APL 2021-00080
Albany County Clerk's Index No. 907537-18

Court of Appeals
State of New York

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

Plaintiffs-Appellants,

— against —

STATE OF NEW YORK and THOMAS P. DINAPOLI,
In His Capacity As Comptroller Of The State Of New York,

Defendants-Respondents.

BRIEF OF AMICUS CURIAE CARL E. HEASTIE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NEW YORK STATE ASSEMBLY

Andrew D. Silverman
Abigail Colella
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

INTRODUCTION

Proposed amicus curiae, Carl E. Heastie, both individually and in his official capacity as Speaker of the New York Assembly, submits this brief in support of Defendants-Respondents. This brief will focus on the 2019 pay increase for members of the New York Legislature, which the Appellate Division correctly upheld. This Court should affirm.

Part HHH of Chapter 59 of the Laws of 2018 ("Part HHH") created the Committee on Legislative and Executive Compensation and directed it to determine whether legislative salaries "warrant an increase." In doing so, the statute identified numerous factors for the Committee to consider, specifically constrained the Committee's authority to make certain recommendations, and allowed the Legislature and Governor to modify or abrogate any recommendation before it took effect. The Supreme Court and Appellate Division both upheld the Committee's recommendation related to the 2019 legislative salary increase, as well as the salary increase for certain statewide elected officials and state Commissioners.

Plaintiffs continue to argue, however, that Part HHH should be struck down in its entirety because, in their view, the Legislature

unconstitutionally delegated legislative pay-setting authority to the Committee. The Appellate Division rightly rejected that argument. In fact, the court pointed out, it had already rejected essentially the same argument in *Center for Judicial Accountability, Inc. v. Cuomo*, 167 A.D.3d 1406, 1411 (3d Dept. 2018), *lv. denied*, 34 N.Y.3d 961 (2019), which involved a nearly identical statute delegating authority to a commission to increase judicial compensation. The Appellate Division was correct, both below and in *Center for Judicial Accountability*. Part HHH is a constitutionally permissible delegation of authority because it set out a defined policy, established a set of factors for the Committee to consider, and provided the requisite constitutional safeguards by (among other things) ensuring that the Legislature and the Governor had an opportunity to modify or abrogate Committee recommendations before they are effective.

There can be no serious dispute that the Committee, having been duly delegated authority by the Legislature and Governor, acted well within its statutory mandate in recommending the 2019 legislative pay increase that the Supreme Court upheld. The very purpose of the Committee was to "examine, evaluate, and make recommendations with

respect to adequate levels of compensation" and "determine whether, on January 1, 2019, the annual salary … of members of the legislature, statewide elected officials, and … state [Commissioners] … warrant an increase." Part HHH, §§ 1, 2.2. That is precisely what the Committee did. That the Committee may have exceeded its statutory mandate as to a different recommendation that has already been overturned does not take the 2019 legislative salary increase outside the Committee's statutory authority. Indeed, the Supreme Court properly severed the recommendations that it found extra-statutory from the plainly authorized 2019 salary increase, which it upheld. Plaintiffs did not contest before the Appellate Division the Supreme Court's thorough severability analysis or its severability holding, and it is too late to do so now. This Court should affirm.

ARGUMENT

I. Part HHH Is A Constitutional Delegation Of Pay-Setting Authority.

Out of "respect due [to] the legislative branch," courts afford statutes a strong presumption of constitutionality. *Dunlea v. Anderson*, 66 N.Y.2d 265, 267 (1985). They therefore approach "with the utmost reluctance" claims, like Plaintiffs' here, that a statute unconstitutionally delegates

"lawmaking power[] to the executive branch." *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987). Indeed, Plaintiffs' facial constitutional challenge must fail unless Plaintiffs demonstrate beyond a reasonable doubt that "the law suffers wholesale constitutional impairment" "in any degree and in every conceivable application." *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (quoting *Cohen v. New York*, 94 N.Y.2d 1, 8 (1999)).

