No. APL-2024-00076

To be argued by:
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20 minutes requested

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.

REPLY BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

Plaintiff contends that New York's Constitution forbids the creation of an ethics commission that is not dominated by the political branches it monitors. That untenable position not only conflicts with the position he took when, as Governor, he signed JCOPE into law, but also fundamentally misconstrues New York's separation-of-powers doctrine.

This doctrine entails a flexible, case-specific inquiry. In construing New York's Constitution, this Court has never imposed a rigid and formalistic rule that the Governor or her subordinate must *always* have the power to appoint and remove all, or a majority, of the members of *every* state executive entity, much less the State's ethics body. Rather, the Constitution affords the Governor and Legislature flexibility to devise a mutually-agreeable method that, in their judgment, will best regulate their own affairs and promote the public's trust in government. They exercised that authority here by creating an ethics commission that is not unduly beholden to the very officials it monitors.

Nor is there any merit to plaintiff's alternative claim—that the Commission's structure violates article V of New York's Constitution, which addresses the civil service structure and limits the Executive

Branch to 20 civil departments. Plaintiff's article V claim suffers the same basic defect as his separation-of-powers claim. It espouses a rigid conception of gubernatorial control that conflicts with New York's long-settled practice, which allows for entities within departments that function with varying degrees of independence from the department heads and the Governor.

Finally, the Commission's authority to administer the ethics laws against a former Governor does not conflict with the Legislature's impeachment power.

ARGUMENT

POINT I

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

A. The Doctrine Allows for an Ethics Commission that Is Not Unduly Beholden to the Officials It Monitors.

The touchstone of the separation-of-powers doctrine is preventing one branch of government from usurping the power that belongs wholly to another branch. *See, e.g.*, *Cohen v. State*, 94 N.Y.2d 1, 14 (1999). To ensure the proper separation of powers, this Court has eschewed the formalist approach espoused by plaintiff and the courts below.

"[C]ommon sense and the necessities of government do not require or permit a captious, doctrinaire, and inelastic classification of governmental functions." *People v. Tremaine*, 252 N.Y. 27, 39 (1929). In New York, the separation-of-powers inquiry is functional, context-specific, and often turns upon degrees, not rigid distinctions. *See, e.g.*, *Bourquin v. Cuomo*, 85 N.Y.2d 781, 785 (1995).

Plaintiff has failed to establish—beyond a reasonable doubt—that the Commission's enabling act either constitutes a legislative usurpation of executive power or excessively impairs gubernatorial control. Several factors, viewed together, make this clear—(i) the Commission's unique function, which is to provide ethical oversight for the Legislative and Executive Branches rather than to regulate the public at large, (ii) the compelling need, established by hard-earned experience, for the Commission to possess both actual and perceived independence from the branches it monitors, (iii) the Governor's advocacy for that independence, while retaining meaningful supervisory powers over the Commission, and (iv) the statutory safeguards that prevent the Legislative Branch from dominating the Commission. (Commission's Opening Br. ["Comm.Br."] 24-33.)

The high courts of other states have considered similar factors, such as the degree of legislative control and the nature of an agency's functions, in analyzing separation-of-powers challenges to independent executive agencies. (Comm.Br. 68-70.) They have rejected such challenges where, as here, the agency's structure does not enable the legislature to exercise executive power. *See, e.g.*, *Marine Forests Socy. v. California Coastal Commn.*, 36 Cal.4th 1, 46-50 (2005); *State Through Bd. of Ethics for Elected Officials v. Green*, 566 So.2d 623, 623-25 (La. 1990); *Parcell v. State,* 228 Kan. 794, 796-98 (1980).

Despite this jurisprudence, plaintiff argues that the above-cited factors provide "no limiting principles" and would permit the Legislature to create any independent agency whenever it "could deem it expedient." (Plaintiff's Br. ["Pl.Br."] 28-33.) Plaintiff is mistaken. He offers a parade of hypothetical laws that he argues *must be* constitutional if the Commission's structure is upheld. But his hypotheticals only confirm that the above-cited factors provide principled and administrable limits. For each hypothetical, some or all of those factors would be absent, making each readily distinguishable from this case.

For example, plaintiff posits a law that eliminates all but one civil department and transfers enforcement power over *all* laws to "independent" commissions led by legislative appointees. (Pl.Br. 31.) Such a law would likely violate the separation-of-powers doctrine for either of two reasons. First, an executive agency's structure may violate that doctrine if it allows for clear legislative control of that agency, such as by granting legislators the unfettered and exclusive power to appoint and remove the agency's members. In that case, which differs dramatically from this one, a court could find that such control could by itself constitute a legislative usurpation of executive power.

