To Be Argued By:
GREGORY J. DUBINSKY
Time Requested: 15 Minutes

APL-2024-00076
Albany County Clerk's Index No. 903759-23
Appellate Division, Third Department Case No. CV 23-1778

Court of Appeals

STATE OF NEW YORK

ANDREW M. CUOMO,

Plaintiff-Respondent,

—against—

NEW YORK STATE COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT

GREGORY J. DUBINSKY
ZACHARY A. KERNER
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue, 14th Floor
New York, New York 10017
Telephone: (646) 837-5151
Facsimile: (646) 837-5150

Attorneys for Plaintiff-Respondent

October 30, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

N.Y. Constitutional Provisions

Statutes

Other Authorities

QUESTION PRESENTED

Whether Executive Law §94 violates the separation of powers and the structural requirements of Article V of the New York Constitution.

PRELIMINARY STATEMENT

As the Appellate Division and Supreme Court both recognized, the Act at issue here is a poster child for a statute that cuts at the heart of the structural protections inherent in the New York Constitution safeguarding the rights and liberties of the People.[1] To our knowledge, the Act is unprecedented in that it creates a state entity—the New York State Commission on Ethics and Lobbying in Government ("COELIG")—with sweeping executive law-enforcement powers, and yet utterly insulates the agency from any oversight by or accountability to the executive branch. Instead, the majority of the members of the commission exercising enforcement powers are legislative agents, and only the members can remove themselves. By express design of the Act, COELIG enforces ethics and other laws with *no* executive oversight—*none*.

Respondent here—the former Governor of New York—is a respondent in an enforcement action brought by COELIG alleging purported violations of a certain ethics statute. By this action, Respondent sought a declaration that the Act creating COELIG is unconstitutional to vindicate his—and the People's—right not to be "subject[ed] to an illegitimate proceeding, led by an illegitimate decisionmaker." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023) (Kagan, J.).

[1] All emphases are added except where otherwise indicated, and quotation marks and citations are omitted throughout.

The Act blatantly transgresses two key (and related) constitutional safeguards: the separation of powers and the structural requirements of Article V of the New York Constitution.

As to the separation of powers, the Act impermissibly (1) vests ultimate authority to appoint COELIG's members in a group of private persons and gives legislative leaders the power to name the majority of COELIG's members; and (2) insulates COELIG's members from removal and oversight by the Governor, because only COELIG can remove its own members. The result is that the Governor is unable to discharge her constitutional duty to "take care" that the laws COELIG is empowered to enforce are "faithfully executed." art. IV, §3.

Indeed, reflecting the Legislature's express goal of creating an agency "truly independent" of the Governor, the Act structured COELIG so as to deprive the Governor of her exclusive "power of appointing, overseeing and controlling those who execute the laws," which Madison explained two centuries ago is "in its nature Executive" "if any power whatsoever is." 1 Annals of Cong. 481 (1789). Contrary to first principles of our constitutional order, this unprecedented entity is empowered to institute enforcement actions, determine that individuals have violated the law, and impose penalties without any executive oversight whatsoever. But there's more. Even as COELIG is controlled by agents of the legislative leaders and may discipline executive officials, the Act provides that COELIG has

no authority to discipline members or employees of the legislative branch. Thus, even as it transgresses the separation of powers, the Act recognizes (in favor of the legislative branch) the impermissibility of agents of one branch disciplining the other.

In a thorough and well-reasoned decision, the Appellate Division explained that the Act impermissibly "creates an agency with executive power"—*i.e.*, COELIG—with "the authority to investigate and impose penalties for the violation of the ethics laws, while being entirely outside the control of the executive branch." R.951. The Act "revokes the Governor's enforcement power with respect to the ethics laws, thereby depriving her of all discretion in determining the methods of enforcement of these laws." R.951. "Instead, it places this power into the hands of ... an entity over which she maintains extremely limited control and oversight." *Id.* Moreover, "appointments must be approved by the IRC, an external nongovernmental entity made up of people who … do not answer to the populace." *Id.* The result is that the Act "usurps the Governor's power to ensure the faithful execution of the applicable ethics laws." *Id.*

Indeed, as Supreme Court explained, if COELIG's position were accepted, "there is no limiting principle that would keep the Legislature from establishing a swarm of independent commissions (where it selects the majority of the commission) to enforce the laws instead of the Governor." R.23. "Here, the

Legislature has done by statute what was required to be done by constitutional amendment." R.28.