Plaintiffs nevertheless insist that Part HHH was an unconstitutional delegation of authority because, in their view, it allows the Committee to act as the Legislature, fails to provide sufficient safeguards and standards, and violates the New York Constitution's requirement that certain legislative compensation amounts be "fixed by law." N.Y. Const. art. III, § 6. All of these arguments fail. The Legislature's delegation of authority charged the Committee with implementing the Legislature's articulated policies—not stepping into the shoes of the Legislature and passing laws freely. § I.A. Part HHH further established a framework to guide and constrain the Committee's exercise of delegated authority that is far more thorough than several others that courts have upheld as permissible delegations of authority. § I.B. And the Legislature complied with the New York Constitution's "fixed by law" requirement by creating and

empowering a committee to make recommendations that will have the force of law, while reserving for the Legislature and the Governor the right to modify or abrogate those recommendations. § I.C.

A. The Legislature's delegation did not give the Committee full legislative authority to pass laws.

Plaintiffs begin by insisting that Part HHH authorizes the Committee to pass laws, thereby transforming it into the Legislature. Pls' Br. 7-8. That is wrong on multiple scores.

To start, it is well established that the Legislature may "enact a general statute that reflects its policy choice" and delegate authority to an agency or commission, such as the Committee, to "expand upon the statutory text by filling in details consistent with that enabling legislation." *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018); *see also Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976) ("[T]here 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."). That permissible delegation of authority does not impermissibly elevate the Committee to the status of the Legislature.

Further, while the Legislature alone is tasked with passing statutes, that does not mean, as Plaintiffs seem to say, that only the Legislature's direct pronouncements may be considered the law. Concomitant with the Legislature's ability to delegate authority to expand upon the statutory text is the implication that such expansions will also be the law. As this Court explained more than a century ago, "[a]n ordinance of the common council, regularly passed, and within the scope of the authority conferred upon it by the legislature, is a law." *Matter of Mut. Life Ins. Co. of N.Y.*, 89 N.Y. 530, 533 (1882).

B. The Legislature's delegation provided constitutionally adequate safeguards and standards.

Having established the Legislature may delegate authority to the Committee, the question becomes whether the delegation in Part HHH is constitutional. It unquestionably is.

A delegation of authority is constitutional so long as the statute includes "reasonable safeguards and standards" to guide the Committee's decision-making. *Levine*, 39 N.Y.2d at 515. In applying that test, this Court has stressed that there is no requirement "that the agency [or commission] be given rigid marching orders," *LeadingAge New York*, 32 N.Y.3d at 260, or that the statute "be a specific and detailed legislative

expression" of the precise policy intended, *Matter of Retired Pub. Emps. Ass'n, Inc. v. Cuomo*, 123 A.D.3d 92, 97-98 (3d Dep't 2014). Indeed, the Legislature's delegation of authority is proper even where that authority is "circumscribed in only the most general of terms." *Boreali*, 71 N.Y.2d at 10. This Court thus has consistently upheld the delegation of authority in circumstances where such authority was governed by broad terms. *See, e.g.*, *Levine*, 39 N.Y.2d at 516-17 (upholding delegation of authority for the "protection and promotion of the health of the inhabitants of the State"); *Matter of Sullivan Cnty. Harness Racing Ass'n v. Glasser*, 30 N.Y.2d 269, 277 (1972) (delegation of authority proper where enacted for the "public interest, convenience or necessity" and the "best interests of racing generally"); *Martin v. State Liquor Auth.*, 15 N.Y.2d 707, 708 (1965) (upholding delegation of power for the "public convenience and advantage").

