No. APL-2024-00076

To be argued by:
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State of New York
Court of Appeals

ANDREW M. CUOMO,

Plaintiff-Respondent,

v.

NEW YORK STATE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT,

Defendant-Appellant.

BRIEF AND ADDENDUM FOR APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

QUESTION PRESENTED 4

JURISDICTIONAL STATEMENT 4

STATEMENT OF THE CASE 5

A. Statutory Context and Background 5

1. The State's Predecessor Ethics Agency 5

2. The Commission's Powers 9

3. The Commission's Structure 12

B. Proceedings Below 14

ARGUMENT

THE COMMISSION'S STRUCTURE COMPLIES WITH NEW YORK'S SEPARATION OF POWERS 19

A. The Separation-of-Powers Doctrine Requires a Functional, Context-Specific Inquiry. 20

B. The Separation-of-Powers Doctrine Allows for a State Ethics Commission That Is Not Dominated by the Political Branches It Monitors 24

1. The Commission's Structure Is Integral to Its Ability to Fulfill Its Mission. 24

2. The Commission's Structure Does Not Constitute a Legislative Usurpation of Executive Power. 28

Page

C. The Appellate Division's Sweeping View of Gubernatorial Control Is Contrary to New York's Precedent and Practice 33

1. The Third Department Misconstrued New York's Take Care and Vesting Clauses. 33

2. The Commission's Appointment Process Is Consistent with New York's Precedent and Practice. 39

3. The Commission's Removal Process Is Consistent with New York's Precedent and Practice and, in Any Event, Any Defect in That Process Would Not Entitle Plaintiff to Relief. 57

4. Precedent from Other States Supports the Commission's Structure........ 64

CONCLUSION 72

AFFIRMATION OF COMPLIANCE

TABLE OF AUTHORITIES

Cases **Page(s)**

Adler v. Deegan,
251 N.Y. 467 (1929) 52

Boreali v. Axelrod,
71 N.Y.2d 1 (1987) 22

Bourquin v. Cuomo,
85 N.Y.2d 781 (1995) 21, 27

Cappelli v. Sweeney,
167 Misc. 2d 220 (Sup. Ct., Kings County 1995) 46

Cohen v. State,
94 N.Y.2d 1 (1999) 21, 23-24, 27-28

Collins v. Yellen,
594 U.S. 220 (2021) 62

Consumer Fin. Protection Bur. v. Law Offs. of Crystal Moroney, P.C.,
63 F.4th 174 (2d Cir. 2023) 63

Cuomo v. New York State Commn. on Ethics & Lobbying in Govt.,
2023 N.Y. Slip Op. 75090(U) (3d Dep't 2023) 17

Delgado v. State,
39 N.Y.3d 242 (2022) 20-23, 28-29, 34

K & R Contractors, LLC v. Keene,
86 F.4th 135 (4th Cir. 2023) 63-64

Lanza v. Wagner,
11 N.Y.2d 317 (1962) 26, 48-50, 56, 64, 68

Litchfield v. McComber,
42 Barb. 288 (Gen. Term. 1864) 40-41

Cases **Page(s)**

Marine Forests Socy. v. California Coastal Commn.,
36 Cal. 4th 1 (2005) 34-35, 65-68

Matter of Acevedo v. New York State Dept. of Motor Vehs.,
29 N.Y.3d 202 (2017) 28

Matter of La Carrubba v. Klein,
59 A.D.2d 99 (2d Dep't 1977) 59

Matter of LeadingAge N.Y., Inc. v. Shah,
32 N.Y.3d 249 (2018) 20

Matter of McAneny v. Board of Estimate & Apportionment of City of N.Y.,
232 N.Y. 377 (1922) 52

Matter of Ricker v Village of Hempstead,
290 N.Y. 1 (1943) 19, 28

Matter of Trustees of Vil. of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.,
191 N.Y. 123 (1908) 21, 37-38

Parcell v. State,
228 Kan. 794 (1980) 66, 70

Pataki v. New York State Assembly,
4 N.Y.3d 75 (2004) 30

People ex rel. Brown v. Woodruff,
32 N.Y. 355 (1865) 44

People ex rel. Cline v. Robb,
126 N.Y. 180 (1891) 59, 61

People ex rel. Gere v. Whitlock,
92 N.Y. 191 (1883) 59

People ex rel. Peaks v. Voorhis,
243 N.Y. 420 (1926) 52

Cases **Page(s)**

People ex rel. Percival v. Cram,
164 N.Y. 166 (1900) 59

People v. Tremaine,
252 N.Y. 27 (1929) 45

People v. Viviani,
36 N.Y.3d 564 (2021) 35

Rapp v. Carey,
44 N.Y.2d 157 (1978) 20, 30, 32, 35-36

Saratoga County Chamber of Commerce v. Pataki,
100 N.Y.2d 801 (2003) 21

Seila Law LLC v. Consumer Fin. Protection Bur.,
140 S. Ct. 2183 (2020) 34, 57

Seymour v. Elections Enforcement Commn.,
255 Conn. 78 (2000) 65-66

Soares v. State of New York,
68 Misc. 3d 249 (Sup. Ct., Albany County 2020) 46, 55

State Bd. of Pharm. v. Bellinger,
138 A.D. 12 (2d Dep't 1910) 43

State Through Bd. of Ethics for Elected Officials v. Green,
566 So. 2d 623 (La. 1990) 66, 69

Sturgis v. Spofford,
45 N.Y. 446 (1871) 41-43, 56

Sun Print. & Publ. Assn. v. Mayor,
8 A.D. 230 (1st Dep't 1896) 44

United Transp. Union v. Long Island R.R. Co.,
455 U.S. 678 (1982) 40

Cases **Page(s)**

White v. Cuomo,
38 N.Y.3d 209 (2022) 19, 64

Constitutions

1777 N.Y. Const.
art. XIX 34
art. XVII 34, 37
art. XXIII.......... 37
art. XXVII 38

1821 N.Y. Const.
art. IV, §§ 1-14 39
art. IV, § 15 39

1846 N.Y. Const.
art. X, § 2.......... 40

1938 N.Y. Const.
art. IX, https://babel.hathitrust.org/cgi/pt?id=mdp.
39015065532213&seq=83 51

N.Y. Const.
art. III, § 1 50
art. IV, § 1 15
art. IV, § 3 15
art. IV, § 4 58
art. IV, § 7 31
art. V, § 1.......... 9
art. V, § 4.......... 9, 45
art. VII, §§ 1-7.......... 30
art. VII, § 2.......... 30
art. VII, § 3.......... 30
art. VII, § 4.......... 31
art. IX, § 9 50
art. IX, §§ 1-3 51
art. IX, § 3(a)(3).......... 52

Constitutions **Page(s)**

N.Y. Const. (cont'd)
art. XIII, § 13(a) 58
art. XIII, § 2 58
art. XIII, § 6 59

State Statutes

L. 1853
ch. 467, § 1.......... 41
ch. 467, § 2.......... 41
ch. 467, §§ 9-10.......... 41
ch. 467, § 12.......... 41

L. 1900
ch. 667, § 1, § 190(4).......... 43

L. 1928
ch. 112, § 1.......... 60

L. 1937
ch. 914, § 2(2) 47

L. 1958
ch. 989, §§ 1-2.......... 48

L. 1983
ch. 1001, § 1.......... 48

L. 2008
ch. 56, pt. G, § 1 48

L. 2011
ch. 62, pt. C, subpt. A, § 38 31
ch. 399, pt. A, § 6(1) 6
ch. 399, pt. A, § 6(2) 6, 55
ch. 399, pt. A, § 6(3) 6
ch. 399, pt. A, § 6(7) 7, 61
ch. 399, pt. A, § 6(13)(a) 8
ch. 399, pt. A, § 6(14-a) 11

State Statutes **Page(s)**

L. 2018
ch. 650, § 1, pt. HHH, § 1 .... 22, 61

L. 2019
ch. 23, § 1 55

L. 2022
ch. 56, pt. QQ, §§ 1-2 8

L. 2024
ch. 50, § 1, pp. 240 31

C.P.L.R.
5519(e) 19
5602(b)(1) 4
5713 4
7803 11

Education Law
§ 202(1) 9

Executive Law
§ 6 30
§ 94 .... 4, 13, 15-16, 19, 25-26, 61-62, 72
§ 94(1)(a) 9
§ 94(1)(c) 15
§ 94(1)(f) 30-31
§ 94(2)(c) 12
§ 94(3) 56
§ 94(3)(a) 12, 29, 31
§ 94(3)(b) 12, 32
§ 94(3)(b)-(d) 26
§ 94(3)(c) 13
§ 94(3)(d) 13
§ 94(3)(e) 13, 32
§ 94(3)(j) 13
§ 94(4)(a) 13-14, 29, 32
§ 94(4)(c) 14, 32, 62

State Statutes **Page(s)**

Executive Law (cont'd)
§ 94(5)(a) 17
§ 94(5)(c) 17
§ 94(7) 9
§ 94(8) 9
§ 94(9) 10
§ 94(10) 10, 16, 18
§ 94(10)(d)-(f) 10
§ 94(10)(f) 10, 25
§ 94(10)(h) 10, 25
§ 94(10)(h)-(i) 10
§ 94(10)(n) 11
§ 94(10)(n)(iv) 11
§ 94(10)(o) 11
§ 94(10)(p) 25
§ 94(10)(p)(i) 11
§ 94(10)(p)(i)-(ii) 10
§ 94(10)(p)(ii) 11
§ 94(14) 10, 16, 18

Judiciary Law
§ 499-a 55
§ 499-b(2) 55
§ 499-c(1) 55
§ 499-c(3) 61
§ 499-d(1)-(2) 55
§ 499-f(7) 55

Legislative Law
article 1-A 10
§ 80(1) 55
§ 80(2)-(4) 61
§ 80(9) 11, 55
§ 80(10) 11
§ 80(10)(b) 55

State Statutes **Page(s)**

McKinney's Uncons. Laws of N.Y.
§ 7501 .... 48, 61
§ 7501(2) 48
§ 7502(1) 48
§ 7502(1)(b) 48
§ 7502(2) 48
§ 7502(11) 48
§ 7507 48

Navigation Law
§ 87 54
§ 87(1) 54, 61
§ 95(1) 54
§ 97(1) 54

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§ 32 60-61
§ 73-a 10
§ 74(3) 14

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Senate Introducer's Mem. in Support *in* Bill Jacket for L. 2011, ch. 399 6

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PRELIMINARY STATEMENT

New York State has a compelling interest in the fair and impartial enforcement of its ethics and lobbying laws. But the State has long struggled to create an ethics commission that is seen as able to achieve this vital goal. Soon after plaintiff Andrew M. Cuomo became Governor, he signed a law that created what he said would be a truly independent commission with jurisdiction over officials and employees within the Legislative and Executive Branches. A decade later, that ethics commission was widely perceived as unduly influenced by the officials whom it was supposed to monitor.

Upon taking office, Governor Kathy Hochul sought to address this problem. She included in the 2022-2023 budget a law that replaced the prior ethics commission with the Commission on Ethics and Lobbying in Government ("Commission"). The Commission's structure was carefully calibrated to ensure that it possessed the actual and perceived independence that would allow it to carry out its mission and restore the public's trust in government.

The Commission at full complement consists of 11 members who serve staggered four-year terms. Three are appointed by the Governor;

one is appointed by the Attorney General; and one is appointed by the Comptroller. The power to appoint the other six members is divided among the four legislative leaders. To ensure appointees are qualified, each is subject to the approval of a non-partisan body composed of the deans of the State's 15 accredited law schools. Further, the power to remove Commission members is vested in the Commission itself, which may remove a member for cause.

Plaintiff filed this declaratory judgment action against the Commission in Supreme Court, Albany County. He sought to enjoin the Commission's administrative proceeding against him that is based on ethics violations he is alleged to have committed while Governor. Relying primarily on recent federal caselaw that defines the President's powers under the U.S. Constitution, plaintiff claimed that the Commission's structure infringed upon the Governor's powers in violation of the separation-of-powers principles of New York's Constitution.

Relying on that same federal caselaw, Supreme Court held that the Commission's structure was unconstitutional. The Third Department, Appellate Division, affirmed. Both courts below held that, because the Commission exercised executive power, the separation-of-powers

doctrine required that the Governor have the power to appoint and remove all, or a majority of, the Commission's members.

This novel categorical rule fundamentally misconstrues the separation-of-powers doctrine as it has developed in New York. That doctrine is practical, flexible, and permits overlap between the branches of government. In this case, several factors, taken together, establish that the Commission's structure is constitutional.

To start, that structure is designed to meet a compelling and legitimate institutional need: It ensures that the Commission is sufficiently insulated, both in fact and in appearance, from the political branches it monitors and thereby able to fulfill its mission. And that structure embodies the political branches' considered judgment as to how to best regulate their own operations and thereby protect their integrity and good name—a judgment that is entitled to respect.

Equally important, the Commission's structure does not allow for the Legislature to usurp the executive power. The Governor agreed to the Commission's structure and has retained meaningful influence and supervision over the Commission's composition, funding, and operation.