Second, plaintiff's hypothetical commissions would wield powers that sweep far beyond the power at issue here. In exercising ethics oversight, the Commission performs an "internal management" function for the Executive and Legislative Branches, *Cohen*, 94 N.Y.2d at 14, and its design reflects the considered judgment of the Governor and Legislature on how to best provide that internal oversight. That judgment is entitled to respect, consistent with the principle that the separation-of-powers doctrine serves as a shield to protect the polity from governmental overreach, not a sword to be wielded by public officers who

dislike the branches' internal-control mechanisms to which they are subject. *See id.* at 13 (the separation-of-powers doctrine is not intended to protect "those individuals who occupy the offices of those [political] Branches at varying times").

Plaintiff's slippery-slope argument ignores the centrality of an agency's function to assessing the constitutionality of its structure. The Commission's structure here is tied *directly* to the nature of its work. *See Matter of Metropolitan Life Ins. Co. v. New York State Labor Relations Bd.*, 280 N.Y. 194, 208 (1939) (the power to create agencies includes "implied power to prescribe all that may fairly be thought to be necessary to foster the agency in its essential functions"). Governor Hochul determined, just as plaintiff did when he was Governor, that the State's ethics commission had been impeded from fulfilling its mission because it was unduly beholden to the very branches it was charged with regulating. (Comm.Br. 5-6, 8.) That rationale has *no* force for agencies that enforce laws that regulate the public at large—such as health or banking laws. In that context, unlike here, there would nothing *intrinsic* in those agencies' mandate that would require the same degree of insulation from the political branches.

B. The Commission's Structure Does Not Unduly Aggrandize the Legislature's Power.

1. The Commission Is Not a Legislative Agent.

Plaintiff primarily contends that the Commission allows the Legislature to usurp executive power because the Commission is "controlled" by "legislative agents," by which plaintiff means the six Commission members appointed[1] by four legislative leaders. (*E.g.*, Pl.Br. 21.) But numerous statutory safeguards included in the Commission's structure ensure that the Commission is not a Legislative Branch agent.

Although legislative leaders may appoint a bare majority of the Commission's 11 members, the appointment power is diluted and spread across four leaders who often have different and even competing views. Executive Law § 94(3)(a). The leaders are not free to appoint whomever they want; the appointment must be approved by a disinterested body,

[1] Plaintiff argues, incorrectly, that the Commission's members are not appointed by the elected officials who nominated them but rather the IRC, the impartial body that reviews each nomination. (Pl.Br. 28-29.) The statutory text is clear: The Commission's members are "appointees" of the elected officials who nominate them, while the IRC is limited to reviewing each "appointment." Executive Law § 94(3)(g), (4)(a). Even the Third Department recognized this fact. (R.951 [noting that the Governor "appoints a minority of members"].)

the IRC, and cannot include someone who is or has recently been a legislative member or employer. *Id.* § 94(3)(b), (e). Nor can the leaders remove their appointees, whose four-year terms of office extend beyond the leaders' terms. *Id.* § 94(4)(a), (c). Indeed, the California Supreme Court cited similar factors, including the lack of removal power, to reject a separation-of-powers challenge to an executive agency where legislators appointed a supermajority of members. *Marine Forests Socy.*, 36 Cal.4th at 48-50.

Given these safeguards, the Commission's enabling act bears no resemblance to the law at issue in *Tremaine*, a case on which plaintiff heavily relies to argue legislative usurpation. (Pl.Br. 19, 23.) That case involved the State's first executive budget in 1929, a budget that included lump-sum appropriations that were to be spent (or "segregated") as the Governor directed. *See* 252 N.Y. at 33-36. After a contentious budget process, the Legislature added to the budget act, over the Governor's disapproval, a law that required that the Governor's segregations be approved by two legislative members—the chairs of the Legislature's two finance committees. *Id.* at 37-38. While this Court struck down this grant

of spending approval power, nothing in the Court's decision suggests that the Commission's structure violates the separation-of-powers doctrine.

To start, this Court did *not* hold that the challenged law violated the doctrine. Rather, it suggested just the opposite. This Court emphasized the elastic nature of New York's separation-of-powers principles; it then observed that the Legislature may, subject to the Governor's veto power, "create administrative offices and *may provide how they shall be filled* and nothing in the *abstract division of powers* prevents the selection of members of the Legislature to fill such offices." *Id.* at 39 (emphasis added). This Court instead invalidated the challenged law because the law violated a specific constitutional provision—article III, § 7—that barred legislative members from receiving civil appointments. *See id.* at 40-43. That provision does not apply here.

Tremaine also fails to support plaintiff's challenge because the arrangement in that case differs from the Commission's structure in every material respect. In *Tremaine*, the two non-executive appointees could be properly deemed "legislative agents": They were not just chosen by legislative members, they *were* legislative members. *Id.* at 38. The appointees were not merely "members of a board" who had just one vote,

but rather each exercised approval power. *Id.* The Legislature could remove each appointee by selecting a new finance-committee chair. And the Governor expressly disapproved of the challenged law. *Id.* at 37. Not one of these factors is present here.

2. The Governor Agreed to the Commission's Structure and Retains Meaningful Influence and Authority Over It.

There is no merit to plaintiff's attempt to minimize the significance of the Governor's role in creating the Commission, as well as the fact she retains meaningful—but not undue—influence and supervision over the Commission.