Part HHH is far more specific than those delegations of authority that have previously been upheld. It directs the Committee to "examine, evaluate and make recommendations with respect to adequate levels of compensation" for legislators, statewide elected officials, and state Commissioners. Part HHH, § 1. It then sets forth eight non-exclusive factors to guide the Committee's consideration of whether circumstances

"warrant an increase" in the "annual salary" of those officeholders. *Id.* §§ 2.2-2.3. Those factors are:

> [1] the parties' performance and timely fulfillment of their statutory and Constitutional responsibilities;
>
> [2] the overall economic climate;
>
> [3] rates of inflation;
>
> [4] changes in public-sector spending;
>
> [5] the levels of compensation and non-salary benefits received by executive branch officials and legislators of other states and of the federal government;
>
> [6] the levels of compensation and non-salary benefits received by comparable professionals in government, academia and private and nonprofit enterprise;
>
> [7] the ability to attract talent in competition with comparable private sector positions; and
>
> [8] the state's ability to fund increases in compensation and non-salary benefits.

Part HHH, § 2.3.

The statute further places significant limitations on the Committee's ability to recommend cost-of-living adjustments and multi-phased pay increases, requiring them to "be conditioned upon performance [by] the executive and legislative branch and upon the timely legislative passage of the budget." *Id.* § 2.4(b)-(c). Finally, the statute requires the Committee to

"report to the [G]overnor and the [L]egislature … its findings, conclusions, determinations and recommendations" for their review by a certain date. *Id.* § 4.1. These detailed parameters governing the Legislature's delegation of authority provide an articulated policy standard for the Committee to implement and are more than "reasonable safeguards and standards" to ensure the constitutionality of the delegation. *Levine*, 39 N.Y.2d at 515.

Center for Judicial Accountability, Inc. v. Cuomo, 167 A.D.3d 1406 (3d Dept. 2018), *lv. denied*, 34 N.Y.3d 961 (2019), is directly on point and confirms the constitutionality of the delegation in Part HHH, as the court below correctly held. In *Center for Judicial Accountability*, the Appellate Division rejected a delegation challenge to a nearly identical statute, which created a commission and delegated it authority to increase judicial compensation. *Id.* at 1411. Much like Part HHH here, the judicial-compensation statute "directed the Commission to examine judicial salaries[,] … make recommendations regarding the adequacy of judicial compensation based on numerous factors specified by the Legislature," and "report its recommendations directly to the Legislature so that it would have sufficient time to exercise its prerogative to reject any Commission recommendations before they become effective." *Id.* at 1410-1411. No

delegation problem arose, the Appellate Division concluded, because the statute "provide[d] adequate standards and guidance for the exercise of discretion by the Commission." *Id.* at 1411. The same is true here, in circumstances that are materially indistinguishable.

Plaintiffs attempt to resist the clear relevance of *Center for Judicial Accountability* by arguing that it did not address the effect of a "supersession provision" that delegates the authority not only to execute the law but also to supersede existing law. Pls' Br. 12-13. Specifically, Plaintiffs home in on a clause in Part HHH providing that the Committee's recommendations "shall have the force of law, *and shall supersede, where appropriate, inconsistent provisions*" of relevant existing law. Part HHH, § 4.2; *see also* Pls' Br. 12. According to Plaintiffs, the italicized language crosses the constitutional line and *Center for Judicial Accountability* failed to take such language into account.

Plaintiffs' fixation on the supersession clause is misplaced. The nearly identical statute in *Center for Judicial Accountability* contained a nearly identical supersession clause. *See* L. 2015, ch. 60, Part E, § 7; *see also* Pls' Br. 13 & n.39. And the Appellate Division still concluded that the

statute "d[id] not unconstitutionally delegate legislative power to the Commission." *Ctr. for Jud. Accountability*, 167 A.D.3d at 1410-1411.