And numerous statutory constraints prevent the Legislature from controlling the Commission.

Moreover, the categorical rule adopted by the courts below is irreconcilable with New York's constitutional history. That history demonstrates that the Constitution does not require that the Governor have full appointment, oversight, and removal power over every executive entity, regardless of that entity's function.

This Court should therefore reverse the Third Department's order and declare that the Commission's enabling act is constitutional.

QUESTION PRESENTED

Whether the Commission's structure comports with New York's separation-of-powers doctrine.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal because the Third Department granted leave to appeal on a certified question under C.P.L.R. 5602(b)(1) and 5713. (Record on Appeal ["R"] 953.) The Third Department's underlying order affirmed an order of Supreme Court that declared portions of Executive Law § 94 unconstitutional and granted an

injunction in plaintiff's favor. The issue of law that the Commission raises in this appeal is preserved because it was fully briefed and argued in the courts below. (*E.g.*, R.5-30, 393-414, 952-953.)

STATEMENT OF THE CASE

A. Statutory Context and Background

1. The State's Predecessor Ethics Agency

In 2011, during his first year as New York's Governor, plaintiff pushed for legislation to enhance the enforcement of the State's ethics and lobbying laws. Plaintiff found that State government "has been widely discredited for its corruption" and "lack of truly independent ethics oversight over all public officials." Governor Program Bill Mem. No. 9 at 6 (2011) (internet).[1] Plaintiff drafted a bill to create what he described would be an "independent" ethics commission with "robust enforcement powers to investigate violations of laws by members of both the executive and legislative branches." *Id.*

Plaintiff ultimately signed a law that, among other things, created what he touted as "a true *independent* monitor to investigate

[1] For sources that are publicly available online, the URLs appear in the Table of Authorities. All URLs were last visited August 14, 2024.

corruption."[2] That body was the Joint Commission on Public Ethics ("JCOPE"), which was established within the Department of State and had jurisdiction "over all elected state officials and their employees, both executive and legislative, as well as lobbyists." Senate Introducer's Mem. in Support, Bill Jacket, L. 2011, ch. 399 at 8; *see* L. 2011, ch. 399, pt. A, § 6(1) (codified at Executive Law former § 94(1)).

JCOPE had 14 members who served five-year terms. L. 2011, ch. 399, pt. A, § 6(2), (3). The Governor could not appoint a majority of JCOPE's members. Rather, the power to appoint eight of the 14 members was dispersed among the four legislative leaders—the Senate's Temporary President, the Senate's Minority Leader, the Assembly's Speaker, and the Assembly's Minority Leader. *Id.* § 6(2).

The Governor also could not unilaterally appoint JCOPE's other six members. The Governor and Lieutenant Governor jointly appointed those six, and at least three of them had to belong to a political party different from that of the Governor. *Id.* Nor could the Governor

[2] Dean Skelos, Press Release, *Governor Cuomo, Majority Leader Skelos & Speaker Silver Announce Agreement on Historic Ethics Reform* (June 2, 2011) (internet) (quoting plaintiff) (emphasis added).

unilaterally remove any JCOPE member. Rather, the members were removable only for cause and only by the officials who appointed them. *Id.* § 6(7).

Over time, concerns grew over JCOPE's "neutrality and ability to function as an independent body." (R.107 [December 2021 New York State Senate Report].) During a 2021 hearing before the Senate's ethics committee, legislators and witnesses explained that multiple features of JCOPE's structure prevented it from fulfilling its statutory mission. Speakers expressed concerns about JCOPE's appointment process and the independence of those who were appointed. (*See* R.107, 113-114, 118.) As witnesses explained, JCOPE's members were appointed based more on their connections to the official who appointed them than on their ability to administer the State's ethics and lobbying laws fairly. (R.113-114, 118-119.)

Those at the hearing also criticized JCOPE's "special vote" requirement. (R.114, 119-120, 123.) Under this requirement, although JCOPE could decide, by a simple majority vote, to proceed against lobbyists and their clients, a special majority was required to proceed against the Governor or the Governor's appointees, other statewide

elected officials or their appointees, and legislative members or employees. *See* L. 2011, ch. 399, pt. A, § 6(13)(a). This requirement meant, for example, that two executive appointees could, by withholding their votes, block an investigation into the Governor, even if the other 12 members voted in favor of such action. (R.119.)

Shortly after taking office in 2021, Governor Hochul prioritized ethics reform. (R.197-199.) As she declared, "It is clear that JCOPE is irreparably broken and has failed to earn the public's trust." (R.198.) She found that "[r]ecent events have called into question" JCOPE's ability to "carry out its mandate to restore trust in government by ensuring compliance with the state's ethics, lobbying laws, and regulations." Governor Kathy Hochul, *2022 State of the State*: *A New Era for New York* at 219 (internet). Governor Hochul attributed a "large part" of JCOPE's dysfunction to the "special vote" provision; she also advocated changing the appointment process. *Id.* (R.198.)

Governor Hochul's efforts culminated in the Ethics Commission Reform Act of 2022, which the Governor drafted and included in the 2022-2023 budget. L. 2022, ch. 56, pt. QQ, §§ 1-2 (codified, in part, at Executive Law § 94). That act replaced JCOPE with the Commission on Ethics and

Lobbying in Government ("Commission"), which—like its predecessor—is established in the Department of State and "responsible for administering, enforcing, and interpreting New York state's ethics and lobbying laws." Executive Law § 94(1)(a).

2. The Commission's Powers

The Commission's jurisdiction encompasses myriad officials and employees within the Legislative and Executive Branches, as well as the lobbyists and their clients who seek to influence State government. *See id*. This jurisdiction extends to individuals belonging to Executive Branch entities that operate independently of gubernatorial control; these entities include, among others, the (i) the Department of Law, which is headed by the independently-elected Attorney General, N.Y. Const., art. V, §§ 1, 4; (ii) the Department of Audit and Control, which is headed by the independently-elected Comptroller, *id.*; and (iii) the Department of Education, which is headed by the Board of Regents, *id.*, whose members are appointed by the Legislature, Education Law § 202(1).

The Commission has various statutory duties. It provides advice, guidance, and training on the State's ethics and lobbying laws. *See* Executive Law § 94(7), (8). It also oversees (i) the annual financial

disclosure statements filed by State officials and employees and (ii) the registration statements and periodic reports on lobbying activities and spending filed by lobbyists and their clients. *See id.* § 94(9), (10); *see also* Public Officers Law § 73-a; Legislative Law article 1-A.

The Commission is also responsible for investigating and pursuing enforcement proceedings with respect to alleged violations of the State's ethics and lobbying laws. Executive Law § 94(10), (14). Unlike JCOPE, the Commission functions solely by majority vote. *See id.* § 94(10)(f), (h).

When the Commission receives a complaint, its staff is responsible for investigating and recommending whether to pursue the matter to disposition. *See id.* § 94(10)(d)-(f). If, after considering the staff's recommendation, the Commission finds credible evidence of a violation, the person under investigation is entitled to a due process hearing before an independent hearing officer. *See id.* § 94(10)(h)-(i). The Commission decides after the hearing whether there is a "substantial basis" to find that a violation occurred. *Id.* § 94(10)(p)(i)-(ii). If the Commission finds such a basis, it prepares a report of its findings. *Id.*

The Commission may impose civil penalties upon substantiating a violation, subject to certain restrictions. Like JCOPE, the Commission

cannot impose penalties on legislative members, employees, or candidates. *Id.* § 94(10)(p)(i); *see* L. 2011, ch. 399, pt. A, § 6(14-a). For these individuals, the Commission gives its report to the Legislative Ethics Commission, Executive Law § 94(10)(p)(i), which can impose applicable civil penalties, Legislative Law § 80(9), (10).

For other individuals subject to the Commission's jurisdiction, the Commission may impose a civil penalty but only for certain violations; the penalty amount is capped by statute and, depending on the violation, may include "the value of any gift, compensation or benefit received as a result of such violation." Executive Law § 94(10)(n), (p)(ii). The Commission may also refer potential criminal violations to law enforcement, *id.* § 94(10)(n)(iv), and direct matters to the individual's employer for discipline, including termination, *id.* § 94(10)(p)(ii). For statewide elected officials, the Commission "may not order suspension or termination" but may recommend impeachment. *Id.*

The Commission's final determinations are subject to judicial review in accordance with C.P.L.R. article 78. *See id.* § 94(10)(o); C.P.L.R. 7803.

3. The Commission's Structure

Although the Commission's structure resembles JCOPE in several respects, including that the Governor does not appoint or remove a majority of the members, that structure was amended to ensure it had the ability to impartially administer and enforce the State's ethics and lobbying requirements.

The Commission at full complement consists of 11 members. Executive Law § 94(3)(a). Five are chosen by executive officials—three by the Governor; one by the Attorney General; and one by the Comptroller. *Id.* The other six members are chosen by the four legislative leaders—two by the Senate's Temporary President; one by the Senate's Minority Leader; two by the Assembly's Speaker, and one by the Assembly's Minority Leader. *Id.*

Each candidate's appointment is reviewed by the Independent Review Committee ("IRC"). *Id.* § 94(3)(b). The IRC is a non-partisan body composed of the deans, or associate deans if so designated, of New York's 15 accredited law schools. *Id.* § 94(2)(c). The IRC has thirty days to either approve or deny a candidate's appointment in accordance with its procedures for reviewing a candidate's qualifications. *Id.* § 94(3)(b). As

required by law, *id.* § 94(3)(c), the IRC has published online those procedures, which allow for public comment on each candidate. *See* IRC, Committee Procedures, at 2-4 (June 15, 2022) (internet).

The IRC's role is limited to reviewing the candidates presented to it. If the IRC does not approve an appointment, the elected official who selected the candidate chooses a new person. Executive Law § 94(3)(d).

Executive Law § 94 confirms that the Commission's members are appointed by the elected officials who chose them rather than by the IRC. The law refers to each Commission member as the "appointee" of the nominating official—for instance, "the governor's first appointee." *Id.* § 94(4)(a); *see also id.* § 94(3)(j).

Executive Law § 94 places some limits on who may be selected by the appointing authorities for the Commission. A person may not be appointed if that person is, or within the last two years has been, a registered lobbyist with the State, a legislative employee or member, a statewide elected official, or a qualifying State officer or employee. *Id.* § 94(3)(e).

Members serve on the Commission for four-year terms. *Id.* § 94(4)(a). No member can be selected for more than two full consecutive

terms. *Id.* The members' terms are also staggered. Assuming there are no mid-term vacancies, the Governor chooses three members during her term, while every other elected official chooses no more than one member during that official's term. *Id.*

The Commission may remove any of its members by a majority vote for substantial neglect of duty, misconduct in office, violation of confidentiality restrictions, or inability to discharge the powers or duties of office, but only after that member has received a written notice and opportunity to respond. *Id.* § 94(4)(c).

B. Proceedings Below

In March 2022, JCOPE issued to plaintiff a "notice of substantial basis investigation and hearing" concerning his authorship of a book published in October 2020, while plaintiff was New York's Governor. (R.638.) JCOPE told plaintiff that it had information that he may have violated Public Officers Law § 74(3). (R.638.)

As plaintiff alleges, after replacing JCOPE, the Commission authorized staff to move forward in the proceeding against plaintiff; it thereafter passed a separate resolution providing that it would continue all matters or inquiries that had been pending before JCOPE, which,

plaintiff alleges, included the proceeding against him. (R.638-639.) *See* Executive Law § 94(1)(c).

In April 2023, plaintiff filed this declaratory judgment action against the Commission in Albany County, Supreme Court; he sought to enjoin the Commission from holding the adjudicatory hearing that had been scheduled in the proceeding against him. (R.39, 388.) In his operative complaint, plaintiff asserted a facial challenge to the Commission's enabling act, Executive Law § 94. He alleged that, among other things, the law violates New York's separation-of-powers doctrine because the Commission may exercise executive power but is not directly controlled by the Governor. (R.655-656.) The Commission moved for summary judgment. (R.390.)

Supreme Court (Marcelle, J.) held that the Commission's structure violates the separation-of-powers doctrine. (R.5-30.) The court noted that New York's Constitution provides that the "executive power" shall be vested in the Governor (the "Vesting Clause"), N.Y. Const., art. IV, § 1, and that the Governor shall "take care that the laws are faithfully executed" (the "Take Care Clause"), *id.* § 3. (R.12.) The court further noted that the U.S. Constitution has a similarly worded Take Care

Clause. (R.12.) Based on this similarity, Supreme Court found that the U.S. Supreme Court's decisions regarding the President's power served "as a guide to define" the Governor's power under New York's Constitution. (R.12; *see* R.14-18.) Relying on that federal caselaw and viewing the Commission to be exercising an executive function to the extent it enforces the ethics and lobbying laws, Supreme Court held that the Commission's structure violated the separation-of-powers doctrine. (R.13-19 [citing, e.g., *Seila Law LLC v. Consumer Fin. Protection Bur.*, 140 S. Ct. 2183, 2198 (2020)].) This was because the Governor could not control the Commission by "populating it with her appointees" (R.14) or removing its members (R.18).