Contrary to plaintiff's assertion (Pl.Br. 36), the Governor's consent to a law, although not dispositive, is highly relevant under the separation-of-powers doctrine. *See, e.g.*, *Delgado v. State*, 39 N.Y.3d 242, 255 (2022) (plurality op.); *id.* at 273 (Wilson, J., concurring). Here, the fact that the Governor proposed, promoted, and agreed to the Commission's enabling act supports its constitutionality.

Plaintiff is also woefully mistaken in claiming that the Commission operates without any gubernatorial oversight. (Pl.Br. 2.) The Governor retains more influence and supervision over the Commission than any

other individual appointing authority. The Governor appoints the most members—three. Executive Law § 94(3)(a). The Governor can, under the Moreland Act, investigate the Commission whenever she wants, including by subpoenaing records and witnesses. *Id.* § 6. Although plaintiff dismisses this power as insignificant (Pl.Br. 38), it allows the Governor "to exercise considerable vigilance" over the affairs of the Executive Branch, *Rapp v. Carey*, 44 N.Y.2d 157, 162 (1978), and provides "a powerful weapon for use in fostering responsible executive government," Ernest Breuer, *Moreland Act Investigations in New York: 1907-65* at 8 (1965).

The Governor also supervises and exerts influence over the Commission through the executive budget. As noted in a report prepared for the 1967 Constitutional Convention, although the Governor's "specific constitutional powers for administrative control are not extensive," the "executive budget is the strongest of the managerial tools provided the Governor by the Constitution." 1967 Rep. of Temp. State Commn. on Constitutional Convention, Rep. No. 14, State Government at 73-74. That power, among other things, allows the Governor to decide upon the

amount of funding, if any, to appropriate to the Commission, and to veto any legislative attempt to increase that amount. (Comm.Br. 30-31.)

There is no merit to plaintiff's claim (at 27) that the Commission's enabling act infringes the Governor's budgetary powers. In support, plaintiff cites a provision of the act that is materially identical to a provision for the Board of Parole's funding that plaintiff agreed to as Governor. *Compare* Executive Law § 94(1)(f), *with* Executive Law § 259-a. The provision states that the Commission's funding must be itemized and that such funding cannot be decreased post-enactment through interchange. *Id.* § 94(1)(f). Interchange is a statutory mechanism through which funds may be transferred from one item in an appropriation to another.[2] Its availability, however, is not constitutionally required. In any event, the Governor has retained the power each fiscal year to either increase *or* decrease the Commission's funding for certain activities. (Comm.Br. 31.)

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[2] *See* Division of the Budget, *Financial Terminology*, https://www.budget.ny.gov/citizen/financial/glossary-all.html.

C. The Commissions on Judicial Conduct and Legislative Ethics Do Not Show that the Commission's Structure Is Unconstitutional.

Plaintiff's claim finds no support in the provisions establishing the two commissions with the power to discipline judges and legislators: the Commission on Judicial Conduct ("CJC") and the Legislative Ethics Commission ("LEC"). (*E.g.*, Pl.Br. 24, 34.) Neither provision establishes that the Governor, or her subordinate, must have the power to appoint and remove a majority of members of an ethics commission with jurisdiction over the Executive and Legislative Branches.

Regarding the CJC, it is empowered to discipline judicial officers for ethics violations, subject to this Court's review. N.Y. Const., Art. VI, § 22. The constitutional provision creating the CJC provides that eight of its 11 members are executive and legislative appointees. *Id.* § 22(b)(1). According to plaintiff, the CJC demonstrates that a constitutional amendment is needed to give "agents of one branch" the power to sanction another branch's members and that the Commission's enabling act violates this purported principle because it is controlled by "legislative agents." (Pl.Br. 23-24.)

Not so. Preliminarily, plaintiff's assertion fails because it assumes, incorrectly, that the Commission's members are "legislative agents." *Supra* 7-12. Regardless, plaintiff cites no authority for his assumption that the CJC was created by constitutional amendment because its *appointment process* would otherwise violate the separation-of-powers doctrine. To the contrary, the CJC's creation required an amendment for two reasons entirely unrelated to its appointment process.

First, the CJC was designed to replace the pre-existing judicial disciplinary body, the Court on the Judiciary, a constitutionally created entity that had become widely seen as ineffectual. *See* N.Y. Senate, Floor Proceedings Tr., 181st Sess., at 10 (Aug. 4, 1976) (the CJC "in essence eliminates the Court on the Judiciary which has become an anachronism"). Given the constitutional status of the Court on the Judiciary, an amendment was required to eliminate that Court and transfer its power to another body. *See People v. La Carrubba*, 46 N.Y.2d 658, 664 (1979) (the Constitution assigned responsibility for judicial discipline to the Court on the Judiciary and then CJC).