In any event, there is nothing extraordinary about that "shall supersede" language that Plaintiffs emphasize. That language merely clarifies how any "inconsisten[cies]" that may arise between existing and new law should be resolved. But the effect of the clause is hardly new: It has long been a general rule that new laws control over existing laws when there is an irreconcilable conflict between the two. *Mut. Life Ins. Co. of N.Y. v. Smyth*, 247 A.D. 27, 29 (1st Dep't 1936). And because Committee recommendations that may become law are constrained by the guidelines set forth by the Legislature, any supersession effect of Committee recommendations is circumscribed to the scope of the Committee's properly delegated authority. The supersession language does not, as Plaintiffs appear to suggest, give the Committee free range to supersede laws the Committee finds disagreeable.

Plaintiffs likewise err in parsing a distinction between Committee recommendations that permissibly carry "the force of law" and that "would be *the law*." Pls' Br. 14. Plaintiffs concede, as they must, that the Legislature may in certain circumstances delegate to another body

authority to "promulgat[e] regulations with the force of law." *Id.* And they cite no authority for a purported distinction between a delegated act carrying the force of law and that act being the law. That is because no such distinction exists. As already explained, this Court has long maintained that "the law" comprises not only statutes directly passed by the Legislature, but also rules and regulations promulgated pursuant to properly delegated authority. *See Mut. Life Ins. Co.*, 89 N.Y. at 533. At bottom, Plaintiffs' argument on this score repackages their earlier argument that the Legislature's delegation of authority gave the Committee the Legislature's power to pass statutes, and that argument remains wrong.

Plaintiffs also argue that Part HHH provides "no workable constitutional safeguard[s]" because the Committee's recommendations may become law if the Legislature and Governor do not modify or abrogate them. Pls' Br. 16-17. In addition to ignoring all the other standards set forth in Part HHH, that argument gets it backwards. Far from expanding the Committee's delegated authority beyond constitutional bounds, the Legislature's and Governor's ability to modify or abrogate the Committee's recommendations constrains the Committee's delegated authority. What

Plaintiffs seem to demand is a rule that agencies or commissions charged with implementing a statute pursuant to delegated authority must obtain specific approval or ratification from the Legislature and Governor before any of their rules may take effect. But no such rule exists. Indeed, such a rule would run counter to the very point of delegation, as well as to precedents making clear that delegations of authority are permissible even where authority is "circumscribed in only the most general of terms." *Boreali*, 71 N.Y.2d at 10.[1] Properly understood, the Legislature's and Governor's ability to modify or abrogate the Committee's recommendations is one of numerous safeguards contained in Part HHH—not, as Plaintiffs insist, proof of the statute's failure to provide safeguards.

Unable to cast the Legislature's delegation as impermissibly overbroad or identify unreasonable safeguards or standards set by the Legislature, Plaintiffs turn to an unpublished, non-precedential trial-court

---

[1] For similar reasons, Plaintiffs' complaints that the Committee's recommendations were not "presented to the Governor for approval," Pls' Br. 17, go nowhere. There is no rule that the Governor must approve all rules or recommendations issued pursuant to properly delegated authority. As the Appellate Division below explained, while statutes must be presented to the Governor for approval, the Governor here approved Part HHH, including its requirement that the Committee submit its recommendations to the Governor (and Legislature) for review. *See* App. Op. 6.

decision: *Hurley v. Pub. Campaign Fin. and Election Comm'n*, 69 Misc.3d 254 (Sup. Ct., Niagara Cnty. 2020). *Hurley* is inapposite and does not address key precedents on delegation. There, the Legislature delegated authority to a commission created to introduce public campaign finance reform to the Election Law, and the court invalidated the delegation because the Legislature "clearly and unequivocally" authorized the commission to "legislate new law" in violation of the New York Constitution. *Id.* at 260. Here, of course, the Legislature did not grant the committee a blank check to make new law. It set out detailed parameters governing its policy choice that legislative pay be adequate, and the Legislature authorized the Committee to implement that policy choice in accordance with those parameters.