The Act, moreover, is unconstitutional for an independent reason: Although it purports to place COELIG in the Department of State, the Act renders COELIG unaccountable to the Secretary of State and thus in all but name establishes COELIG as its own civil department. And, because, by design, COELIG's head is not appointed by the Governor with the advice and consent of the Senate, the Act violates Article V.

COELIG offers no sound basis to reject the Appellate Division's careful analysis and holding. COELIG instead trots out a series of red herrings and waves away the foundational importance of the separation of powers. As COELIG ignores, "[t]he separation of the three branches is necessary for the preservation of liberty itself." *Maron v. Silver*, 14 N.Y.3d 230, 258 (2010); *see Burby v. Howland*, 155 N.Y. 270, 282 (1898). COELIG asks this Court to permit legislative agents to enforce the ethics, lobbying, and other laws without any executive control or oversight. But, as COELIG would have this Court disregard, "in this State the executive has the power to enforce legislation," *Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985), and the Governor is "supreme within [the] field of [executive] action," *People v. Tremaine*, 252 N.Y. 27, 39 (1929). This Court should reject COELIG's woeful attempt to justify what the Constitution plainly abhors.

BACKGROUND[2]

A 2022 act (the "Act") of the New York Legislature created COELIG, and conferred on it broad powers to enforce numerous ethics and other laws. R.615 (¶1), 661 (Ex. A). COELIG replaced the Joint Commission on Public Ethics ("JCOPE"), which a Senate committee, after hearing calls for a more independent agency, determined should be "replace[d] ... with a truly independent body," though the committee thought it "clear" a "comprehensive constitutional amendment" was required to do so. R.627 (¶¶36–37), 682 (Ex. B), 764 (Ex. C). Other advocates shared the belief that a constitutional amendment was necessary. R.637 (¶37), 682 (Ex. B), 770 (Ex. D).

The constitutional amendment never even made it out of committee. R.628 (¶39). Nonetheless, on January 5, 2022, Governor Hochul announced a plan to replace JCOPE with a "truly independent agency"—solely through legislation. *Id.* & 774 (Ex. E). That legislation, the Act, was enacted on April 8, 2022 and signed into law by Governor Hochul the next day. *Id.*

A. COELIG's Structure

The Act repealed Executive Law Section 94 ("former Section 94"), under which JCOPE members were appointed by elected officials, and established

[2] Respondent refers to the Complaint for further background. R.615.

COELIG by enacting the current Section 94. R.628 (¶40). COELIG's members are nominated by elected officials but appointed by an independent review committee (IRC) consisting of deans of New York's law schools, and IRC members cannot "be public officers [or] be subject to the requirements of the public officers law." *Id.* The IRC appoints those candidates it "deems to meet the qualifications necessary" to be a COELIG member. R.629 (¶41). The Act does not define any necessary or even desirable "qualifications." *Id.*

COELIG has eleven members, a majority of which—6 out of 11—constitutes a quorum. R.630 (¶44). Six members—the majority—are nominated by the legislative leaders. R.630 (¶43). The state-wide elected officers in which the executive powers of the state are vested nominates only three members; the Attorney General and Comptroller each nominate one. *Id.* COELIG members may only be removed by majority vote of the members, and only for specified reasons. R.630 (¶44). Further, COELIG's members are not public officers subject to the requirements of the Public Officers Law, *including* the ethics laws COELIG oversees.[3] *Id.* (¶45).

COELIG appoints, by majority vote, an Executive Director to whom COELIG may delegate substantial authority, including enforcement authority.

[3] *See* Pub. Officers L. §2; §73(1)(i)(iii); §73-a(1)(c)(ii); §74(1).

§94(6)(a), (b). The Executive Director may be removed only by COELIG and again only in limited circumstances. R.631 (¶47), 634 (¶57).

B. The Covered Statutes

COELIG administers, enforces, and interprets New York's ethics laws (Public Officers Law §73, Public Officers Law §73-a, and Public Officers Law §74); the Lobbying Act (Legislative Law Article I-a); and the "Little Hatch Act" (Civil Service Law §107) (collectively, the "Covered Statutes"). R.632 (¶49). Together, these laws reach both private and public individuals. R.632–33 (¶¶50–55).

As relevant here, Public Officers Law §74, the "Code of Ethics," establishes broad standards of conduct for state officers and employees, members of the Legislature, and legislative employees, including conduct related to outside employment and business activities, disclosure of confidential information, and the use of state property. R.632 (¶52).