The court declared unconstitutional Executive Law § 94(10) and (14). (R.29-30.) Section 94(10) empowers the Commission to investigate potential violations and pursue enforcement proceedings, and section 94(14) states that, in addition to those powers and duties specified by law, the Commission has the "power and duty to administer and enforce" Executive Law § 94's provisions. Supreme Court further declared unconstitutional "any and all power and authority of the [C]ommission derived from or ancillary or incidental to" Executive Law § 94(10), (14),

including but not limited to Executive Law § 94(5)(a), (c). (R.30.) Section 94(5)(a) empowers the Commission, among other things, to adopt regulations relating to conflicts of interests and lobbying requirements, as well as procedures related to financial disclosure statements and ethics training programs.

Supreme Court entered a permanent injunction that barred the Commission "from doing an act inconsistent with the court's declaration." (R.30.)

The Commission appealed. (R.3.) The Appellate Division, Third Department, granted the Commission's motion to stay the order pending appeal except insofar as it enjoined the hearing proceeding against plaintiff. *Cuomo v. New York State Commn. on Ethics & Lobbying in Govt.*, 2023 N.Y. Slip Op. 75090(U) (3d Dep't 2023).

The Third Department affirmed Supreme Court's order. (R.947-952.) The court stated that New York's separation-of-powers doctrine prohibits one branch of government from "encroaching upon the powers of another for the purpose of expanding its own powers." (R.951.) Citing the New York Constitution's Vesting and Take Care Clauses, the Third Department observed that that the Governor has the power to enforce

laws. (R.948, 951.) And, by creating the Commission, the Legislature usurped the Governor's power "by placing upon itself that power conferred upon the executive to faithfully execute the laws." (R.952.) In so holding, the Third Department stated that the Commission is an entity over which the Governor "maintains extremely limited control and oversight, as she appoints a minority of members and has no ability to remove members." (R.951.) And brushing aside the detailed history of New York's Constitution that the Commission had presented in support of its position, the court noted that "[t]he analogies defendant attempts to draw to other committees and commissions are unavailing." (R.952.) The court thus upheld Supreme Court's order declaring unconstitutional "Executive Law § 94(10), (14) and all ancillary provisions" and enjoining "any action inconsistent with that finding." (R.952.)

The Commission moved in the Third Department for leave to appeal. That court granted the motion (R.953), thereby continuing the court's partial stay of Supreme Court's order pending this appeal. *See*

C.P.L.R. 5519(e).[3]

ARGUMENT

THE COMMISSION'S STRUCTURE COMPLIES WITH NEW YORK'S SEPARATION OF POWERS

Duly enacted laws enjoy an exceedingly strong presumption of constitutionality. *White v. Cuomo*, 38 N.Y.3d 209, 216-17 (2022). A party challenging a law must prove its unconstitutionality beyond a reasonable doubt, *id.*, a burden which here requires the challenging party to establish "a clear usurpation by the Legislature of prohibited power," *Matter of Ricker v Village of Hempstead*, 290 N.Y. 1, 5 (1943). Moreover, where, as here, a party alleges that a law is facially unconstitutional, that party bears the "the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment." *White*, 38 N.Y.3d at 216 (internal quotation marks omitted). Plaintiff has not carried his formidable burden to prove

[3] Supreme Court has not yet entered final judgment. In its order, the court had noted that Executive Law § 94 contains a severability clause and invited the parties to address whether any provisions of the law are severable. (R.29.) The parties have submitted briefing on the severability issue and Supreme Court has stayed resolution of that issue pending this appeal and further briefing.

that the Commission's enabling act violates New York's separation-of-powers doctrine.

A. The Separation-of-Powers Doctrine Requires a Functional, Context-Specific Inquiry.

The separation-of-powers doctrine is implied from the Constitution's creation of "three coordinate and coequal branches of government, each charged with performing particular functions." *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 259 (2018) (internal quotation marks omitted). The doctrine avoids the "excessive concentration of power in any one branch or in any one person," *Rapp v. Carey*, 44 N.Y.2d 157, 162 (1978), and ensures that New York has a "government of law," not "a government by men left to set their own standards, with resultant authoritarian possibilities," *id.* No branch is therefore "allowed to arrogate unto itself powers residing *entirely* in another branch." *Delgado v. State*, 39 N.Y.3d 242, 255 (2022) (plurality op.) (quoting *Under 21, Catholic Home Bur. For Dependent Children v. City of New York*, 65 N.Y.2d 344, 356 [1985]) (emphasis added).

New York, however, has never had "that sharp line of demarcation between the functions of the three branches of government which obtains

in some other jurisdictions." *Matter of Trustees of Vil. of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 N.Y. 123, 134 (1908). The "duties and powers of the legislative and executive branches cannot be neatly divided into isolated pockets." *Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 (1995). The "fluid functioning of government requires that the interactions among the three branches be allowed some play in its joints." *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 822 (2003) (internal quotation marks omitted).

This Court has thus steadfastly refused "to construe the separation of powers doctrine in a vacuum, instead viewing the doctrine from a commonsense perspective." *Bourquin*, 85 N.Y.2d at 785. The "exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers." *Id.* (quoting *Matter of Richardson*, 247 N.Y. 401, 410 [1928] [Cardozo, C.J.]).

Consistent with these principles, this Court has repeatedly engaged in a pragmatic, context-specific inquiry to assess whether one branch's powers have been usurped or excessively impaired. *See, e.g.*, *Delgado*, 39 N.Y.3d at 255-56 (plurality op.); *Cohen v. State of New York*, 94 N.Y.2d

1, 12-14 (1999); *see also*, *e.g.*, *Boreali v. Axelrod*, 71 N.Y.2d 1, 11-14 (1987) (citing multiple factors to resolve separation-of-powers claim). This Court's recent decision in *Delgado* is illustrative. That case involved a challenge to an act that created a committee with the power to recommend salary increases for legislators and various executive state officers; those recommendations acquired the force of law unless the Legislature modified them by passing a statute. *Delgado*, 39 N.Y.3d at 249-50 (plurality op.). The committee's members were appointed by the enabling act, not the Governor, and the act did not authorize the Governor or any other official to remove the members. *See id.* at 254; L. 2018, ch. 59, § 1, pt. HHH, § 1.

This Court held that although the committee operated without the opportunity for the Governor's direct input, the enabling act did not unduly diminish gubernatorial power in violation of the separation-of-powers doctrine. *See* 39 N.Y.3d at 255 (plurality op.); *id.* at 265-66 (Wilson, J., concurring). This Court considered various features of the statutory scheme and highlighted, among other factors, that the Governor "assented" to the act. *Id.* at 255 (plurality op.); *id.* at 273 (Wilson, J., concurring), and did not "cede any authority to propose

different legislation in the future or to veto future legislation," *id.* at 255 (plurality op.). Indeed, Judge Wilson noted in his concurrence that, although the enabling act diminished "gubernatorial authority significantly more than prior delegations to other committees and commissions," a "scheme is not unconstitutional merely because it is novel." *Id.* at 272-73, 284.

Other precedent confirms that a separation-of-powers claim entails a practical, not formalistic, inquiry. In *Cohen*, for instance, a group of legislators challenged a law that specified that, if a budget was not passed by the fiscal year's start, the legislators' salaries would be withheld until the budget's passage. 94 N.Y.2d at 6-7. The plaintiffs alleged the law violated the separation-of-powers doctrine by excessively aggrandizing the Governor's power over budget negotiations. *Id.* at 13.

In rejecting that claim, this Court emphasized two factors. First, the challenged law concerned one of the political branches' efforts at self-regulation. *Id.* at 14. The Legislature had "decided to restrict itself and discipline its own work and power in this fashion." *Id.* Given the Legislature's authority to regulate its own affairs, the law at issue was a "credit to the Legislative Branch's internal management practices, not a

mark of some ultra vires surrender of power to any other Branch." *Id.* Second, the "motive behind the legislation" was "highly significant" and supported its constitutionality. *Id.* The law was a "self-imposed prod to attain the paramount State interest" of passing a timely budget. *Id.* This Court thus declined to second-guess the Legislature's judgment on how to best regulate its own conduct. *See id.* at 14, 16.

B. The Separation-of-Powers Doctrine Allows for a State Ethics Commission That Is Not Dominated by the Political Branches It Monitors.

Under the functional, context-specific inquiry described above, plaintiff has failed to establish beyond a reasonable doubt that the Commission's structure violates New York's separation-of-powers doctrine. That doctrine permitted the Governor and Legislature to agree to create an ethics commission whose structure sufficiently insulates it from domination by the political branches that it monitors while preventing the Legislature from usurping executive power.

1. The Commission's Structure Is Integral to Its Ability to Fulfill Its Mission.

To start, the Commission's structure is designed to attain a "paramount State interest." *Cohen*, 94 N.Y.2d at 14. The Commission

serves the vital mission of maintaining the public's trust in government by impartially enforcing and administering the State's ethics and lobbying requirements. (*See* R.198.) And the Commission's structure, as much as its substantive power, is critical to its ability to fulfill that mission. When plaintiff was Governor, he promised that the prior ethics commission—JCOPE—would be a "true independent monitor." *Supra* at 5. Yet, as Governor Hochul found a decade later, JCOPE was "irreparably broken" because it was perceived as being insufficiently independent of the officials it was charged with monitoring. (R.198.)

The Commission was carefully crafted to remedy JCOPE's structural flaws—and thereby allow the Commission to operate without the taint of political interference. The Commission's enabling act, Executive Law § 94, removed JCOPE's "special vote" requirement, which Governor Hochul found had contributed to JCOPE's perceived dysfunction. (R.198.) That requirement had allowed a minority of JCOPE's members to prevent investigations into executive or legislative officials. *See supra* at 7-8. The Commission, by contrast, operates by a simple majority vote and thus does not allow a minority to prevent Commission action. *See* Executive Law § 94(10)(f), (h), (p).

Moreover, to address concerns over the independence of JCOPE's members, Executive Law § 94 created a non-partisan body—the IRC—to ensure those appointed to the Commission are, in fact, qualified to fairly enforce the State's ethics and lobbying requirements. *See id.* § 94(3)(b)-(d). As detailed *infra* at 48-50, there is "no constitutional bar" to legislation that creates a body that consists of the heads of private organizations and that can limit whom an elected official may appoint to a state executive board, where such a body can "reasonably be expected" to help ensure the appointment of qualified individuals. *Lanza v. Wagner*, 11 N.Y.2d 317, 333 (1962). The IRC, which is composed of law school deans, serves just that role. The IRC's members lack a personal interest in the Commission's composition. And they bring an informed perspective as leaders of institutions that train people for a profession that demands adherence to a legal code of ethics.

The Third Department thus erred in holding that the Commission's enabling act was designed for "the purpose" of the Legislature "expanding its own powers." (R.951.) Rather, the act's purpose was to further a compelling and legitimate institutional need—ensuring that the State's ethics commission is sufficiently independent, both in fact and in

appearance, from the political branches it monitors. Indeed, the "exigencies of government," *Bourquin*, 85 N.Y.2d at 785—and, in particular, the experience with JCOPE—had made plain the dangers created by an ethics commission that is perceived to be subject to excessive political interference: Such a commission erodes, rather than promotes, public trust in government. (*See* R.197-198.)

Another aspect of the Commission's enabling act further supports its constitutionality. The act—like the laws upheld in *Cohen* and *Delgado*—is not focused on regulating the public at large. The act instead is an effort by the political branches at self-regulation, which courts are very reluctant to disturb lest they exert undue judicial "superintendence" over the operations of the political branches. *Cohen*, 94 N.Y.2d at 16. In *Cohen*, for instance, this Court declined to second-guess one of the Legislature's "internal management practices" to regulate "its own affairs and proceedings." *Id.* at 14.

The Commission is similarly part of the political branches' internal management practices: The Commission's job is to protect the integrity and operations of those branches by monitoring the conduct of their officials and employees, as well as the conduct of the lobbyists who seek

to influence them. And the political branches' considered judgment to restrict themselves from unduly interfering with the Commission's day-to-day activities is entitled to respect under the separation-of-powers doctrine. *See id.*

2. The Commission's Structure Does Not Constitute a Legislative Usurpation of Executive Power.

The Commission's structure is also carefully calibrated to ensure that the Commission does not constitute a "clear usurpation by the Legislature" of executive power. *Matter of Ricker*, 290 N.Y. at 5. This is so for multiple reasons.

To begin, in assessing a separation-of-powers claim, this Court routinely considers whether the allegedly infringed-upon branch or official approved the challenged action. *See, e.g.*, *Delgado*, 39 N.Y.3d at 255 (plurality op.); *Cohen*, 94 N.Y.2d at 14; *Matter of Acevedo v. New York State Dept. of Motor Vehs.*, 29 N.Y.3d 202, 225 (2017) (citing legislative approval of action in rejecting separation-of-powers claim). Here, this factor, while not dispositive, weighs in favor of the Commission's enabling act. The Governor indisputably "assented" to that act. *Delgado*, 39 N.Y.3d at 255 (plurality op.); *see id.* at 273 (Wilson, J., concurring).