Second, a constitutional amendment was required to create the CJC because the Constitution otherwise bars any legislation that creates

an entity—regardless of its appointment process—authorized to remove judges.[3] *See Matter of La Carrubba v. Klein*, 59 A.D.2d 99, 102 (2d Dep't 1977) (citing N.Y. Const., art. XIII, § 5), *aff'd*, 46 N.Y.2d 1009 (1979). The removal of judicial officers instead has been "governed exclusively by article VI of the Constitution," *id.* at 103, which included the provision establishing the Court on the Judiciary.

The Commission is thus on fundamentally different footing from the CJC: No constitutional provision bars legislation that creates a body with the Commission's powers. And because the Commission's predecessor, JCOPE, was created by legislation, not constitutional amendment, JCOPE could be replaced by legislation.

Plaintiff's reliance on the CJC fails for an additional reason. Even if a constitutional amendment were needed to create the CJC *because of* its appointment structure, it would not follow that the Commission's

[3] Plaintiff insists, incorrectly, in a footnote (at 35) that the Court on the Judiciary was succeeded not by CJC but rather by the Temporary State Commission on Judicial Conduct, an entity created by statute. The temporary commission could investigate allegations of judicial misconduct but lacked any disciplinary power. The Court on the Judiciary thus was not abolished until the CJC was created and, even then, that Court was permitted to resolve any cases that were pending before it. *See Matter of O'Connor*, 32 N.Y.3d 121, 127 n.2 (2018).

structure would also require a constitutional amendment. The judiciary is not similarly situated to the political branches. The Governor and Legislature, as members of the political branches, "have the power to bargain with each other over all sorts of matters," including ethics oversight. *Matter of Maron v. Silver*, 14 N.Y.3d 230, 259 (2010). The judiciary, by contrast, has "no seat at the bargaining table" and cannot participate in politics. *Id.* So even if the judiciary's "unique place in the constitutional scheme," *id.*, requires that the People approve, by constitutional amendment, the entity that monitors judicial conduct, that would not preclude the political branches from determining how to best regulate their *own* conduct, as they have done for decades.

Equally unavailing is plaintiff's reliance on another entity—the LEC. With respect to legislators, there has long been a two-step process for enforcing ethics requirements. Before the Commission was established, JCOPE was charged with investigating legislative members, employees, and candidates for potential ethics violations and sending its

findings to the LEC.[4] Executive Law former § 94(14-a) (2011). The LEC decided the penalty for violations that JCOPE substantiated. Legislative Law § 80(9), (10). The LEC's members are appointed solely by legislative leaders. *Id.* § 80(1). In 2022, the Commission replaced JCOPE in conducting the first step in the two-step process. Executive Law § 94(p)(i).

There is thus no reason to compare the Commission's structure to the LEC's structure, when the Commission replaced JCOPE, and the LEC remained in place. Plaintiff is incorrect (at 31) that there is "*no* explanation" for granting the Commission greater structural independence than the LEC. The explanation for the Commission's structure lies in the fact that it was created in response to a widely-held view that JCOPE's structure allowed officials in the political branches, especially the Executive Branch, to interfere unduly with JCOPE's ability to monitor these branches and the lobbyists who seek to influence them. (Comm.Br. 6-7; N.Y.C. Bar Assn. Amici Br. 10-13 [citing scandals].) Plaintiff cites no evidence that the LEC was subject to similar criticism.

[4] Contrary to plaintiff's assertion (at 9), the Commission's reports to the LEC must be publicly disclosed, unless law enforcement requests otherwise. Legislative Law § 80(9)(b).

The Commission's enabling act thus targeted the problem at hand. It kept JCOPE's basic structure, in which the four legislative leaders appointed a bare majority of members, while adding restraints designed to prevent undue influence from *all* appointing authorities, not just—as plaintiff claims (at 34)—the influence of executive officials. These restraints include the IRC review process and vesting the removal power in the Commission itself. (Comm.Br. 24-25.)

In sum, experience showed that JCOPE's structure impeded its ability to impartially monitor the political branches and eroded public trust in government. If sufficient concerns arise over the LEC's structure, the political branches are free to negotiate over how best to address them.

D. Plaintiff's Categorical View of Gubernatorial Control Contravenes New York's Precedent and Practice.

Like the courts below, plaintiff asserts that New York's separation-of-powers doctrine imposes a novel, categorical rule: the Governor or her subordinate *must* always have the power to appoint all those who enforce the law—here, the majority of the Commission's members—as well as the power to oversee and remove them. (Pl.Br. 38.) That proposed rule rests on a formalist view of the separation-of-powers doctrine that this Court

has long disavowed, *see, e.g.*, *Bourquin*, 85 N.Y.2d at 784-85, and is inconsistent with New York's precedent and practice.