C. COELIG's Enforcement Powers

COELIG may bring enforcement actions, and discipline and impose civil penalties on those it finds have violated certain provisions of the Covered Statutes. R.633 (¶56). COELIG also has the power to adopt and execute its own enforcement procedures, including by seeking judicial relief. *Id.*

After an initial investigation, COELIG staff prepares a report with "a recommendation for the closing of the matter as unfounded or unsubstantiated, for settlement, for guidance, or moving the matter to a confidential due process hearing." R.634 (¶¶58–59); *see* Exec. L. §94(10)(f). If COELIG accepts (by majority vote) a staff recommendation to initiate a hearing, an "independent arbitrator," paid for acting as such, conducts the hearing. R.635 (¶61); *see* Exec. L. §94(10)(f). In fact, this "independent arbitrator" is not independent of COELIG: each is selected by COELIG, through an inscrutable process with no statutory specifications on qualifications or terms of service, and serves at the pleasure of COELIG. R.635 (¶61). If they are referred to COELIG by, for example, legislators or political party officers, the public will never know. No executive branch official accountable to the Governor has any authority whatsoever over an independent arbitrator. *Id.*

COELIG determines after the hearing by majority vote whether a "substantial basis" exists to conclude that the respondent violated the law. R.636 (¶63). For certain violations of the Covered Statutes, COELIG assesses penalties of between $10,000 and $40,000 and can also seek the amount of any benefit it deems attributable to the violation. *Id.* (¶¶64–65). On top of civil penalties, COELIG may refer the matter for employer discipline and order "suspension or

termination" of employment, except for statewide elected officials, for which COELIG "may recommend impeachment." *Id.* (¶67).

COELIG is specifically denied authority to penalize or discipline members of the Legislature, legislative employees, or legislative candidates. R.637 (¶68). Moreover, COELIG is required to publish reports with its factual findings and legal conclusions on executive officials and employees. But, in an obvious effort to protect members of the Legislature and legislative employees from accountability, the Act prohibits COELIG from publishing such reports on members and legislative employees. *Id*.

D. COELIG's Enforcement Action Against Respondent

On July 10, 2020, Respondent's Special Counsel submitted a written request to JCOPE for approval to author and publish a book, as required by 19 NYCRR 932.5. R.637 (¶69). JCOPE approved the request in a July 17, 2020 letter. *Id.* The book was published on October 13, 2020. R.638 (¶70). On April 9, 2021, JCOPE notified Respondent that he may have violated Public Officers Law §74 through his preparation and publication of the book. *Id.* (¶71). On May 10, 2021, Respondent denied any violation of the law. *Id.* (¶72).

Respondent resigned on August 10, 2021. *Id.* (¶73). After its lengthy investigation, JCOPE formally charged Respondent with a violation of Public Officers Law §74(3) on March 15, 2022 by issuing a 37-page Notice of Substantial

Basis Investigation and Hearing. That document conclusively determined, before providing any opportunity for Respondent to be heard, that there was "substantial[,]" "overwhelming[,]" and "incontrovertible" evidence "beyond dispute" that Respondent violated the law. *Id.*

JCOPE was terminated on July 8, 2022, when the Act went into effect. *Id.* (¶74). However, on September 12, 2022, COELIG's deputy director informed Respondent's counsel that COELIG had authorized its staff to prosecute the charges brought by JCOPE. *Id.* The administrative hearing before an "independent arbitrator" was scheduled for June 12, 2023, but is on hold pending determination of this and related appeals.

E. Proceedings Below

On September 11, 2023, in a scholarly and thorough decision, Supreme Court (Marcelle, J.) granted summary judgment to Respondent and declared the Act was unconstitutional, at least in part, for having violated the separation of powers. R.5–30. First, Supreme Court concluded that COELIG's "enforcement of the ethics laws through civil penalties and forfeiture," as well as COELIG's "unreviewable discretion not to enforce the ethics laws in a particular circumstance or against a particular individual," is "the exercise of executive power belonging to the executive branch." R.13–14.