The Governor drafted the Commission's enabling act, which the Legislature enacted into law. *See supra* at 8. And the Governor did not "cede any authority to propose different legislation in the future or to veto future legislation." *Delgado*, 39 N.Y.3d at 255 (plurality op.). Should the Governor find that the Commission is deficient in any way, she remains free to partner with the Legislature to restructure or eliminate it.

Equally significant, and contrary to the Third Department's reasoning (R.951-952), the Commission's structure does not allow for legislative usurpation of executive power. Rather, executive officials retain meaningful—but not undue—influence over the Commission.

First, executive officials, and the Governor in particular, have a significant role in determining the Commission's composition. The Governor, Attorney General, and Comptroller collectively appoint five of the 11 members of the Commission. Executive Law § 94(3)(a). Among all appointing authorities, the Governor appoints the most members—three. *Id.* The terms of the Commission's members are also staggered such that while every other appointing authority is only guaranteed the chance to appoint one member per term, the Governor can make all three of her appointments each term. *Id.* § 94(4)(a).

Second, the Governor—unlike the other appointing authorities—retains general supervisory powers over the Commission. Under the Moreland Act, the Governor is empowered at any time to "examine and investigate the management and affairs" of any State department, board, or commission. Executive Law § 6. As part of that broad investigative power, the Governor, or the Governor's appointees, may subpoena witnesses, examine them under oath, and require records to be produced. *Id.* This power "permits the Governor to exercise considerable vigilance" over Executive Branch entities, including the Commission. *Rapp*, 44 N.Y.2d at 162.

Third, the Governor can also supervise and influence the Commission through her power over the purse. New York's Constitution, unlike its federal counterpart, provides for executive budgeting. *See* N.Y. Const., art. VII, §§ 1-7. The Governor, as the budget's author, initially decides "not only on how much money is to be spent, but on what the money is to be spent for." *Pataki v. New York State Assembly*, 4 N.Y.3d 75, 83 (2004). When drafting the budget, the Governor decides the amount of funds, if any, to appropriate to the Commission. *See* N.Y. Const., art. VII, §§ 2, 3; Executive Law § 94(1)(f). And the Governor may

veto any attempt by the Legislature to increase that appropriation. *See* N.Y. Const., art. VII, § 4; art. IV, § 7.[4]

Moreover, not only do executive officials retain meaningful influence over the Commission, but also the Legislature's own ability to influence the Commission is restricted in various ways. First, the Commission's enabling act does not authorize the Legislature as a *whole* to appoint any members. Rather, the act disperses the power to appoint a bare majority of members across four legislative leaders. Executive Law § 94(3)(a). That appointment power is thus diluted and spread across individuals who often have competing interests and goals. Second, the four leaders do not have unfettered control over whom they appoint. The

[4] The provision governing the Commission's funding is substantively identical to the provision for the Board of Parole's funding that plaintiff agreed to as Governor. *Compare* Executive Law § 94(1)(f), *with* L. 2011, ch. 62, pt. C, subpt. A, § 38 (codified at Executive Law § 259-a). The provision maintains transparency by ensuring that the amount appropriated to the Commission is itemized, rather than included in a lump-sum appropriation. *See* Executive Law § 94(1)(f). The provision also generally prevents the appropriation from being decreased during the fiscal year through a process known as interchange. *See id.* Subsequent laws, however, have authorized the Governor, through the Division of the Budget, to increase *or* decrease the Commission's funding during the fiscal year in connection with certain activities. *See, e.g.*, L. 2024, ch. 50, § 1, pp. 241 (specifying that Commission's appropriations are subject to Office of General Service and IT interchange authority).

appointee cannot be someone who has been, within the last two years, a legislative member or employee. *Id.* § 94(3)(e). The appointment must also be approved by a disinterested body, the IRC. *Id.* § 94(3)(b). Third, the legislative leaders lack any mechanism to directly supervise or control their appointees once they are on the Commission. The leaders cannot remove any Commission member, and each member's four-year term extends beyond the term of any legislative leader. *Id.* § 94(4)(a), (c).

In sum, the Commission's structure strikes a careful balance. It ensures the Commission is subject to the Governor's general supervision but is not unduly beholden to the Governor or any other official it monitors. And this balanced structure fosters a key purpose of the separation-of-powers doctrine, which is to avoid the "excessive concentration of power in any one branch or in any one person." *Rapp*, 44 N.Y.2d at 162. That concern is especially acute here given the Commission's unique jurisdiction, which extends to officials and employees who are not otherwise subject to direct gubernatorial control. That includes officials and employees of the Legislative Branch, as well as those who belong to Executive Branch entities that are headed by independently elected or appointed officials, like the Attorney General,

the Comptroller, or the Board of Regents. New York's separation-of-powers doctrine is not so rigid and impractical as to *require* that an ethics commission with power over all these executive and legislative officials must be directly controlled by just one—the Governor.

C. The Appellate Division's Sweeping View of Gubernatorial Control Is Contrary to New York's Precedent and Practice

In invalidating portions of the Commission's enabling act, the courts below adopted plaintiff's sweeping view of gubernatorial control. Under this view, because the Commission wields power that can be characterized as executive, such as the power to seek civil penalties, the Governor must have the power to appoint and remove a majority, if not all, of the Commission's members. (*See* R.951-952.) This formalistic and categorical rule not only ignores the flexible nature of the separation-of-powers doctrine, as discussed above, but also conflicts with New York's constitutional history, precedent, and practice.

1. The Third Department Misconstrued New York's Take Care and Vesting Clauses.

As an initial matter, the Third Department erred in holding that its categorical rule is required by the Take Care and Vesting Clauses of

New York's Constitution. (R.948, 951.) These two clauses have been in the Constitution in some form since its inception in 1777. *See* 1777 N.Y. Const., art. XVII, XIX. Yet no New York court has ever construed either clause as implicitly granting the Governor appointment, oversight, and removal powers over every state official with enforcement authority.

Given the absence of New York precedent to support this categorical rule, plaintiff and Supreme Court relied primarily on federal caselaw—in particular, recent and sharply-divided decisions by the U.S. Supreme Court. (*See, e.g.*, R.18 [quoting *Seila Law LLC*, 140 S. Ct. at 2198]; R.376].) According to plaintiff and Supreme Court, the federal caselaw defining the scope of the President's power under the federal constitution's Take Care Clause applies equally to the Governor's power under New York's Constitution. (*See* R.12.)

That assertion, however, ignores that "[o]ur Constitution has a separate history and structure and must be interpreted accordingly." *Delgado*, 39 N.Y.3d at 281 (Wilson, J., concurring). It has long been recognized that, "despite the superficial similarities, state governments are not merely miniature versions of the national government." *Marine Forests Socy. v. California Coastal Commn.*, 36 Cal. 4th 1, 29 (2005)

(quoting G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. Ann. Surv. Am. L. 329, 330 [2003]). A separation-of-powers challenge under a state constitution must be resolved based on that constitution's specific history, "without preconceptions derived from familiarity with the separation of powers on the national level." *Id.* (quoting Tarr, *supra*, at 330). Here, New York's constitutional history establishes that the Take Care and Vesting Clauses do not require that the Governor have power to directly control every executive entity, much less wield a paramount, indefeasible power of appointment and removal. *See People v. Viviani*, 36 N.Y.3d 564, 578 (2021) (relying on New York's history and practice to assess whether law deprives constitutional officers of an essential function of their office).

First, this Court in *Rapp* rejected such a sweeping understanding of the Take Care or Vesting Clauses. As this Court highlighted, there exists "State departments and many so-called independent agencies, such as public authorities, over which the Governor ha[s] no general control or powers of supervision or operation." 44 N.Y.2d at 161. Then, after citing the constitutional provisions containing the Take Care and Vesting Clauses, this Court observed that these provisions reflect "the

power in the Governor to oversee, but again *not necessarily to direct*, the administration of the various entities in the executive branch." *Id.* at 162 (emphasis added).

Second, an authoritative commentator on New York's Constitution, Charles Z. Lincoln, likewise explained that the Take Care and Vesting Clauses give the Governor a power of "general supervision" but not complete control. 4 Charles Z. Lincoln, *The Constitutional History of New York* at 471 (1906) (internet). As Lincoln explained, "[t]he governor is the executive head of the state, but he does not possess all 'executive power,'" *id.* at 456, and there are many officers "outside the scope of the governor's jurisdiction and supervision," *id.* at 471. Thus, "whatever he may do to 'take care that the laws are faithfully executed' must often be done by admonition or suggestion rather than by any action resulting from possession of power to see that a given statute is enforced, or that a particular officer does his duty." *Id.*

Third, the structure of New York's first Constitution reflects the drafters' intent that the Take Care and Vesting Clauses did not grant the Governor a paramount, indefeasible power to appoint or remove executive officers. Although the first Constitution included the Take Care

Clause and a version of the Vesting Clause,[5] that Constitution gave the Governor a limited role in appointing and removing officers. The power to appoint "every officer in the executive government of the state, including local officers, with the exception of a few named in the Constitution, was vested in the [C]ouncil of [A]ppointment." *Matter of Trustees of Vil. of Saratoga Springs*, 191 N.Y. at 132. The Council consisted of five members each with equal voting power—the Governor and four Senators chosen by the Assembly. *See id.*; 1777 N.Y. Const., art. XXIII.[6] Further, the power to remove was vested in the Council, not the

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[5] The Vesting Clause in the 1777 Constitution provided that "the supreme executive power and authority of this State" shall be vested in the Governor. 1777 N.Y. Const., art. XVII. As Charles Lincoln explained, the change in language—from "supreme executive power" to just "executive power"—reflected that officers besides the Governor are "vested with large executive powers." 4 Charles Z. Lincoln, *The Constitutional History of New York* at 456 (1906) (internet).

[6] A dispute arose early on whether the power to nominate officials for the Council's consideration was vested exclusively in the Governor or shared concurrently by each Council member. *See* 1 Charles Z. Lincoln, *The Constitutional History of New York* at 601-03 (1906) (internet). A majority of the Council observed that, in practice, each member exercised a concurrent right to nominate, *see id.* at 603, and the 1801 Constitutional Convention resolved the dispute in favor of that practice. The Convention clarified that the Constitution vested the power to nominate concurrently in each Council member, so the Governor was thus only one among five members of equal power. *See id.* at 610-11.

Governor. *See* 1777 N.Y. Const., art. XXVII. The coexistence of the Council with the Take Care and Vesting Clauses confirms that these provisions were never meant to exclude legislators from any role in the appointment or removal process.

Fourth, although the Council of Appointment was abolished by an 1821 constitutional amendment, *see Matter of Trustees of Vil. of Saratoga Springs*, 191 N.Y. at 132, New York's subsequent history—which the Appellate Division swept aside without any explanation—cannot be reconciled with the Appellate Division's sweeping view of gubernatorial control. As detailed below, this history shows that the power to appoint and remove executive officers—or a majority of officers to an executive board or commission—is not a function that must *always* be given to the Governor or another executive official. Rather, New York's Constitution, like that of many other states, has embodied a different principle: If the Constitution does not expressly prescribe the manner of appointment or removal of a state officer, the Legislature has the default power to prescribe this process.

2. The Commission's Appointment Process Is Consistent with New York's Precedent and Practice.

Turning first to appointments, New York's precedent and practice makes clear the Legislature may direct the manner of appointment, including by involving private parties in the process.

Starting with the 1821 Constitution, it replaced the Council of Appointments with several provisions that prescribed the specific procedures for appointing various public officials. 1821 N.Y. Const., art. IV, §§ 1-14. That Constitution then included a catch-all clause that specified that all other officers whose appointment is not provided for by the Constitution, or whose offices are thereafter created by law, "shall be elected by the people, or appointed, as may by law be directed." *Id.* § 15.

This catch-all clause was renumbered in 1846, although its substance remained the same. As amended, the provision containing the clause first specified the method of appointing certain county and municipal officers; it concluded with the catch-all clause that recognized the Legislature's residual power over appointments. That clause specified: "All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may

hereafter be created by law, shall be elected by the people or appointed as the legislature may direct." 1846 N.Y. Const., art. X, § 2.

The catch-all clause, by its terms, did not apply if an officer's manner of appointment was provided for by another constitutional provision. Yet, until this case, no New York court had ever construed the Take Care Clause or Vesting Clause as a provision that provides for the manner of appointing executive officers, much less a provision that vests the appointment power in the Governor, and thereby had rendered the catch-all clause inapplicable.

In fact, New York courts have consistently rejected constitutional challenges to the appointment of officers who wield executive power but were not appointed by an executive official. In *Litchfield v. McComber*, 42 Barb. 288 (Gen. Term. 1864), Supreme Court upheld a law that authorized a private corporation—the Long Island Railroad[7]—to appoint an officer who could collect unpaid taxes, including by suing those who allegedly owed the taxes, *see id.* at 298-99. The court held that there was

[7] *See United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 680 (1982) (noting that the Long Island Railroad was privately owned from its creation in 1834 until 1966).