Hurley, meanwhile, made no mention of any statutory standards that would guide the work of the commission established to reform public campaign finance. The court simply rejected, without explanation or citation to authority, the premise that the Legislature's right to modify or abrogate the commission's reform measures could be an adequate safeguard. *Hurley* thus did not grapple with the situation here—or in *Center for Judicial Accountability*—where the delegating statute provides

numerous additional safeguards to govern the Committee's implementation of the statutory mandate, beyond the Legislature's (and Governor's) right to modify or abrogate. And even setting aside the plainly distinguishable circumstances of *Hurley*, that decision is in no way binding on and carries no persuasive force in this Court.

C. The Legislature complied with the New York Constitution's "fixed by law" requirement.

Plaintiffs next claim that Part HHH violates the Constitution's mandate that certain compensation amounts must be "fixed by law." *See* Pls' Br. 18 & n.50 (citing N.Y. Const. art. III, § 6). As Plaintiffs' argument goes, because the Constitution vests the Legislature "with the exclusive power to make laws generally," Pls' Br. 18 & n.51 (citing N.Y. Const. art. III, § 1), "fixed by law" must mean only "legislation passed in the ordinary course [by the Legislature], subject to the Governor's veto power," Pls' Br. 19.

Again, Plaintiffs misunderstand what constitutes "law." More than a century ago, this Court concluded that the phrase "fixed and established by law," as used in the Act of 1871, meant fixed by any "competent authority," including "an ordinance of the common council"—not just statutes passed by the Legislature. *Mut. Life Ins. Co.*, 89 N.Y. at 533. The United States

Supreme Court likewise has concluded that the precise phrase at issue here—"fixed by law"—unambiguously includes the "law" of "municipal ordinance[s] as well as statutes." *U.S. Fid. & Guar. Co. v. Guenther*, 281 U.S. 34, 37 (1930) (quotation marks omitted). As that Court explained, in the phrase "'fixed by law,' … the term 'law' is used in a generic sense, as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force." *Id.*

Plaintiffs offer no compelling reason why "fixed by law" should take on a different meaning in the New York Constitution. Plaintiffs point to the fact that after the New York Constitution was amended in 1948 to incorporate the current form of the "fixed by law" requirement, the Legislature fixed legislative compensation amounts directly by statute for many years. Citing *New York Public Interest Research Group v. Steingut*, 40 N.Y.2d 250 (1976), they say that this practice is owed "[g]reat deference" as the "legislative exposition of a constitutional provision." Pls' Br. 20 (quoting *Steingut*, 40 N.Y.2d at 258). But neither the Legislature's immediate post-1948 practice nor *Steingut* supports the narrow reading of "fixed by law" urged by Plaintiffs.

Of course the 1948 amendment permitted the Legislature to fix legislative compensation amounts directly by statute; that is *one way* of fixing compensation amounts by law. Plaintiffs' argument depends on it being the only way of fixing compensation, and the historical evidence Plaintiffs point to fails to show that. Indeed, nothing in that history shows that the Legislature cannot fix legislative compensation by setting forth several guidelines and delegating authority to a commission or committee for implementation of the details—that too is a means of fixing compensation by law.

Steingut is not to the contrary. There, this Court pointed to the Legislature's historic practice to *reject* a "too narrow" reading of the Legislature's constitutional authority to fix certain compensation amounts by law. *Steingut*, 40 N.Y.2d at 259. The challengers had argued that particular allowances for legislators were not "fixed by law" at the beginning of a legislative session because they were provided only by supplemental budgetary appropriation in the preceding year, but this Court rejected that reading, finding that "[n]othing in [the Constitution] contemplates" such a "constricted" and "practically unrealistic" vision of the Legislature's authority. *Id.* As one factor

(among others) supporting its conclusion, the Court cited the fact that the Legislature had historically treated the complained-of allowances as "fixed by law." In other words, the Legislature's historic practice was relevant in *Steingut* because it *conflicted* with, and thus tended to refute, the narrow reading advanced by the challengers. Here, by contrast, nothing about the Legislature's earlier method of fixing by law conflicts with the current method of fixing by law. Both methods comply with the constitutional requirement that the compensation amounts in question be "fixed by law."