1. New York's Take Care and Vesting Clauses Do Not Mandate an Absolute Gubernatorial Appointment and Removal Power.

Plaintiff purports to derive his categorical rule from the New York Constitution's Take Care and Vesting Clauses (*E.g.*, Pl.Br. 16-17), which were included in the first Constitution. *See* 1777 N.Y. Const, art. XVII, XIX. Those clauses reflect the Governor's power of general supervision over the Executive Branch; they do not, however, grant the Governor the power to control every executive entity. *See Rapp*, 44 N.Y.2d at 161-62 (noting the Governor's power "to oversee," but not "to direct the administration of the various entities in the executive branch"); 4 Charles Lincoln, *The Constitutional History of New York* at 456, 471 (1906) (noting that the Governor has power of "general supervision" but not control).

New York's history establishes that from the beginning neither the Take Care Clause nor the Vesting Clause were understood to mandate that the Governor, or her subordinate, appoint and remove *every* executive officer or a majority of members on *every* executive entity. The 1777

Constitution included both clauses, but it gave the Governor "very little voice in either appointments or removals." Edward Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum.L.Rev. 353, 385 (1927). That power was instead vested in the Council of Appointments, which consisted of four Senators and the Governor, each of whom had one vote. (Comm.Br. 36-38.) The Council's co-existence with these clauses demonstrates that a gubernatorial appointment or removal power was never understood to be required by either clause.

Although the Council was abolished in 1821, the Legislature has, since then, repeatedly created state executive entities in which neither the Governor nor any other executive official has controlled the appointment and/or removal of a majority of members. (Comm.Br.39-48, 54-55, 60-61.) Plaintiff fails to cite any New York judicial decision—other than the decisions below—holding that such a body unduly infringed upon gubernatorial or other executive authority. On the contrary, courts have uniformly rejected challenges to such bodies, while recognizing the Legislature's power to direct the manner of appointment, including by granting private parties far greater control over appointments than the limited review power granted to the IRC. *See, e.g.*, *Lanza v. Wagner*,

11 N.Y.2d 317, 328-30 (1962); *Sturgis v. Spofford*, 45 N.Y. 446, 449-51 (1871) (upholding law that granted private parties the exclusive power to appoint).

Nor is there any merit to plaintiff's assertion (at 44-46) that this unbroken line of precedent has been abrogated. Plaintiff notes that these decisions relied in part on a constitutional provision regarding the Legislature's residual power to direct appointments that was repealed in 1963. That repeal, plaintiff argues, divested the Legislature of its power to direct the manner of appointments.

Plaintiff's argument is unsupported by the 1963 amendment's text and legislative history. As the Commission explained (Comm.Br. 51-53), the amendment that eliminated the constitutional provision at issue was designed to simplify the home-rule provisions while expressly reserving the Legislature's plenary power over matters of State concern—which would include the power over the structure of state commissions. Nothing in the amendment's text or its history suggests that it was meant to overrule this Court's precedent or divest the Legislature's long-settled power over agency structure. *See Marine Forests Socy.*, 36 Cal.4th at 39-40 (holding that repeal of similarly-worded constitutional provision

relating to appointment of executive officers did not diminish legislature's power to determine the mode of appointment).

Plaintiff's assertion that the 1963 amendment stripped the Legislature of a lawmaking power contravenes the basic constitutional tenet that "[t]he legislature's power to enact laws is plenary—limited only by the Federal and State Constitutions." *Stefanik v. Hochul*, 2024 WL 3868644, at *3 (N.Y. 2024). To determine whether the Legislature has exceeded its legislative powers, the question is "not whether the State Constitution permits the act, but whether it prohibits it." *Id.* Neither the Take Care Clause, Vesting Clause, nor any other constitutional provision has ever been read to impose an implicit, *categorical* prohibition on the Legislature creating an executive entity for which the Governor or another executive official appoints some but not a majority of members.

Plaintiff's proposed rule also conflicts with New York's practice since the 1963 amendment. Remarkably, given his role in its creation, plaintiff omits any mention of the obvious comparator—JCOPE. The Governor lacked the power to appoint or remove a majority of JCOPE's members (Comm.Br. 6-7), yet plaintiff does not suggest that JCOPE's structure was unconstitutional. Another comparator is the Board of

Commissioners of Pilots, which has existed since the nineteenth century. It can impose civil penalties, but no executive official has ever had the power to appoint or remove a majority of its members. (Comm.Br. 54.) Plaintiff tries (at 52) to brush aside this board as an "unconstitutional anomaly," but this Court has held otherwise, *Sturgis*, 45 N.Y. at 449-51.

Plaintiff claims that other entities cited by the Commission are inapposite because they do not "exercise core executive authority" while the Commission does (Pl.Br. 52), but he is mistaken for two reasons. First, while seeking or imposing civil penalties for violations of law may generally be a "core law-enforcement power" (Pl.Br. 42), it does not have that character when, as here, it is tied to a branch's internal management practices rather than the regulation of the general public. Indeed, plaintiff seems to admit as much by recognizing that the LEC, which lacks *any* executive appointees, is constitutional even though the LEC has the power to impose civil penalties for violations of ethics laws by legislative members, employees, and candidates. The LEC, in other words, does not wield "core" executive power because it regulates a political branch. The same is true of the Commission.