"no constitutional impediment" to giving the Long Island Railroad the power to appoint "the person who was to execute" the tax assessment. *Id.* at 299.

Several years later, in 1871, this Court rejected a constitutional challenge to the structure of a state board that wielded executive power, even where private parties exclusively controlled the appointments. *See Sturgis v. Spofford*, 45 N.Y. 446, 449-51 (1871). That board—the Board of Commissioners of Pilots, which still exists in similar form today—governed the licensing of the pilots who guide ships through the Port of New York. *See id.* at 448-49; L. 1853, ch. 467, §§ 1, 9-10. The board consisted of five commissioners appointed solely by private parties: the New York City Chamber of Commerce or the presidents and vice-presidents of certain marine insurance companies. *See* L. 1853, ch. 467, § 2; *Sturgis*, 45 N.Y. at 449. The board's commissioners were "officers of the State," and had the power to rescind licenses and seek civil penalties. *Sturgis*, 45 N.Y. at 450, 453; *see* L. 1853, ch. 467, § 12.

The defendant in *Sturgis* challenged the penalties that the board had sought based on the defendant's hiring of an unlicensed pilot; the defendant argued that because private organizations had appointed the

board's commissioners, they have "have no lawful *status* as public officers, and cannot maintain the action" for penalties. *Sturgis*, 45 N.Y. at 448-49 (emphasis in original). The defendant's brief emphasized that the board had powers "affecting a large class of citizens" and could "inflict penalties for violations of their own laws," as well as "judge and punish offences." Appellant's Statements and Points, *Sturgis v. Spofford*, at 11 (reproduced in Addendum ["Add."] 11). The defendant further claimed that creating a board "not chosen directly or indirectly by the people, or accountable to them, is a violation of one of the implied restrictions upon [the Legislature's] power." *Id.* at 11-12.

This Court rejected that argument and upheld the constitutionality of the board's appointment process. 45 N.Y. at 450-51. This Court acknowledged that the Constitution imposes both "express limitations" and those that are implied, such as the "provisions for organizing the executive, legislative and judicial departments of the government." *Id.* at 450. This Court nonetheless held that nothing in the Constitution, expressly or implicitly, requires that the power of appointment be vested "upon somebody or officer representing or responsible to the people." *Id.* In so holding, this Court cited to the constitutional provision that

reflected that the Legislature could direct the manner of appointing officers whose appointment was not provided for in the Constitution. *See id.* (citing 1846 N.Y. Const., art. X, § 2).

New York precedent post-*Sturgis* confirms that the power to appoint members to executive boards or commissions need not be vested in the Governor or another executive official. The Second Department, for instance, rejected a constitutional challenge to the appointment process for the State Board of Pharmacy, which could seek penalties for violations of the Public Health Law. *State Bd. of Pharm. v. Bellinger*, 138 A.D. 12, 13-15 (2d Dep't 1910); *see* L. 1900, ch. 667, § 1, § 190(4). That board's five members were public officers and appointed entirely by private parties—namely, groups of licensed pharmacists. *Bellinger*, 138 A.D. at 14-15. Citing *Sturgis*, the Second Department held that the board's appointment process was properly subject to the "direction of the Legislature." *Id.* at 15.

Courts have also observed that the Legislature's power to prescribe the manner of appointments allows it to exercise that power directly. As the First Department observed, the Legislature's power over appointments "carried with it, as an incident, the power to appoint

directly, as well as through some other agency—a power which has been repeatedly exercised without question," including in cases "where vast interests were involved." *Sun Print. & Publ. Assn. v. Mayor*, 8 A.D. 230, 255 (1st Dep't 1896), *aff'd*, 152 N.Y. 257 (1897). This Court likewise noted that the Legislature's power to prescribe the manner of appointment includes the power to appoint an officer directly "as it might deem just and proper." *People ex rel. Brown v. Woodruff*, 32 N.Y. 355, 364 (1865).

Although efforts were made to amend the Constitution to give the Governor or the Governor's appointees an exclusive or residual power to appoint and remove state officers, those efforts were unsuccessful. In 1916 and 1917, legislators proposed amendments that would have increased the Governor's power under article IV by broadly providing that the Governor "shall appoint and may remove all officers whose election or appointment is not otherwise provided for in this constitution, and subject to the provisions of [article X, § 2], all officers whose offices may hereafter be created by law." N.Y. Constitutional Convention Comm., *Amendments Proposed to the Constitution, 1895-1937*, at 1081 (1938) (reproducing 1916, S. Int. No. 1394, S. Pr. No. 1761; 1917, S. Int. No. 326, S. Pr. No. 337) (internet). The sole exception would have been

for "subordinate officers" within the various departments, whose appointments could be vested in the Governor's appointee—namely, the head of the relevant department. *Id.* The amendment would have also altered the clause reflecting the Legislature's power regarding appointments under then-article X, § 2 by limiting it to *local* officers only, rather than "*[a]ll* other officers" whose appointment is not provided for by the Constitution. *Id.* at 1084. These amendments were never adopted.

In 1925, article V of the Constitution was amended to bring greater efficiency to State government by reorganizing the various executive agencies into a limited number of departments. *See People v. Tremaine*, 252 N.Y. 27, 51 (1929). The reorganization amendment, however, did *not* grant the Governor an exclusive or residual power to appoint and remove executive officers unless the Constitution provided otherwise. The amendment instead specified by name the executive departments that were to exist, and granted the Governor the power to appoint certain heads of departments, with the Senate's advice and consent, and remove those heads as provided by law.[8] *See* N.Y. Constitutional Convention

[8] Today, article V, § 4's last clause provides in full: "Except as otherwise provided in this constitution, the heads of all other

(*continued on the next page*)

Comm., *Problems Relating to Executive Administration and Powers*, vol. 8, at 121, 161-62, 268-69 (1938) (hereinafter, "1938 Report") (reproduced at R.798, 838-839, 902-903).

The 1925 reorganization amendment was not understood to categorically bar the creation of entities within a department that were independent of the Governor's control, including those within departments whose head was appointed by the Governor. The 1925 amendment instead "left the question of supervision and control by the Governor an open one to a large extent, and passed that problem along to the Legislature." *Id.* at 268-269 (reproduced at R.902-903.) Indeed, a report prepared for the 1938 Constitutional Convention exhaustively

departments and the members of all boards and commissions, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law." Courts have consistently held that this provision's "advice and consent requirement" applies *only* to "boards and commissions" that themselves serve as the heads of a department. *See, e.g.*, *Cappelli v. Sweeney*, 167 Misc. 2d 220, 230-33 (Sup. Ct., Kings County 1995) (canvassing article V's text and history), *aff'd for reasons stated below,* 230 A.D.2d 733 (2d Dep't 1996); *Soares v. State of New York*, 68 Misc. 3d 249, 272-73 (Sup. Ct., Albany County 2020). Indeed, plaintiff has never alleged that the "advice and consent" requirement applies to every member of every board or commission that is within a department but not a head of that department. (R.432.)

examined the Executive Branch's structure at that time, and found that all but two departments contained boards or commissions that were "not subject to direct control by the head of the department or the Governor." *Id.* at 301 (reproduced at R.935).

Following the 1925 reorganization amendment, the Legislature has continued to vest the power to appoint members of state executive bodies in persons and entities outside the Executive Branch. In 1937, for instance, the Legislature created the Advisory Board for the Bureau of Narcotic Control—a body within the Department of Health; the Advisory Board had the power to veto regulations of the Bureau governing the enforcement of narcotic controls. L. 1937, ch. 914, § 2(2) (codified at Public Health Law former § 421-a(2)). That Board was composed of five members, all appointed by private organizations. *Id.* The 1938 Report acknowledged the Board, and the fact that neither "the Governor nor the department head have anything to do with appointment or removal of the members and it is completely free of formal control." 1938 Report, *supra*, at 288 (reproduced at R.923.) The report did not suggest that the Advisory Board's independence rendered it unlawful.

In 1958, the Legislature created the State Commission of Investigations, another Executive Branch entity in which neither the Governor nor any other executive official had the power to appoint a majority of members. *See* L. 1958, ch. 989, §§ 1-2. Although the commission was deemed temporary, it continuously operated until 2009. *See* McKinney's Uncons. Laws of N.Y. § 7501; L. 2008, ch. 56, pt. G, § 1. The commission was empowered, among other things, to investigate "the conduct of public officers and public employees"; it had the power to subpoena records, take testimony, and confer immunity on witnesses on notice to the Attorney General and the relevant District Attorney.[9] Uncons. Laws of N.Y. §§ 7502(1)(b), 7502(11), 7507. And the majority of its members were appointed by the legislative leaders. *See id.* § 7501(2); L. 1983, ch. 1001, § 1.

In 1962, this Court in *Lanza* reaffirmed *Sturgis* in rejecting a constitutional challenge to the appointment process for a state executive board. *See* 11 N.Y.2d at 327-34. In *Lanza*, a party challenged the

[9] Although certain investigations had to be at the Governor's direction, this was not the case for investigations into public officers and employees. *Compare* Uncons. Laws of N.Y. § 7502(1), *with id.* § 7502(2).

appointment of members of New York City's Board of Education—"an agency of State Government" whose members were "State, not local, officers." *Id.* at 326-27. In response to "grave" concerns over the condition of City schools, the Legislature had created a new board and materially altered its appointment process. *Id.* at 320. The new board's enabling act empowered a "selection panel" to create a list of at least 18 individuals, from which the City's mayor could then appoint nine individuals to the board. *Id.* at 322-23. The selection panel consisted of the heads of private organizations located in the City. *Id.* at 322 & n.1. This included organizations that lacked any direct subject-matter expertise, such as the heads of the City Bar Association and the Commerce and Industry Association of New York. *Id.*

This Court held that the board's appointment process was supported by "ample authority, both in this State and elsewhere." *Id.* at 328. This authority included (i) this Court's decision in *Sturgis* and its progeny, (ii) New York's ongoing practice, which gave a similar role to private parties in the appointment process, and (iii) the constitutional provision which referred to the Legislature's power to direct the manner of appointment for officers whose appointment was not set forth in the

Constitution—a provision that, by then, had been moved to article IX, § 9. *See id.* at 328-30. The Court also relied on decisions from other states, including California, which had recognized that officers "may be appointed by the Legislature itself, or the duty of appointment may be delegated upon some other person or body." *Id.* at 330-31 (quoting *Ex parte Gerino*, 143 Cal. 412, 414 [1904].)

This Court also separately rejected the claim that giving the selection panel a voice in the appointment process "constitutes an unconstitutional relinquishment of legislative authority" in violation of New York's Constitution, article III, § 1, which vests the lawmaking power in the Legislature. *Id.* at 327-28, 333. This Court held that the "exercise of the power of appointment to public office is not a function of such essentially legislative character as to fall afoul of the constitutional proscription." *Id.* at 333. In so holding, this Court emphasized that "it is an exceedingly narrow and artificial view to emphasize, as the plaintiffs have, the 'private' character of the selection [panel]." *Id.* The law at issue created "a new public or quasi-public body invested with specific duties and responsibilities, in the field of education, for the interest and benefit of the public at large." *Id.*

Article IX of New York's Constitution—which contains the "home rule" provisions—was shortened by an amendment approved in 1963 and, as a result, the clause relating to appointments cited by *Lanza* and *Sturgis* is no longer in the Constitution. The 1963 amendment to article IX was designed in part to "substantially simplify" what had become a "lengthy and complex article." State of New York, Public Papers of Nelson A. Rockefeller, Fifty-Third Governor of the State of New York, at 824 (1962). The amendment thus reduced article IX from 16 sections to three. *Compare* 1938 N.Y. Const., art. IX (as amended and in force Jan. 1, 1960) (internet), *with* N.Y. Const., art. IX, §§ 1-3.

In the courts below (R.428), plaintiff argued that the 1963 amendment somehow extinguished the Legislature's power to prescribe the manner of appointing state executive officers. Nothing in the amendment's text or history remotely suggests that this was the amendment's purpose. To the contrary, the amendment included a saving clause that reiterated the Legislature's residual power over matters of State concern. This clause states that "[e]xcept as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to," among other things, "[m]atters other than the property,

affairs or government of a local government." N.Y. Const., art. IX, § 3(a)(3). The clause uses a settled term of art—"matters other than the property, affairs or government" of a locality—which "is merely another way of saying that the Legislature is unfettered as to 'matters of state concern.'" *Adler v. Deegan*, 251 N.Y. 467, 490 (1929). And statewide commissions, including their structures, are matters of state concern.