Plaintiffs also make much of a 1946 joint legislative committee's statement in support of a constitutional amendment to vest the Legislature "with power to adjust salaries by law," in a manner that "would require consent of the Governor." R.105 (Final Rep. of the Joint Comm. On Legislative Methods, Practices, Procedures and Expenditures, 1946 N.Y. Legis Doc. No. 31 at 171). Nothing about that statement is inconsistent with the Legislature's method of "fixing by law" through Part HHH. Again, that statute set forth the Legislature's policy on salary adjustments, as well as detailed guidelines for implementing that policy, and the Governor approved the statute. That statute further allowed the Legislature and

Governor to modify or abrogate any recommendations before they became law.[2]

In short, the New York Constitution's "fixed by law" requirement does not require the Legislature and Governor to control every aspect of compensation directly via statute. Rather, the Legislature and Governor here complied with the "fixed by law" requirement by enacting a law empowering a committee to make recommendations that would have the force of law only after the coordinate branches had an opportunity to modify or abrogate the recommendations. Part HHH, § 4.2.

II. The Committee Did Not Exceed Its Constitutionally Delegated Powers.

Plaintiffs argue in the alternative that, if the Legislature did permissibly grant the Committee pay-setting authority in Part HHH, the Committee exceeded the scope of the delegation. That claim, too, fails. Part HHH specifically directed the Committee to "examine, evaluate, and make recommendations with respect to adequate levels of compensation … for members of the [L]egislature," and to "determine

[2] The "complete history" of the federal Salary Act does not favor Plaintiffs' interpretation of "fixed by law" either. Pls' Br. 23. That statute bore little resemblance to Part HHH.

whether, on January 1, 2019, the annual salary … of members of the [L]egislature … warrant an increase." Part HHH, §§ 1, 2.2. The Committee acted well within the scope of that statutory mandate in recommending that legislative pay be increased on January 1, 2019.

A. The *Boreali* factors confirm that the Committee properly engaged in administrative rule-making.

Despite protesting that the Committee acted beyond the scope of its delegated authority, Plaintiffs fail to address the four factors set out in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), that help courts "determin[e] whether an agency has crossed the hazy 'line between administrative rule-making and legislative policy-making,'" *Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 610 (2015). Under those factors, the Committee acted well within the scope of its properly delegated authority.

The first *Boreali* factor considers whether the agency did more than balance the costs and benefits according to preexisting guidelines and instead made "value judgments entailing difficult and complex choices between broad policy goals to resolve social problems." *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 610 (quotation marks and brackets omitted). Here, the Legislature made the policy decision that legislative

pay should be "adequate" in view of specific statutory factors, including "rates of inflation," "the levels of compensation … received by … legislators of other states and of the federal government," "the ability to attract talent," and "the state's ability to fund increases in compensation." Part HHH, § 2.3. Accordingly, the Committee examined the adequacy of legislative pay within the parameters of those guidelines and determined that increasing legislative pay in 2019 would implement the legislature's policy goal of ensuring "adequate" pay for legislators. Because "the basic policy decisions" underlying the legislative pay increase were "made and articulated by the Legislature," *N.Y. State Health Facilities Ass'n v. Axelrod*, 77 N.Y.2d 340, 348 (1991), this factor favors finding the Committee's legislative salary increase as proper administrative rulemaking.