Second, even if this Court were to conclude that the Commission exercises "core" executive power, plaintiff's argument would still fail because, as explained above at 3-6, the Commission's unique mission confers upon the Governor and Legislature the flexibility to agree upon a commission structure that is carefully calibrated to ensure the Commission can impartially monitor the political branches.

In all events, other longstanding laws refute plaintiff's assertion that, for *every* executive agency that can seek or impose civil penalties, the Governor, or her subordinate, must *always* appoint and remove a majority of the agency's members. (Pl.Br. 38.) The Attorney General, who is independently elected, is the State's chief law-enforcement officer and empowered to initiate civil enforcement proceedings on her own. *See, e.g.*, Executive Law § 63(12). The Department of Education, headed by the legislatively appointed Board of Regents, may investigate misconduct by various types of licensed professionals, and the Board of Regents may impose civil penalties for certain violations. Education Law §§ 202(1),

6510(1)-(4); 6511.[5] Although the Board of Regents is an entity named in the Constitution, its power to regulate certain professions and impose civil penalties is granted by statute. And no court has ever held that it violates the Take Care and Vesting Clauses to vest this enforcement power in this entity, which consists solely of legislative appointees. Rather, the Governor oversees the Board of Regent's enforcement activities the same way she oversees the Commission's—through her investigative and budgetary powers, as well as the bully pulpit.

Lastly, the U.S. Supreme Court's precedents on the President's powers cannot save plaintiff's claim. The U.S. Constitution creates a singular executive, the President. *See Seila Law LLC v. Consumer Fin. Protection Bur.*, 591 U.S. 197, 227 (2020). By contrast, New York's Constitution creates a plural executive in which the Governor is one of several constitutionally-created executive officers and is granted additional administrative power through an executive budget—a power the President lacks. The federal precedents on presidential control thus

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[5] *See* Education Dept., *Professional Misconduct Enforcement*, https://www.op.nysed.gov/enforcement/professional-misconduct-enforcement.

provide little to no guidance with respect to the mechanics of executive administration in New York. Nor can the federal precedents justify overriding New York's precedent and practice.

2. Plaintiff Misreads New York and Federal Caselaw on Removal.

Plaintiff claims that the removal power "belongs to the Governor alone." (Pl.Br. 26.) But the case he cites for this claim, *Matter of Guden*, 171 N.Y. 529 (1902), does not remotely support him.

Guden addressed the scope of the Governor's removal power where, unlike here, the Constitution *expressly empowers* the Governor to remove a specified officer. 171 N.Y. at 536. That case concerned a challenge to the Governor's removal of a county sheriff under then-article X, § 1, which provided that "the governor may remove any officer, in this section mentioned, [sheriffs, clerks of counties, district attorneys and registers]," after giving the officer a copy of the charges. *Id.* at 531-32 (alterations in original). This Court explained that this provision, which is now article XIII, § 13(a), was "the section of the Constitution under consideration," *id.* at 535, and provided "a simple and prompt method of removal of county executive officers by the governor," *id.* at 534-35.

Granted, this Court observed that the power conferred by this section was "executive, not judicial, and that it was intended to be vested exclusively in the governor." *Id.* at 531. But this Court did not suggest that, in addition to this express removal power, the Governor had an implied and indefeasible right to remove all other executive officers, whether local or state. Rather, *Guden* held only that the removal power, *when* expressly granted to the Governor, was "executive" in that the Governor's removal decision was not subject to judicial review and instead "rest[ed] solely upon the governor." *Id.* at 535-36.

Plaintiff fails to cite any authority that has adopted his sweeping gloss on *Guden*. Indeed, just seven years after *Guden* was issued, Governor Charles Evan Hughes acknowledged that the Governor lacked the power to order the removal of many executive officials; he then explained that New York's system is "therefore widely different from that of the Federal government." State of New York, Public Papers of Charles Evan Hughes, 1909, at 8-9 (1910). Similarly, a report prepared for the 1938 Constitutional Convention cited *Guden* merely as relating to the scope of judicial review of removal decisions. N.Y. Constitutional

Convention Comm., *Problems Relating to Executive Administration and Powers*, vol. 8, at 211 (1938) ("1938 Report") (reproduced at R.298).

The federal caselaw on which plaintiff relies for his removal argument further undercuts his claim, as explained in the Commission's opening brief (at 62-64). Even if that caselaw were applicable, which it is not, it makes clear that a removal defect by itself would not entitle plaintiff to relief. *See Collins v. Yellen*, 594 U.S. 220, 258-60 & n.24 (2021). Rather, to obtain relief against a validly-appointed officer based on a removal restriction, a party must show that the restriction caused actual harm. *See id.* at 259-60. Granting relief without proof of such harm would, "contrary to usual remedial principles, put [the party] in a better position than if no constitutional violation had occurred." *Id.* at 274 (Kagan, J., concurring in part) (quotation marks omitted).

