to the President for signature, but in all other respects the federal salary act remained the same as the one upheld against constitutional challenge in *Pressler*. *See Humphrey v. Baker*, 848 F.2d at 158-159. The Enabling Act, however, never had a legislative veto to begin with, but requires the passage of a new statute to modify or reject the Committee's recommendations. See L. 2018, ch. 59, part HHH, § 4(2) (reproduced at R73). The 1985

amendments thus did not weaken the parallel with the Enabling Act, but made it closer.

The D.C. Circuit upheld the 1985 amendments, finding that the post-*Pressler* changes in the Salary Act did not alter "in any significant fashion the system for setting congressional salaries" and specifically rejecting the contention that "Congress must affirmatively set its own salaries, and may not, in conformity with the Ascertainment Clause, delegate this responsibility to the President." *Id*. at 159. The history of the federal statute, therefore, supports the constitutionality of the Enabling Act.

Like the federal Ascertainment Clause, the "animating purpose" of Article III, § 6's requirement that the salaries of members of the Legislature and other state officers named in the Constitution be "fixed by law" is to "affix political responsibility" for this compensation with the Legislature itself. *See Humphrey v. Baker*, 848 F.2d at 158. Although the Enabling Act delegates the establishment of these salaries to the Committee, the Legislature and the Governor remain politically accountable for the Committee's actions, because they are the ones who enacted the law that created this independent body, imbued it with

authority, and allowed its recommendations to acquire the force of law in the absence of further legislative action.

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. As established below, the Committee stayed within its legislatively delegated authority in making the recommendations at issue here.

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

As the Appellate Division 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 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 employees" (Br. at 28). 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 as compared with other state

legislatures, considering its workload and productivity. (R56, ¶ 10.) This was an observation of practical reality, and not a distinct recommendation of the Committee. Had the Committee sought to confer legal status on its observation, it would have set it forth as a distinct recommendation, which it did not do.

Plaintiffs argue (Br. at 30) that the 2019 legislative pay raise nonetheless cannot be salvaged because it is "bundled" with the invalid 2020 and 2021 legislative pay raises, and like them predicated on a "policy decision" to make legislators full-time. This claim is meritless.

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 preserve the 2019 legislative pay raise notwithstanding the invalidity of the successive legislative pay raises, 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 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 gave effect to this intent by upholding and preserving the 2019 pay increase while severing the invalid 2020 and 2021 pay raises and accompanying outside activity and income restrictions.

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 salary recommendations for commissioners subject to Executive Law § 169. Prior to the enactment of the 2018 Enabling Act, 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 specified for each tier, at levels between the salary for Tier 6 and the salary for Tier 1, 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 their commissioners.

In making recommendations for the salaries of the 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 of adequate pay levels for these 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 Act'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, 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, with discretion in the Governor to set a precise salary within those ranges. (R51, 61.) These contentions do not withstand scrutiny.

Plaintiffs argue that the Committee's authority was limited to 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 at 260. 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]). Where the Committee's recommendations furthered the Enabling Act's basic policy goal of adequate compensation and did not conflict with any of its terms, the Committee was free to make "'subsidiary policy choices consistent

with the enabling legislation.'" *Dorst v. Pataki*, 90 N.Y.2d 696, 699 (1997) (quoting *Matter of Citizens For an Orderly Energy Policy v. Cuomo*, 78 N.Y.2d 398, 410 [1991], *rearg. denied*, 79 N.Y.2d 851 [1992]).

Simplifying the tiered salary structure from six to four tiers directly served 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 subsidiary policy choice consistent with the enabling legislation's basic policy. 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 the "performance" of their "statutory and Constitutional responsibilities."

In arguing that the Enabling Act precluded a restructuring of the tiers because it did not specifically direct one, plaintiffs state the law backwards. The proper question is whether anything in the Act *prohibited* the Committee from employing this means—restructured

tiers—to achieve the Act's policy goal. Plaintiffs cannot identify any such barrier.

Indeed, plaintiffs' position, if adopted, would have thwarted the Legislature's policy goal of adequate commissioner salaries. For example, under the pre-existing six-tier structure, the Superintendent of Financial Services was in the second tier and so received the same salary as the Commissioner of Labor, among others. *See* Executive Law § 169(1)(b) (McKinney Supp. 2021). In view of the Superintendent's broad-ranging responsibilities over the insurance and banking industries, the Committee found that the Superintendent should receive a salary of $220,000 as of 2021, and placed her in the new Tier A. (R61, 65.) The Executive Director of the State Gaming Commission, formally in the first tier, Executive Law § 169(1)(a), was placed in new Tier C, evidently because, in the Committee's considered judgment, the Executive Director's duties and responsibilities were no longer comparable with other Tier A agency heads. (R65.) Under plaintiffs' theory, the Committee would have been saddled with the original tier assignments, and thus constrained to underpay the Superintendent of Financial Services or overpay the Executive Director of the Gaming Commission or both.

As the Appellate Division properly recognized, the delegation doctrine did not compel deference to the pre-existing tier structure and the Committee was free to diverge from it because that structure represented a subsidiary policy in service of the overarching goal of adequate compensation.

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 to be determined by a schedule established by the Governor.[4] Once again, this recommendation rationally furthered the goal of adequate compensation by authorizing 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,

[4] 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.

whereas having a range of salary options affords greater flexibility in hiring and increases the ability to attract talent.

As members of this Court know, having a range of salary options for law clerks enables judges to select clerks with varying degrees of experience, in a way that might not be possible with a single fixed salary. For instance, if a judge were limited to paying a law clerk a salary of $80,000, candidates with many years of experience might be out of reach, whereas having the flexibility to offer between, for example, $70,000 and $95,000 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.

The Committee sought to give the Governor similar flexibility in recommending a range of salaries for Tier C and Tier D Commissioners. The salary ranges allow the Governor—who is responsible for appointing these commissioners and deciding whether they are qualified and loyal —greater flexibility in hiring in accordance with current agency workload, needs, and responsibilities. (R64-65.) Not only does the Committee's recommendation setting a salary range and leaving the Governor discretion to calibrate within that range make logical sense,

but it has also 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.)

In sum, the Committee's recommendations restructuring the salary tiers, recommending a range of salaries for Tier C and Tier D commissioners, and allowing the Governor flexibility to set a precise salary within those ranges, all directly further the overarching policy established by the Legislature in the 2018 Enabling Act that salaries for commissioners be adequate and reflect their workload and responsibilities.

CONCLUSION

The Appellate Division's order should be affirmed.

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December 16, 2021

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