Next, Supreme Court concluded that the Act authorizes COELIG to exercise executive powers "beyond the Governor's reach," because "[t]he Governor has no capacity to control the commission by populating it with her appointees" or to "remove commissioners who misuse their office or fail in their duties." R.14. "Indeed," Supreme Court observed, "the whole reason for the commission's existence is to be independent from any government control—an objective which Executive Law § 94 surely accomplishes." R.14. As Supreme Court explained, if COELIG's position were accepted, "there is no limiting principle that would keep the Legislature from establishing a swarm of independent commissions (where it selects the majority of the commission) to enforce the laws instead of the Governor." R.23. Therefore, Supreme Court held that the Act violates the separation of powers because it "infringes upon the Governor's prime constitutional directive" to "ensure that the laws are faithfully executed." R.14. "Here, the Legislature has done by statute what was required to be done by constitutional amendment." R.28.

Accordingly, Supreme Court declared that Executive Law §94(10) and §94(14) are unconstitutional and enjoined COELIG from doing any act inconsistent with that declaration. R.29–30. The order was stayed pending appeal except that it continued to enjoin the enforcement proceedings against Respondent.

On May 9, 2024, the Appellate Division, Third Department unanimously affirmed Supreme Court's Order. The Appellate Division concluded that the Act impermissibly "creates an agency with executive power" with "the authority to investigate and impose penalties for the violation of the ethics laws, while being entirely outside the control of the executive branch." R.951. Specifically, the Appellate Division explained, the Act "revokes the Governor's enforcement power with respect to the ethics laws, thereby depriving her of all discretion in determining the methods of enforcement of these laws." *Id.* Instead, the Act "places this power into the hands of" COELIG, "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." *Id.* Moreover, "appointments must be approved by the IRC, an external nongovernmental entity made up of people who … do not answer to the populace." *Id.* Accordingly, the Appellate Division held the Act "usurps the Governor's power to ensure the faithful execution of the applicable ethics laws." *Id.*

The Appellate Division rejected the same arguments that COELIG rehashes on this appeal (as well as arguments COELIG has now abandoned). First, the Appellate Division found that "Supreme Court did not improperly rely upon federal precedent" but rather "permissibly used this nonbinding precedent to guide its analysis." R.951; *see* Br. 2, 16, 34. Second, the Appellate Division rejected the

notion that "the Legislature's motive or the beneficial purposes of this legislation" could immunize a blatant violation of the separation of powers. R.951; *see* Br. 24–25. Third, the Appellate Division refused to construe the Act's installment of appointment power in a group of private persons as a permissible delegation of legislative power. R.952; *see* Br. 43–44, 50, 64. Fourth, the Appellate Division dismissed as "unavailing" the "[a]nalogies [COELIG] attempts to draw to other committees and commissions." R.952; *see* Br. 40–43, 54–55, 60–61. The Appellate Division found COELIG's "remaining contentions"—many of which it repeats in this Court—"lacking in merit." R.952.

On June 5, 2024, the Appellate Division granted COELIG's motion for permission to appeal to the Court of Appeals. Pursuant to CPLR 5713, the Appellate Division certified the following question: "Did this Court err, as a matter of law, in affirming the order of Supreme Court?" R.953.[4]

ARGUMENT

The Act suffers from glaring constitutional infirmities.

First, the Act violates the separation of powers by accomplishing the Legislature's avowed goal of creating an agency armed with quintessentially

[4] Supreme Court stayed its determination of COELIG's severability request pending its appeal to the Appellate Division and has continued that stay pending this appeal.

executive powers of investigation, enforcement, and punishment that is "truly independent" of the Governor.

Second, the Act transgresses the express requirements for officers and civil departments set forth in Article V of the New York Constitution. *See Soares v. State of New York*, 68 Misc. 3d 249, 301–02 (Sup. Ct. Albany County 2020) (declaring Article 15-a of the Judiciary Law unconstitutional and enjoining its implementation, including the formation of the State Commission of Prosecutorial Conduct).

Last, in another violation of the separation of powers, the Act's creation of an agency controlled by legislative agents improperly circumvents the only mechanism through which the Legislature may discipline the Governor for an ethics violation—the impeachment power.