A basic constitutional principle confirms that the excision of the appointment provision did not eliminate the Legislature's residual power to prescribe the manner of appointments. The "legislative power is unlimited, except as restrained by the Constitution." *Matter of McAneny v. Board of Estimate & Apportionment of City of N.Y.*, 232 N.Y. 377, 389 (1922); *see, e.g.*, *People ex rel. Peaks v. Voorhis*, 243 N.Y. 420, 423 (1926). The Legislature's plenary lawmaking power includes the power to create commissions and also provide for their structure, unless the Constitution affirmatively restrains that power. And, as shown above, neither the Take Care nor the Vesting Clauses have ever been read to require that the Governor appoint a majority of a commission's members.

The materials accompanying article IX's simplification support the conclusion that the removal of the appointments clause was not designed

to divest the Legislature of power to prescribe the manner of appointments. Nothing in the existing materials suggests that the amendment was meant to overrule *Sturgis* or *Lanza* or limit the Legislature's power with respect to statewide matters. *See, e.g.*, Sponsor's Mem. to A. I. 5163, Pr. 5961, *in* 1963 *N.Y. Legis. Ann.* at 223-24 (noting that the amendment contains "[s]aving clauses for the powers of the Legislature"). Nor do those materials suggest that the amendment was intended to expand the Take Care or Vesting Clauses to grant to the Governor—for the first time in New York's history—a paramount and indefeasible power of appointment or removal. On the contrary, a 1963 letter from the Attorney General observed that, while the amendment will diminish the Legislature's powers over local matters, it "otherwise will have no effect upon the other provisions of the Constitution." Letter from Attorney General Louis Lefkowitz to the New York State Senate and Assembly (April 3, 1963) (reproduced at Add.16-17).

In sum, the 1963 simplification of article IX did not disturb the Constitution's longstanding allocation of power between the Legislative and Executive Branches. To hold otherwise would require an incongruous assumption: A constitutional amendment focused on the *vertical*

separation of powers (i.e., between local governments and the State) implicitly—and dramatically—altered the *horizontal* separation of powers (i.e., between the Legislative and Executive Branch).

New York's practice today comports with its history. While statutes generally give Executive Branch officials the power to appoint a majority of members on executive boards and commissions, this is not invariably so. For instance, the Board of Commissioners of Pilots, which was upheld in *Sturgis*, still governs the licensing of pilots who guide ships through various waters and may revoke licenses and seek civil penalties. *See* Navigation Law §§ 87, 95(1), 97(1). The board has six commissioners, yet the Governor appoints just two of them. *Id.* § 87(1). The Assembly's Speaker and the Senate's Temporary President each appoint one commissioner, and, as has been the case for over 150 years, certain marine insurance executives appoint two commissioners. *Id.*

Further, the Governor has not previously, and does not now, have the power to appoint all or a majority of members of commissions responsible for investigating or sanctioning misconduct by public officials and employees. For example, the Legislative Ethics Commission can impose civil penalties against legislative members, employees, and

candidates. *See* Legislative Law § 80(9), (10)(b). Its members are appointed solely by the legislative leaders. *Id.* § 80(1). And for JCOPE (the Commission's predecessor), the Governor lacked the power to appoint a majority of its members. *See* L. 2011, ch. 399, pt. A, § 6(2).

Similarly, the State Commission on Prosecutorial Conduct ("CPC"), which plaintiff signed into law as Governor, is empowered to investigate complaints of misconduct by district attorneys or assistant district attorneys. *See* Judiciary Law § 499-a, 499-b(2); L. 2019, ch. 23, § 1. The commission consists of eleven members. Only four are appointed by the governor; the remaining seven are appointed by either one of the four legislative leaders or this Court's Chief Judge. Judiciary Law § 499-c(1). The CPC can, among other things, subpoena records, take testimony, confer immunity on witnesses on notice, and make findings and recommendations with respect to any misconduct. *See id.* §§ 499-d(1)-(2), 499-f(7); *see also Soares v. State of New York*, 68 Misc. 3d 249, 271-79 (Sup. Ct., Albany County 2020) (rejecting separation-of-powers challenge to CPC's appointment process, explaining that the federal precedent cited by plaintiffs would, if adopted, "upend wide swaths of New York law and longstanding practice").

In sum, over 170 years of New York precedent and practice reveal a flexible approach to appointment that is at odds with the categorical rule that the courts below adopted whereby the exclusive or paramount power to appoint state officers who wield executive power is vested in the Governor. When, as here, the Constitution does not expressly prescribe the appointment process for an office, the Legislature may direct the manner of appointment, including by permitting legislative leaders to appoint a majority of a commission's members or by involving private parties in that process. Indeed, as to the latter point, this Court has upheld statutes that have given private parties a far greater role in the appointment process than the narrow role assigned to the IRC. *See Sturgis*, 45 N.Y. at 449-51 (private organizations have exclusive power to select and appoint); *Lanza*, 11 N.Y.2d at 329-33 (elected official must choose from among those nominated by heads of private organizations). The IRC merely reviews appointees chosen by the elected officials; it does not appoint members of its own choosing nor have any say over whom the elected officials appoint in the first instance. *See* Executive Law § 94(3).

This does not mean, however, that the separation-of-powers doctrine places no constraints on a commission's appointment process.

Rather, as noted *supra* at 24-33, that doctrine *may* be implicated in the absence of the factors present here. Those factors include: a special institutional need for the commission's independence, a commission by which the political branches seek to regulate themselves rather than the public at large, and a commission structure that does not tilt so far toward legislative dominance that it constitutes a clear legislative usurpation of executive power.

3. The Commission's Removal Process Is Consistent with New York's Precedent and Practice and, in Any Event, Any Defect in That Process Would Not Entitle Plaintiff to Relief.

Turning next to the Commission's removal process, the Appellate Division held that the Constitution implicitly grants the Governor a paramount, indefeasible power to remove state executive officers. The court erred for several reasons.

To begin, New York's precedent and practice refutes the Appellate Division's holding that the Governor has an implicit, paramount power of removal. For one thing, when New York's Constitution grants the Governor the power to remove, it does so expressly. Whereas the U.S. Constitution contains no "removal clause," *Seila Law LLC*, 140 S. Ct. at

2205, the New York Constitution contains provisions that expressly grant the Governor the power to remove certain specified officers—namely, the heads of departments who are appointed by the Governor, N.Y. Const., art. IV, § 4, and elected sheriffs, county clerks, district attorneys and registers, *id.*, art. XIII, § 13(a). The courts below correctly did not hold that either provision applies here.

Another provision further undermines the inference that the Constitution implicitly reserves to the Governor an indefeasible power to remove state executive officers. That provision specifies that when the duration of an office is not provided by the Constitution or by law, "such office shall be held during the pleasure of the *authority making the appointment*." N.Y. Const., art. XIII, § 2 (emphasis added). That provision shows that the power to remove may be held by someone other than the Governor because absent an express assignment it belongs by default to the appointing authority, which may or may not be the Governor. In other words, while the power to remove *may* be derivative of the power to appoint, the Legislature may also provide otherwise, and as shown above, the power to appoint executive officers may be vested by statute outside of the Executive Branch.

Further evidence that New York's Constitution gives the Legislature the power to prescribe the manner of removal can be found in article XIII, § 6. That provision specifies that the Legislature "may declare the cases in which any office shall be deemed vacant when no provision is made for that purpose in this constitution." Because declaring when an office is vacant can have the effect of removing its occupant, the power to declare vacancies includes an indirect power to prescribe when and how an officer is removed—a power that is held by the Legislature unless the Constitution provides otherwise. *Matter of La Carrubba v. Klein*, 59 A.D.2d 99, 103 (2d Dep't 1977), *aff'd for reasons stated below,* 46 N.Y.2d 1009, 1010 (1979) (noting that declaring a vacancy in an office may be an indirect method of removal).

Thus, the Legislature retains the power to prescribe when and how an executive officer may be removed. As this Court explained, an officer's term of office is "within the control of the legislature, and as it gave the power to appoint, [it] may also give the power to remove." *People ex rel. Gere v. Whitlock*, 92 N.Y. 191, 198 (1883). The removal process thus may be "restrained and limited by some other provision of law." *People ex rel. Cline v. Robb*, 126 N.Y. 180, 182 (1891); *see also People ex rel. Percival v.*

Cram, 164 N.Y. 166, 171 (1900) ("in the case of public officers such duration of term and permanence of tenure must proceed from the action of the legislature itself, for so the constitution ordains").

New York's history and practice confirm that neither the Take Care Clause nor Vesting Clause implicitly vests the Governor with an indefeasible power of removal over public officers. Lincoln noted in his authoritative commentaries that "[m]any officers are beyond the governor's immediate control, for, as to them, he has no power of removal." 4 Lincoln, *The Constitutional History of New York*, *supra*, at 456. And, as explained *supra* at 44-45, attempts were made to amend the Constitution to give the Governor the power to remove *all* state officers whose removal was not provided by the Constitution. Those efforts were unsuccessful.

Moreover, the Legislature has repeatedly vested power to remove executive officers outside the Executive Branch. For instance, Public Officers Law § 32 has long made clear that the Legislature may deny the Governor the power to remove even some officers whom the Governor appointed. *See* L. 1928, ch. 112, § 1 (codified at Public Officers Law § 32). That statute provides that, except for department heads, if an officer's

appointment is subject to the advice and consent of the Senate, the Governor may only recommend to the Senate that it remove that officer. *See* Public Officers Law § 32. The sole exception is where the Legislature, by statute, has chosen to grant the Governor the power of removal. *Id.*

In addition, the enabling acts of the various Executive Branch entities cited above, *see supra* at 22, 47-48, 54-55, did not grant the Governor, or any other executive official, the power to remove a majority of the entity's members. *See, e.g.*, Legislative Law § 80(2)-(4) (Legislative Ethics Commission); Judiciary Law § 499-c(3) (Commission on Prosecutorial Conduct); Navigation Law § 87(1) (Board of Commissioners of Pilots); L. 2018, ch. 59, § 1, pt. HHH, § 1 (Committee on Legislative and Executive Compensation); L. 2011, ch. 399, pt. A, § 6(7) (JCOPE); Uncons. Laws of N.Y. § 7501 (Commission of Investigations).

Executive Law § 94's removal process is therefore consistent with the Constitution. That process does not violate any of the constitutional provisions that grant the Governor a power to remove public officers. And the Commission's enabling act properly "restrain[s] and limit[s]" the removal process, *Cline*, 126 N.Y. at 182, by specifying that Commission members may be removed by the Commission for cause only, *see*

Executive Law § 94(4)(c). While a state commission's removal process might conceivably violate the separation-of-powers doctrine if it excessively aggrandizes the Legislature's powers, that is not the case here. Executive Law § 94's removal process fosters the Commission's independence, not only from the Executive Branch officials whom it monitors, but also from the Legislature.

Finally, plaintiff's challenge to the Commission's removal procedure fails for an independent reason as well. Even if, as plaintiff asserts (*e.g.*, R.379), federal caselaw regarding the President's power of removal were applicable, which it is not, that caselaw makes clear that any defect in the Commission's removal process would not be sufficient to entitle plaintiff to relief. Rather, plaintiff would have to show that the alleged defect harmed him—a showing he cannot make.

The U.S. Supreme Court has held that, if an officer is validly appointed, a defect in the agency's removal process does not by itself render all agency action void. *See Collins v. Yellen*, 594 U.S. 220, 258-60 & n.24 (2021). Rather, to obtain relief based only on a removal defect, a party must show that the removal restriction caused actual harm. *See id.* at 259-60. The federal courts of appeals have thus repeatedly "denied

relief on removal claims when the challengers have not shown that the constitutional violation caused them harm." *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023) (collecting cases).

For example, the Second Circuit rejected a request for prospective relief—there, to bar enforcement of an administrative subpoena—where the party failed to show that the challenged removal restriction affected the subpoena's issuance or the investigation into that party. *Consumer Fin. Protection Bur. v. Law Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 179-80 (2d Cir. 2023), *cert. denied* 2024 WL 2709347 (2024). The Second Circuit reasoned that the principle that "an officer's actions are valid so long as she was validly appointed" applies with equal force regardless of whether the party challenging that action seeks prospective or retrospective relief. *Id.* at 181.

So even if federal caselaw were persuasive on the removal issue, which it is not, that caselaw would bar plaintiff from obtaining relief based on any alleged defect in the Commission's removal process. This is because the Commission's members were validly appointed, and plaintiff fails to allege that the Commission's removal process affected the Commission's decision to pursue the administrative proceedings against

him. Plaintiff does not allege, for example, that Governor Hochul or any other official who appoints the Commission's members has "attempted or desired to remove" any Commission member and was prevented from doing so. *K & R Contractors, LLC*, 86 F.4th at 149. Thus, given plaintiff's failure to allege that the Commission's removal process harmed him, his challenge to that process fails.

4. Precedent from Other States Supports the Commission's Structure.

In evaluating a law's constitutionality, this Court has long given consideration to precedent from other states. *See, e.g. Lanza*, 11 N.Y.2d at 330-31 (relying on out-of-state precedent in rejecting challenge to appointment process); *White*, 38 N.Y.3d at 224, n.5. The great weight of authority from other states supports the Commission's structure.