Plaintiff does not contend that the Commission's removal provisions harmed him. Rather, he argues (at 51) that this Court should follow the U.S. Supreme Court's holdings regarding the scope of the President's removal power but then disregard its holdings regarding the remedy for removal defects. He cites no authority that could justify such an unprincipled distinction.

E. The Weight of Authority in Other States Supports the Commission

Plaintiff's reliance on caselaw from other states fares no better. Plaintiff ignores entirely the treatises and cases the Commission cited, which confirm that the weight of the authority from other States supports the Commission's structure. (Comm.Br. 64-70.) Many of the cases cited by plaintiff (at 54-55) undermine his argument. For example, *Opinion of the Justices*, 102 N.H. 195, 194-95 (1958), emphasized that the separation-of-powers doctrine must be given a "practical and workable application" and upheld an executive commission where *no* executive officer made appointments; the quotation proffered by plaintiff comes from the *dissent* in that case.

While plaintiff has identified some cases from other states describing the power to appoint as an inherent "executive" function, those cases represent the minority view. *See Marine Forests Socy.*, 36 Cal.4th at 43. Even then, caselaw from those jurisdictions does not hold that power to appoint *must* be vested in an executive officer. For instance, the Arizona Supreme Court, cited by plaintiff, rejects a formalist view of the separation-of-powers doctrine, in favor of a functional analysis that weighs several factors, such as the degree of control by the legislative

branch and the law's purpose. *See State ex rel. Woods v. Block*, 189 Ariz. 269, 275-76 (1997). These factors support the Commission's constitutionality.

Similarly, the Pennsylvania Supreme Court, cited by plaintiff, affirmed a lower court's decision that upheld a law that created a "fully independent" ethics commission in which legislative leaders appointed the majority of members. *Pennsylvania State Assn. of Township Supervisors v. Thornburgh,* 45 Pa.Cmwlth. 361, 364-65, *aff'd*, 496 Pa. 324 (1979).

Finally, the primary case on which plaintiff relies, the North Carolina Supreme Court's decision in *Cooper v. Berger*, 370 N.C. 392 (2018), is distinguishable. It involved a board that, unlike the Commission, regulated the public at large by enforcing the election and campaign finance laws. *See id.* at 415.

POINT II

THE COMMISSION'S STRUCTURE COMPLIES WITH ARTICLE V OF NEW YORK'S CONSTITUTION

Plaintiff's claim under article V of New York's Constitution lacks merit. He argues that this article, which deals with the civil service

organization, imposes a categorical dichotomy whereby *every* executive body must either (i) constitute its own "civil department," headed by an officer who must be appointed by the Governor with the Senate's advice and consent under article V, § 4, or (ii) exist as a "subsidiary entity within a civil department" that is "subordinate to" the department's head. (Pl.Br. 56.) According to plaintiff, because the Commission, which is placed in the Department of State, does not satisfy either condition, it is unconstitutional. This claim fails for the same reason as his separation-of-powers claim: It rests on a rigid conception of executive control that is irreconcilable with New York's precedent and practice.

When enacted in 1925, the article V amendments were designed to bring greater efficiency to State government by "consolidating the far flung state agencies into a limited number of departments." *Soares v. State of New York*, 68 Misc.3d 249, 280 (Sup. Ct., Albany County 2020). Article V specified the only civil departments that were to exist and also empowered the Governor to appoint certain of the department heads. *See* 1938 Report at 268-269 (reproduced at R.325-326.) The amendment, however, "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.*

Article V was never intended to impose the organizational strait-jacket that plaintiff now insists upon. This Court rejected long ago the assertion—made by plaintiff here—that *any* intra-department entity that is independent of the head of the department in which it is placed must constitutes its own "civil department" under article V. In *Metropolitan Life Insurance*, a party challenged a law that created the State Labor Relations Board—a quasi-judicial body—within the Department of Labor, but expressly deprived that department of all control and supervision over the board. *See* 280 N.Y. at 207 (citing Labor Law former § 702(1), (9)). This Court rejected the claim that because the board functioned as an "autonomous unit" within the department, it constituted a new "civil department" under article V. *Id.* at 207-08. In so holding, this Court explained that the independence conferred upon the board was deemed necessary given its function, and article V does not preclude such independence. *Id.*

Nor was the board upheld in *Metropolitan Life* an outlier. A report prepared for the 1938 Constitutional Convention exhaustively examined

the departments and found that boards or commissions existed within "all but two" of the departments that were "not subject to direct control by the head of the department or the Governor." 1938 Report at 300 (reproduced at R.357); *see, e.g.*, *id.* at 288 (citing board within Health Department with members appointed by private organizations and power to veto regulations) (reproduced at R.345). The 1938 report observed that the creation of an intra-department board or commission must "in each individual case" be evaluated based on two factors: "first, whether the work to be performed calls for a multi-membered body or an individual, and second, if a board is desirable, whether the Governor's control should be extended over its members, particularly in so far as appointment, tenure and removal are concerned." *Id.* at 301 (reproduced at R.358). The report observed that independence was appropriate for bodies that exercised quasi-judicial or quasi-legislative power or "advisory and inspectional functions, and political or control functions." *Id.* at 262 (reproduced at R.319); *see id.* at 297 (identifying commissions "placed in a position of independence felt justified" by their functions) (reproduced at R.354).