The second *Boreali* factor evaluates "whether the agency wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance or whether it simply filled in the details of broad legislation describing the over-all policies to be implemented." *Matter of Acevedo v. N.Y. State Dep't of Motor Vehs.*, 29 N.Y.3d 202, 223-24 (2017) (quotation marks and brackets omitted). An agency does not

write on a blank slate if the Legislature has provided "a clear legislative policy decision." *Id.* at 224; *see Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 609 ("As long as the legislature makes the basic policy choices, the legislation need not be detailed or precise as to the agency's role."). When the Legislature provides clear policy direction, a committee can have the "power and flexibility" to "make subsidiary policy choices consistent with the enabling legislation"—the Legislature need not provide "rigid marching orders." *Matter of Citizens For An Orderly Energy Policy, Inc. v. Cuomo*, 78 N.Y.2d 398, 410 (1991).

Here, the Committee's recommendation to increase legislative pay is plainly consistent with the text and purpose of Part HHH, which directs the Committee to "examine" and "evaluate" whether the legislative compensation in 2018 was "adequate" and "make recommendations" whether their salaries "warrant an increase" in light of lengthy list of factors to be considered. Part HHH, §§ 1, 2.2-2.3. Rather than starting off with a "clean slate," this case is a clear example where "the basic policy decisions underlying" the legislative pay increase were "made and articulated by the Legislature," with the

details filled in and implemented by the Committee. *Bourquin v. Cuomo*, 85 N.Y.2d 781, 785 (1995) (quotation marks omitted).

The third *Boreali* factor contemplates whether the Legislature has repeatedly but unsuccessfully tried to resolve the same issue. *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 611-12. But "[l]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences." *Bourquin*, 85 N.Y.2d at 787-88 (quotation marks omitted). Rather, this third factor is relevant only when there has been prolonged legislative deadlock on the same subject the agency has chosen to regulate—such as the situation in *Boreali*, where 40 bills to prohibit smoking in specific public places failed "in the face of substantial public debate and vigorous lobbying" over more than a decade. 71 N.Y.2d at 13. Here, however, the Legislature has been mostly inactive on the issue, having rejected only a few bills on the subject. The Legislature's rejection of a few bills will not support invalidation of a regulation. In *Acevedo*, for example, the Court of Appeals found that the third factor could not limit a regulation restricting the relicensing of drunk drivers, despite the fact that the Legislature previously rejected three bills on that same subject. 29

N.Y.3d at 225. Ultimately, the third factor offers "limited probative value" in this situation because this is nothing like the kind of repeated legislative failure typically needed to invoke it. *Id.*

The final *Boreali* factor considers "whether the agency used special expertise or competence in the field to develop the challenged regulations." *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 612. Here, the Committee's decision involved special expertise and thorough consideration of relevant data—as opposed to the pure value judgments reserved for the Legislature. *Acevedo*, 29 N.Y.3d at 226. The Legislature directed the Committee to evaluate several technical considerations, including "rates of inflation" and comparative legislative compensation structures. Part HHH, § 2.3. And, like in *Acevedo*, the Committee was directed to "utilize … data" in determining how to implement the Legislature's policy. *Id.* § 3.4. Because the Committee's decision involved special expertise and the Committee relied on such expertise, the fourth *Boreali* factor also indicates that the legislative pay increase was within the Committee's statutory mandate.

B. The Committee did not change the job descriptions of legislators.

Ignoring the *Boreali* analysis, Plaintiffs instead claim that the Committee exceeded the scope of its authority by reclassifying legislators as full-time employees rather than part-time employees. Pls' Br. 28-30. The Committee did no such thing. The Committee merely acknowledged that legislators' roles have evolved and become more complicated, so that they may be more akin to fulltime jobs. (Indeed, the COVID-19 pandemic has further confirmed the Committee's views.) But none of the Committee's recommendations actually redefined or reclassified legislators' job description. And, as the Appellate Division below rightly observed, the Committee's findings regarding the characteristics of legislators' positions were wholly within its statutory mandate to consider legislators' "performance and timely fulfillment of their statutory and [c]onstitutional responsibilities." Part HHH, § 2.3; *see also* App. Op. 8; Sup. Ct. Op. 17 ("The Committee was tasked with examining the nature of the position as part of its recommendation."). That the Committee fulfilled its directive to scrutinize the nature of legislators' roles obviously cannot invalidate its recommendations regarding the 2019 legislative pay increase.