As treatises confirm, state legislatures "may themselves appoint or delegate the power of appointment," unless the state's constitution specifically prescribes the manner of appointment. 1 Shambie Singer & Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 3:21 (7th ed., Nov. 2023 update); *see also*, *e.g.*, 63C Am. Jur. 2d, *Public Officers and Employees* § 90 (Aug. 2024 update); 16 C.J.S. *Constitutional Law*

§ 324 (May 2024 update). Thus, as the California Supreme Court has explained, "in the great majority of our sister states in which the question has been presented," including New York, "the courts have held that under their respective state constitutions the power to appoint executive officers is not an exclusively executive function that may be exercised only by the Governor or another executive official." *Marine Forests Socy.*, 36 Cal. 4th at 42 (citing, e.g., *Woodruff*, 32 N.Y. at 364-65). The power to appoint instead "may be exercised—either in general or in appropriate circumstances—by the Legislature." *Id.*; *see also, e.g.*, *Seymour v. Elections Enforcement Commn.*, 255 Conn. 78, 106-108 (2000) (rejecting separation-of-powers challenge to commission with power to levy civil penalties, even where legislature appointed four of five commissioners).

Further, as with the appointment process, state legislatures "are free to alter the methods for removal of public officers." 63C Am. Jur. 2d, *Public Officers and Employees* § 169 (Aug. 2024 update). The power of removal is not implied from governors' "obligation to faithfully execute the laws." 1 Shambie Singer & Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 3:23 (7th ed., Nov. 2023 update). As one scholar of state administration noted, "in no respect, perhaps, does the

power of removal [exercised by state governors] contrast more strikingly with that of the president." John Mabry Mathews, *Principles of American State Administration* 98 (1917) (internet). State governors have not been considered to have the power of removal based on their "general executive power," and whatever removal power governors have must "as a general rule be derived from specific provision of the constitution or statutes." *Id.*; *see id.* at 103 (noting that "in spite of constitutional and statutory provisions, the power of the governor of New York to remove from office is still seriously circumscribed").

In accordance with these principles, many state courts have rejected separation-of-powers challenges to laws establishing executive agencies for which neither the governor nor another executive official has the power to appoint and/or remove a majority of members. *See, e.g.*, *Marine Forests Socy.*, 36 Cal. 4th at 41-42; *Seymour*, 255 Conn. at 106-108; *State Through Bd. of Ethics for Elected Officials v. Green*, 566 So. 2d 623, 623-25 (La. 1990); *Parcell v. State*, 228 Kan. 794, 795-96 (1980).

For instance, in *Marine Forests Society*, the California Supreme Court rejected a separation-of-powers challenge to a state commission, where legislators appointed two-thirds of the voting members, while the

Governor appointed the remaining one-third. *See* 36 Cal. 4th at 13-14. This executive-branch commission could bring enforcement proceedings to compel a party to cease and desist operating under a development permit. *See id.* at 16-17. The California Supreme Court held that under the California Constitution, unlike the U.S. Constitution, the power to appoint executive officers has never "been viewed as an inherent or exclusive power of the executive branch." *Id.* at 40; *see id.* at 28, 31-32 (finding federal precedent is inapposite).

Marine Forests Society is especially instructive given the close parallels between California's and New York's constitutional history. California's Constitution, like New York's, had a clause that allowed the legislature to prescribe the manner of appointing executive officers whose appointment was not specified in the constitution. *See id.* at 31-38. Then, in the mid-twentieth century, California's Constitution, like New York's, was amended to repeal that clause. *See id.* at 38. But this repeal did not "alter the state constitutional allocation of power with regard to the appointment of executive officers." *Id.* This was so because none of the materials accompanying the repeal suggested an intent "to withdraw constitutional authority from the Legislature or to grant additional

constitutional authority to the Governor or any other official in the executive branch." *Id.* at 39-40.

Like plaintiff here, the plaintiff in *Marine Forests Society* relied heavily on the California Constitution's equivalent to New York's Take Care and Vesting Clauses, but the court found that reliance to be misplaced. *Id.* at 47. Those clauses have been in the California Constitution since its inception. *Id.* at 33, 47. Yet they have never been seen as conflicting with or invalidating any statute "that grants the Legislature the power to appoint an executive officer." *Id.* at 47.

The reasoning of *Marine Forests Society* squarely applies to New York's materially similar constitutional history—and is irreconcilable with the categorical rule read into the Constitution by the courts below. Indeed, the California Supreme Court relied on the same precedent that this Court found persuasive in *Lanza*. *Compare Lanza*, 11 N.Y.2d at 330 (quoting *Ex parte Gerino*, 143 Cal. at 414), *with Marine Forests Socy.*, 36 Cal. 4th at 38 (same).

Equally instructive are the state court decisions that rejected separation-of-powers challenges to independent ethics bodies based on many of the same factors that are present here. For instance, the

Supreme Court of Louisiana upheld the law creating the Board of Ethics for Elected Officials, which could conduct investigations and seek civil penalties; the board consisted of five members, with just one appointed by the Governor and four appointed by either the Louisiana Senate or House of Representatives. *See Green*, 566 So. 2d at 623-25 & n.2.

The court noted that a law might violate Louisiana's separation-of-powers doctrine if it allowed the legislature to exercise executive functions through the legislative appointees. *See id.* at 625. But the court held that no such violation had occurred given the "significant restraints" that the board's enabling act placed on legislative control. *Id.* The court emphasized that the act (i) dispersed the appointment powers across the legislature's two houses, (ii) staggered the Board member's terms, (ii) provided that members could be removed only for cause, and (iv) barred any legislative member or employee from serving on the board. *Id.* at 625-626. That reasoning applies with equal force here, especially given the stringent limits the Commission's enabling act places on the legislative leaders' ability to control their appointees.

The Kansas Supreme Court likewise rejected a separation-of-powers challenge to the Governmental Ethics Commission, a body where

four legislative leaders appointed a total of six of the commission's 11 members. *See Parcell*, 228 Kan. at 795-96. Although the commission could conduct investigations but not impose civil penalties, *id.* at 797, the absence of the power to impose penalties was neither dispositive nor central to the holding in *Parcell*. The court explained that its separation-of-powers analysis turned on factors such as the "degree of control by the legislative departments," as well as a law's objective and practical results. *Id.* at 796-98. The court held that these factors weighed in the law's favor. As to the degree of legislative control, the law diffused the appointment power among legislative leaders from different political parties. *See id.* at 797-98. Further, the law's objective was "to increase the public trust in our elected officials." *Id.* at 798. And, given that the commission investigated members of both the legislative and executive branches, the law had the effect of giving the commission "needed independence should it be called upon to investigate those officials who appointed some of its members." *Id.* These factors similarly weigh in favor of the Commission's constitutionality.

* * *

Accordingly, the Third Department's rigid conception of gubernatorial control conflicts with New York's long-settled practice of creating boards and commissions in which neither the Governor nor any other executive official has controlled the appointment and/or removal of a majority of its members. Like other state courts, New York courts have recognized the Legislature's power to prescribe the appointment and removal process, including by giving private parties a voice in the appointment process. New York's separation-of-powers doctrine thus does not require that the ethics commission with jurisdiction over both the Legislative and Executive Branches *must be* dominated by the Governor. Rather, the doctrine allows for the Governor and the Legislature to do as they did here—create a commission that is neither unduly beholden to the officials it monitors nor allows for the Legislature to usurp executive power.

CONCLUSION

This Court should reverse the Third Department's order and declare that Executive Law § 94 is constitutional.

Dated: Albany, New York
August 14, 2024

Respectfully submitted,

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AFFIRMATION 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), Dustin J. Brockner, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 13,974 words, which complies with the limitations stated in § 500.13(c)(1).

DUSTIN J. BROCKNER

ADDENDUM

TABLE OF CONTENTS

Page

Appellant's Statements and Points, *Sturgis v. Spofford*, 45 N.Y. 446 (1871) ADD1

Letter from Attorney General Louis J. Lefkowitz to the New York State Senate and Assembly (April 3, 1963) ADD16

Union Printing House, Law Printers, 79 John Street, N. Y.

N. Y. Court of Appeal.

Russell Sturgis, and others, Comrs of Pilots *Respondents,* *against* Paul N. Spofford, et al, *Appellants.*	*Appellant's Statement and Points.*

This action was brought by the plaintiffs, as Commissioners of Pilots, to recover certain penalties given by Section 29 of the Act of 1853, regulating pilotage in the port of New York, for employing a person not holding a license from the plaintiffs, or under the laws of New Jersey, to act as pilot.

The cause was tried before Mr. Justice Noah Davis in October, 1866, without a jury, and the plaintiffs recovered a judgment, which was affirmed at General Term, whereupon the defendant appealed to this Court.

It was claimed, and the Court found, that the defendant employed one John Maginn to pilot certain steamers and sailing vessels bound outward from the port of New York by way of Sandy Hook. That Maginn, at the time, held a license under the act of Congress, 1852. That he

held a license under the laws of this State passed in 1836, (fols. 239, 259, 261).

That he took a license under the Board of Commissioners of Pilots in 1853, and each year thereafter until and including 1859 (fols. 230, 231, and 217).

The plaintiffs claim that he was suspended by the Board, April 10, 1860 (fol. 216), but continued to act as pilot, no pilot being appointed in his place (fol. 218). A new license was issued to him April 26, 1865. In the meantime he piloted the vessels in question.

Maginn had no license under any law of New Jersey, nor does it appear that New Jersey ever had enacted any law for licensing pilots.

Neither does it appear that any pilots, other than Maginn, had ever been appointed by the Board of Commissioners of Pilots of New York under the act in question.

The recovery was for forty-six penalties.

I.

Only one penalty was recoverable in this action.

The statute is as follows: "All persons employing a "person to act as pilot, not holding a license under this "act, or under the laws of the State of New Jersey, shall "forfeit and pay to the Board of Commissioners of Pilots "the sum of one hundred dollars."

It is the employing of a person to act as pilot that subjects the defendant to a penalty. The defendant em-

ployed a person to act as pilot; that person was John McGinn. While acting as pilot, he piloted several vessels.

We claim that it is immaterial how many vessels he piloted while so acting; we pay the $100 for employing him to act.

Washburn *vs.* McInroy, 7 John., 134.
Tiffany *vs.* Driggs, 13 John., 252.

II.

Maginn was a pilot *de facto*, acting under color of legal authority, and his acts as regards third persons are valid.

People *v.* Tieman, 8 Abb. 361. Pr. Allen, J.

The defendant knew he was acting as pilot. He was not bound to know, nor did he know, that he had no license; and he, therefore, cannot be subjected to the penalty.

1*st.* Maginn claims that the plaintiffs had not the power by any act of pretended suspension to take away his functions as pilot, and he continued to act, and is *de facto* a pilot. This action assumes that he had no title to the office—a question that cannot be tried in this collateral way. He should first be actually ousted and prevented from acting. But until that be done, the resolution of suspension is of no effect as regards third persons.

13 Wend. 494.
People *vs.* Tieman, 8 Abb. 362.

People *vs.* Collins, 7 John., 549.
Weeks *vs.* Ellis, 2 Barb. 321.
8 Paige, 428.
Greenleaf *vs.* Low, 4 Denio, 170.
5 Wend., 233.
Fowler *vs.* Beebe, 9 Mass., 231.

In Weeks *vs.* Ellis, Willard, J., says: "The law does "not require third persons at their peril to know whether "a magistrate coming into office by color of a regular "election, and acting as such, has taken the requisite "steps to continue in it." Until forfeiture is judicially declared, by a proper proceeding instituted to oust him, he is a magistrate *de facto.*

In Fowler *vs.* Beebe, 9 Mass., 231, the defendant pleaded in abatement, that Smith, who served the capias, was not properly appointed to the office of Sheriff. The point of the objection was that he was commissioned as Sheriff of Hampden Co. by the Governor several months before the passage of the Act erecting the county.

The Court, Parsons, J., says: "That Smith was Sheriff "of the county *de facto* is certain."

"Mr. Smith is not a party to this record, nor can he "be legally heard in the discussion of this plea, although "our decision would as effectually decide on his title to "the office as if he were a party. This would be judging "a man unheard, contrary to natural equity and the "policy of the law. From considerations like these has "arisen the distinction between holding an office *de facto* "and *de jure.*

Again. Maginn has good grounds to contest the validity of the act suspending him. The Board had not

the right arbitrarily to suspend him, but only after a trial upon notice to him.

Sec. 25 of the Act of 1853.

The Board have such powers only as the statute confers, to be executed only in the statutory mode.

There is no pretence that he had such notice. The Board acted without jurisdiction, and their arbitrary sentence was disregarded by Maginn.

2*d*. The Commissioners claim to have suspended Maginn in 1860, but appointed or licensed no one in his place (fol. 218).

In such case his suspension should be held as not to take effect until his successor was appointed and qualified. The port of New York is not to be left without a pilot, and for aught that appears in the case Maginn was the only pilot who had at the time complained of, ever been licensed by the Board.

8 Abb., 363.
Reed in the City of Buffalo, 3 Keys, 447.

III.