Despite the vast diversity of agency structure in State government, plaintiff fails to cite any case that has held that an agency's structure violates article V, much less that it does so because it is not sufficiently accountable to a department head or the Governor. Indeed, Supreme Court observed during oral argument below that plaintiff's article V claim lacked "credence." (R.564.) And Albany Supreme Court Justice Weinstein rejected a substantively identical article V challenge to the State Commission on Prosecutorial Conduct; that commission, which plaintiff, as Governor, signed into law, is established within the Executive Department and has 11 members, only four of whom the Governor appoints. *See Soares*, 68 Misc.3d at 251-52. As Justice Weinstein reasoned, it is "entirely commonplace" for commissions and boards to be housed within a department but not controlled by the department head. *Id.* at 280 (citing JCOPE and State Insurance Fund). As he explained, requiring courts to assess whether a commission is sufficiently subordinate to a department head or Governor would

entangle courts in the "particularly inappropriate task of monitoring the structure of State government." *Id.*[6]

The Commission thus complies with article V. First, there is nothing incongruous about the Commission's placement within the Department of State. The Commission's predecessor agencies were also placed in that department yet operated independently of its head, the Secretary of State. *See, e.g.*, L. 2011, ch. 399, pt. A, § 6 (JCOPE); L. 1987, ch. 813, § 7 (State Ethics Commission). And the State Department long served as a repository for State employees' financial disclosure statements, *Rapp*, 44 N.Y.3d at 177, a role that the Commission currently performs, Executive Law § 94(9)(b). Second, given the Commission's unique jurisdiction, the Commission is a clear-cut instance of a multi-member entity for which independence from the political branches is "necessary to foster the agency in its essential functions." *Metropolitan*

[6] Plaintiff's reliance on a 2018 memorandum from the Attorney General's Office does not warrant a contrary conclusion. That case dealt with a prior version of the Commission on Prosecutorial Misconduct's enabling act, which failed to place the commission within any department. (R.581-583.) Further, after that memorandum was drafted, Justice Weinstein rejected the article V challenge to the enabling act and this Court further clarified in *Delgado* the applicable separation-of-powers principles.

Life Ins., 280 N.Y. at 208. Lastly, there exists an administrative link between the Commission and the State Department: Although the Commission is operationally independent, it is subject to the Secretary of State's general rulemaking authority to adopt regulations relating to the State Department's functions. *See* Executive Law § 91.

Plaintiff's contrary reading of article V, if adopted, would be profoundly destabilizing to State government. Today, article V provides that the State may have no more than 20 civil departments, N.Y. Const., art. V, § 2, and there currently exist 19 departments.[7] Under plaintiff's cramped view of article V, numerous executive entities that operate independent of a department head would appear to constitute their own "civil department" and thus be deemed unconstitutional as exceeding the 20-department cap. These entities include, for instance, the Commission on Prosecutorial Conduct; the Tax Appeals Tribunal, Tax Law § 2002; the Tug Hill Commission, Executive Law §§ 847-b–847-c; and the Independent Authorities Budget Office, Public Authorities Law § 4, another independent entity in the State Department.

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[7] Division of the Budget, *State Government Structure*, https://www.budget.ny.gov/citizen/structure/index.html#executive.

POINT III

THE COMMISSION'S AUTHORITY DOES NOT CONFLICT WITH THE LEGISLATURE'S IMPEACHMENT POWER

Plaintiff's final argument attempts to manufacture a conflict between the Commission's powers of enforcement and the Legislature's power of impeachment. He argues that the "only mechanism" by which the Legislature may discipline a Governor is through the power of impeachment, and the Legislature may not circumvent this limit by delegating disciplinary power to its "agents," which, according to plaintiff, describes the Commission. (Pl.Br. 15, 61-62.)

This claim is unavailing. First, plaintiff's underlying premise is wrong because the Commission is not controlled by legislative agents. The Commission's actions are thus not constitutionally attributable to the Legislature. Second, the Commission has not been delegated the power to impeach and try impeachments or any equivalent power. Judgment in the case of impeachment entails removal and disqualification from office, N.Y. Const., art. VI, § 24, and is not subject to judicial review (R.291). The Commission's powers fundamentally differ. The Commission cannot order the Governor's removal or disqualification, and its final determinations are subject to judicial

review under C.P.L.R. article 78. Third, even if plaintiff's argument had any force as applied to the sitting Governor, which it does not, it has no force as applied to a former one.

CONCLUSION

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

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November 15, 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 6,969 words, which complies with the limitations stated in § 500.13(c)(1).

DUSTIN J. BROCKNER