Contrary to Plaintiffs' contention, moreover, the Appellate Division below did not err by pointing out that the statute expressly directs the Committee to consider "the parties' performance and timely fulfillment of their statutory and [c]onstitutional responsibilities." Pls' Br. 32 (quoting Part HHH, § 2.3); *see also* App. Op. 8. That statutory factor encompasses the Committee's consideration of legislators' "ability … to fulfill their responsibilities to serve the public in a focused and ethical manner." R.57.

III. The 2019 Legislative Salary Increase Was Severable From Other Recommendations Invalidated By The Supreme Court Below.

The Supreme Court refused to invalidate the whole of the Committee's recommendations when it found that a subset of those recommendations went beyond the scope of delegated authority. Specifically, the Supreme Court found that restrictions that were to take effect in 2020 that limited the amount of outside income of legislators and precluded them from performing certain jobs, such as those with fiduciary obligations, went beyond the Committee's statutory mandate. At the Speaker's urging, the Supreme Court severed those recommendations, holding that "the recommendations … related to

salary increases for 2019 continue to have the force of law," while the recommendations for 2020 and beyond "are null and void." Sup. Ct. Op. at 17-18; *accord id.* at 15.

Plaintiffs did not challenge on appeal to the Appellate Division the Supreme Court's severability holding or its thorough severability analysis. Nor do Plaintiffs attempt to raise such challenges before this Court. Plaintiffs have therefore abandoned any argument regarding severability. *See Giblin v. Pine Ridge Log Homes, Inc.*, 42 A.D.3d 705, 706 (3d Dep't 2007); *Matter of Zimmerman v. Planning Bd.*, 294 A.D.2d 776, 777-78 (3d Dep't 2002).

In any event, the 2019 legislative salary increase was plainly severable. The test for severability is "whether the Legislature 'would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.'" *Matter of N.Y. State Superfund Coal., Inc. v. N.Y. State Dep't of Env't Conservation*, 75 N.Y.2d 88, 94 (1989) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920)). The Legislature would have wanted the invalid part to be severed, as evidenced by the severability clause in the enabling legislation (Part UUU, § 2 of Chapter 59 of the Laws of 2018), which

itself "raises a presumption that the legislature intended the act to be divisible," *People v. Kearse*, 56 Misc.2d 586, 596 (Syracuse City Ct. 1968).

Such a presumption may be overcome only if "the valid and invalid provisions are so intertwined that excision of the invalid provisions would leave a regulatory scheme that the legislature never intended." *Nat'l Adv. Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (citing *N.Y. State Superfund Coalition*, 75 N.Y.2d at 94). But, as the Supreme Court recognized, and Plaintiffs have not challenged, that is not the situation in this case. The legislative pay increase that took effect on January 1, 2019, was entirely independent from the recommendations for 2020 and beyond. Indeed, the outside income restrictions did not take effect until 2020 (a year after the 2019 raise), demonstrating that the 2019 raise was in no way conditioned on or connected to the outside income limitations. The Supreme Court therefore correctly concluded that the 2019 raise and 2020 recommendations were not "so intertwined" as to overcome the presumption of severability.

CONCLUSION

The Court should affirm the Appellate Division's holding that the 2019 legislative pay increase is valid and remains in effect.

New York, New York
Dated: February 11, 2022

Respectfully submitted,

/s/ Andrew D. Silverman

By: Andrew D. Silverman
Abigail Colella
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
asilverman@orrick.com
acolella@orrick.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), I hereby certify that the total word count for all printed text in the body of the brief is 5396 words, excluding parts identified as common requirements by § 500.13(c)(3).

/s/ Andrew D. Silverman
Andrew D. Silverman
Attorney for Amicus Curiae