Maginn held a license under the Act of Congress of 1852, which expressly authorized him to act as pilot of steamers on the pilot ground of the port of New York by way of Sandy Hook (fol. 259).

This license was granted in strict conformity to Sec. 9 of the Act of Congress, the 10th clause of which section provides a penalty for employing on any steam vessel any

person who has not such license. 10 U. S. Statutes at Large,61, 67.

It is respectfully submitted that this law is paramount, and protects the defendants against any penalty sought to be imposed by a State law for doing precisely what the federal law enjoins.

The Joliffe case, and the case of Cisco *vs.* Roberts, decided by this Court, are authority only to the extent that, notwithstanding the Act of 1852, the States had authority to make regulations requiring vessels in the harbors to take port pilots licensed under State laws. It is another thing to say that the States can impose penalties for going to sea with such a pilot as Congress peremptorily requires.

And in this connection we again refer to the absence of any proof that any pilots except Maginn had been appointed under the laws of New York or New Jersey.

IV.

The last clause of Section 29 expressly excepts from the operation of the Act, all vessels propelled wholly or in part by steam belonging to citizens of the U. S., and licensed and engaged in the coasting trade. This clause was evidently intended to except the vessels to which the Act of Congress of 1852 applied.

Twenty-two of the causes of action recovered on, were for piloting steam vessels owned by citizens of the U. S., sailing under a register (fols. 257, 254).

A register confers all the rights and benefits of a coasting vessel sailing under a license.

1 U. S. Statutes at Large, 55, Sec. 1.

These 22 penalties therefore are not given by the statute and must be deducted.

V.

The Commissioners of Pilots claim to be public officers. Unless they are such they have no functions to perform, and the action being brought by themselves, their title to the office is directly in issue.

People *v.* Tieman, 8 Abb. 362.
People *v.* Hopson, 1 Denio, 579 (assaulting public officer).
Green *v.* Burk, 23 Wend., 490 (Constable an infant levied) held not protected.
Fowler *v.* Bebee, 9 Mass. 234 & 5 (Sheriff).

They are not legally elected or appointed to office.

The office is created by the statute of 1853, which provides, § 2, that three of such Commissioners shall be elected by the *members* of the Chamber of Commerce of the city of New York.

§ 3. That the other two Commissioners shall be elected by the *Presidents and Vice-Presidents of the Marine Insurance Companies* composing or represented in the Board of Underwriters of the said city.

The election is to be evidenced by the certificate of the Secretaries of the respective Boards.

This mode of constituting officers is contrary to the terms as well as the spirit of the Constitution.

Article 10, Sec. 2, of the Constitution provides for the election or appointment of county, city, town, and village

officers, and restricts the Legislature respecting the elective constituency and the appointing power :

1*st.* If elected—To the *electors of the county, city, town or village* to which the office relates.

2*d.* If appointed—To the Board of Supervisors of the county, or to such *authorities* of the cities, towns, or villages as the Legislature shall designate.

Other provision is made in the Constitution for appointments to certain other offices by the Governor.

Then follows the latter clause of Section 2: That all other officers whose election or appointment is not provided for by this Constitution, or which may hereafter be created by law, shall be elected by the *people or appointed,* as the Legislature shall direct.

The Pilot Commissioners are neither—

1*st.* Elected by the people; but by the members of two corporations in no way representing or responsible to the people; or

2*d.* Appointed by any recognized appointing power.

The words elected and appointed are not to be construed as meaning the same thing, for each is sufficiently defined by the Constitution. Each has its own process and method.

The machinery provided by the Law of 1853 for choosing these Commissioners is not adapted to the process of appointment, but only to an election, which it expressly declares the process to be.

An appointment to office is a judicial act.

Wood *vs.* Peake, 8 John., 71.

Wildy *vs.* Washburn, 16 John., 49.

Of course it requires a quorum to be present. Then the action is by the Board. Individual membership is merged in the Board or body.

By the terms of this statute, the *members* of the Chamber of Commerce are to elect, not the body, but the *members.*

Nine members constitute a quorum for business as a Board, whereas an election requires the presence of only one at a time.

The statute evidently does not require a corporate act, but an act by the individual members.

As to the Board of Underwriters, the statute is still more explicit:

"Two others of such Commissioners shall be elected "by the Presidents and Vice-Presidents of the Marine "Insurance Companies of the city of New York, *composing* "or *represented* in the Board of Underwriters of said "city."

"Each insurance company represented at such meeting "shall be entitled to one vote," &c.

Who compose the Board is not explained, but only presidents and vice-presidents can vote at this election, and then each insurance company is entitled to but one vote.

It is impossible to regard this proceeding as a corporate act, merging individual action; but it requires individual action by the members. The process is what the statute names it, an election.

Not being by the people, it is in violation of the Constitution.

VI.

Regarded as an appointment, it equally violates the Constitution.

1st. Section 2 of Article 10 of the Constitution provides a mode for electing or appointing all local officers, not elsewhere specifically provided for, and requires that all county, city, town, and village officers shall be elected by the electors of such counties, cities, towns, and villages, or appointed by such authorities thereof as the Legislature shall designate.

Thus clearly manifesting the purpose to confine the choice of local officers to the people of those localities, or to some local authority representing them.

Then follows the clause in reference to all officers whose offices may hereafter be created. And it is declared that they also shall be elected by the people or appointed, whichever the Legislature may direct.

We submit that this clause, being construed with reference to the context, and the clearly defined policy of the convention that framed it, recognizes no other appointing power than some authority representing the locality for which the officer is to be chosen.

2*d*. The Legislature have no authority to locate, establish, or delegate a power to appoint officers in or to any person, corporation, or body not representing, or responsible to, the people.

It is not only a departure from all the precedents, but contrary to the whole theory and spirit of our Government.

By the Law of 1853, a Board of five Commissioners of Pilots is to be chosen. On these Commissioners important functions are devolved — legislative, judicial, and administrative, over important interests, and affecting a large class of citizens.

They are to enact laws and regulations relative to pilotage and navigation, inflict penalties for violations of their own laws, not only on pilots, but shipowners and persons holding no relations with them, and they judge and punish offences. §§ 9, 10, 12, 23, 24, 25, 26, 27.

These important functionaries are chosen by men not in authority, and not representing the people either of the district or the State.

They are not even necessarily citizens of the State. There is nothing in the laws requiring any member of the Chamber of Commerce, or the Board of Underwriters, to be a citizen of the United States.

They individually voluntarily become members of these societies, and thus, without the agency of the people, or their legitimate representatives, assume the right to select this Board of Commissioners with all its legislative and judicial powers.

They are responsible to nobody, they represent no constituency.

For the Legislature thus to foist upon us a local legislative and judicial power, not chosen directly or indirectly by the people, or accountable to them, is a violation of one of the implied restrictions upon their powers.

In The People *vs.* Draper, 15 N. Y. 532, Denio, J., in discussing the question of power conferred by the Constitution, says that:

" Every positive direction contains an implication
" against every thing contrary to it, or which would
" frustrate or disappoint the purpose of the provision.
" The frame of Government; the grant of legislative
" power itself; the organization of executive authority;
" the erection of the principal courts of justice, create
" implied limitations upon the law-making power, as
" strong as though a negative was expressed in each
" instance."

37 N. Y., 673, etc.

In Clark *vs.* the City of Rochester, 28 N. Y., 605, it was said that:

" While general statutes must be enacted by the Legis-
" lature, it is plain the power to make local regulations,
" having the form of law in limited localities, may be
" committed to other bodies representing the people in
" their local divisions, or to the people of those districts
" themselves."

In Schuster *vs.* the Metropolitan Board of Health, 49 Barb., 454, it was laid down as settled law "That the
" power of local legislation may be conferred upon muni-
" cipal corporations or officers, but those upon whom the
" power is conferred must hold their offices *from the people*
" *of the municipality or district*, or by appointment *from*
" *officers elected by such municipality or district.*"

This is stated as the doctrine of the People *vs.* the Board of Metropolitan Police, 33 How., Pr. 52, affirmed by the Court of Appeals.

In this respect there is no difference between the legislative power and the judicial power, or any other govern-

mental function ; the people are the source of power, and as the act in question entirely ignores them, it is void.

The Board of Commissioners of Pilots then is a nonentity. The act creating it is void. Their action in suspending Maginn as pilot is a nullity, and Messrs. Sturgis, Marshall, and others, have no right to recover the penalties.

VII

The law inflicting the penalty had ceased to exist before the trial and judgment.

The trial was had Oct. 24, 1866, and the judgment entered Jany. 26, 1867.

1. The power given by the Federal Constitution to regulate commerce covers the whole subject of pilotage.

> Steamship Co. *vs.* Joliffe, 2 Wallace, 459.
> Cooley *vs.* Port Wardens of Phila , 12 How., 299.

2. When the power is once exercised by Congress it becomes exclusive.

> City of N. Y. *vs.* Miln., 11 Peters.,158.
> People *vs.* Brooks, 4 Denio, 477.
> Brown *vs.* State of Maryland, 12 Wheat., 419.
> Gibbon *vs.* Ogden, 9 do. 1, 197.
> Passenger case, Smith *vs.* Turner, 7 How., 392.

3. Because Congress had not exercised this power it was held in Cooley *vs.* Port Wardens, 12 How. 299, that the States had not been divested of legislative jurisdiction over the subject. This decision was in 1851.

4. The next year Congress, as if intending to exclude State authority, passed the Act of 1852, among other things regulating pilotage upon steam vessels.

10 U. S. Statutes at Large, 61.

This statute provided for the appointment of inspectors of steam vessels who were required to examine, appoint, and license pilots, and requiring that such pilots and none others should have charge of steam vessels.

5. In the Joliffe case, 2 Wallace, 450, it was held by a divided Court that this Act did not apply to the ports and harbors, but only to vessels on their voyage upon the high seas. This decision was made in 1864.

6. In August, 1866, Congress made another, and we claim a successful effort to divest all State authority over the subject. By enacting that all vessels navigating the *bays, inlets, rivers, harbors and other waters* of the United States, etc., should be subject to the navigation laws of the United States, and that all steam vessels *navigating as aforesaid* should be snbject to *all rules and regulations established by the Act of* 1852, " and every *sea-going steam* " *vessel now subject or hereby made subject* to the navigation " laws of the United States, and to the rules and regula- " tions aforesaid, shall, *when under way, except upon the* " *high seas*, be under the control and direction of pilots " licensed by the inspectors of steam vessels."

14 U. S. Stat. at Large, 228.

This Act of Congress covered the whole ground. Its effect was to extinguish all local authority over the subject of pilots and pilotage. The New York Statute of 1853 was thereupon abrogated. It ceased to be of force.

7. On the 24th of October, 1866, and the 26th of January, 1867, the Supreme Court was engaged in enforcing a statute that had become extinct as effectually as by repeal, without a saving clause.

The repeal of a statute, giving a penalty, extinguishes the right to the penalty, even though a prosecution is pending.

Butler *vs.* Palmer, 1 Hill, 325, 330–2.
Joliffe case, 2 Wallace, 450, 464–5–6.
Hartung *ads.* The People, 22 N. Y., 100-1-2.
Commonwealth *vs.* Duane, 1 Binney, 601.
Board of Trustees *vs.* City of Chicago, 14 Illinois, 334.
Norris *vs.* Crocker, 13 How. (U. S.), 429.

The same result follows where the law expires by its own limitation, pending the appeal from a judgment.

Yeaton *vs.* United States, 5 Cranch, 281.
Schooner "Rachel," 6 Cranch, 329.

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April 3, 1963

The Honorable, The Senate and Assembly
of the State of New York
The Capitol
Albany, New York

Re: Senate Int. 3767, Pr. 4544
Assembly Int. 5163, Pr. 5961
entitled "Concurrent Resolution of the Senate and Assembly proposing a new article nine of the constitution, in relation to a bill of rights and home rule powers for local governments and repeal, re-numbering and amendment of provisions of the constitution presently in force to conform thereto"

Sirs:

In accordance with Article XIX, Section 1, of the Constitution, your honorable bodies have requested my legal opinion as to the legal effect of the amendment proposed by the above-designated concurrent resolution upon the other provisions of the Constitution.

This concurrent resolution would repeal present Article IX, except Sections 5, 6 and 8 thereof, and replace it by a new Article IX, repeal subdivision (e) of Section 7 of Article I, and Section 18 of Article III, amend Article VIII, Section 12, renumber and amend Sections 5, 6 and 8 of Article IX to be subdivisions (a), (b) and (c) respectively, of a new Section 13 added to Article XIII, and amend Article XIII by adding thereto another new section, to be Section 14, to provide for a bill of rights for local governments and expanded home rule powers for all local governments.

In my opinion, the proposed amendments, if adopted, will impair the legislative power of the Senate and Assembly with respect to local governments conferred by Article III, Section 1, and will affect the power of the Legislature provided in Article IV, Section 7, to override the Governor's veto of any bill repealing, diminishing, impairing or suspending a power granted in the statute of local governments, but otherwise will have no effect upon the other provisions of the Constitution.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

ROTHLAUF:KK