I. The Act Violates the Separation of Powers.

The separation of powers "is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions." *Maron*, 14 N.Y.3d at 258; *see Burby*, 155 N.Y. at 282 ("The object of a written constitution is to regulate, define, and limit the powers of government by assigning to the executive, legislative, and judicial branches distinct and independent powers."). This "fundamental principle of the organic law" requires that each branch of

government "be free from interference, in the discharge of its peculiar duties, by either of the others." *Maron*, 14 N.Y.3d at 258. That foundational precept is a structural one, inherent in the New York and federal constitutions, that serves as a bulwark safeguarding the constitutional rights and liberties of the people. *Id.* ("The separation of the three branches is necessary for the preservation of liberty itself."). Of course, some admixture of the powers granted to the various branches is unavoidable and salutary. *Tremaine*, 252 N.Y. at 39. But this Court has explained that clear rules exist: one branch of government may not "dominat[e] or interfer[e] with the functioning of another coequal branch" or with the "discharge of its peculiar duties." *Maron*, 14 N.Y.3d at 244, 258. "The safety of free government rests upon the independence of each branch, and the even balance of power between the three." *Burby*, 155 N.Y. at 282.

As the Appellate Division explained, the New York Constitution vests the "executive power"—all of it—"in the governor" and commands her to "take care that the laws are faithfully executed." art. IV, §§1, 3; R.948. As this Court has emphasized, "it cannot be denied that a principal function of the executive is to carry out the laws of the State .... A failure to fulfill this obligation violates the unequivocal command of the Constitution—it is not subject to academic debate concerning the proper division of governmental powers." *Matter of Cnty. of Oneida v. Berle*, 49 N.Y.2d 515, 523 (1980). What belongs to the executive power

is clear, as Madison explained two centuries ago: "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing and controlling those who execute the laws." 1 Annals of Cong. 481 (1789); *see Rapp v. Carey*, 44 N.Y.2d 157, 162 (1978) (the Constitution demands "the need for and the power in the Governor to oversee ... the administration of the various entities in the executive branch"); Federalist No. 47 (Madison) ("the appointment to offices, particularly executive officers, is in its nature an executive function").[5] As a necessary incident, "the power of removal is an executive power, and in this state it has been vested in the governor." *Matter of Guden*, 171 N.Y. 529, 531 (1902).

By contrast, as is evident, "[l]egislative power, as distinguished from executive power, is the authority to make laws, *but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.*" *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928); *see Myers v. United States*, 272 U.S. 52, 117–18 (1926) ("If such appointments and removals [of administrative officers] were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power[.]").

[5] *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021) ("the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President").

"[T]he rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power … and in carrying out that constitutional division into three branches it is a breach of the national fundamental law if Congress … attempts to invest itself or its members with either executive or judicial power." *J.W. Hampton, Jr. & Co. v. U.S.*, 276 U.S. 394, 306 (1928) (cited by *Tremaine*, 262 N.Y. at 39, in explaining the New York constitutional separation of powers); *see People ex rel. Broderick v. Morton*, 156 N.Y. 136, 144–45 (1898) ("The three great branches of government are separate and distinct .... One makes the laws; another construes and adjudges as to the rights of persons … thereunder; and the third executes the laws enacted and the judgments decreed. While each department, in its sphere, is, in a sense, independent, each operates as a check or restraint upon the other…. But in every case in which one department controls, modifies, or influences the action of another, it acts strictly within its own sphere[.]").

The Act flagrantly violates the separation of powers by turning these foundational principles on their head. As set forth below, the Act arms COELIG with quintessentially executive powers of law enforcement and punishment, but it completely insulates COELIG from all executive control and oversight. COELIG is empowered to enforce statutes in its discretion against executive branch officers and employees and private persons and impose penalties. Yet the Act deprives the

Governor of the power to appoint the members that control COELIG's enforcement decisions, to remove any of COELIG's members, or otherwise to supervise (directly or indirectly) COELIG and its enforcement of the Covered Statutes (for example, by exercising power over COELIG's budget). Nor is COELIG accountable to any inferior executive officer.

The result is exactly what the Constitution is designed to prevent—a powerful agency, administered by legislative agents, granted sweeping law-enforcement powers without any accountability to or control by the executive branch. *Cf. People v. Viviani*, 36 N.Y.3d 564, 576–78 (2021) (Legislature may not "deprive" executive branch officials of "an essential function of their constitutional office").

A. COELIG Performs Quintessential Executive Functions.

There can be no question that COELIG is granted quintessential executive power. "[I]n this State the executive has the power to enforce legislation." *Rapp*, 44 N.Y.2d at 163. And "the executive ... is accorded great flexibility in determining the methods of enforcement." *Id.*; *Bourquin v. Cuomo*, 85 N.Y.2d 781, 785 (1995) (recognizing the "'great flexibility' to be accorded the Governor in determining the methods of enforcing legislative policy"). "[E]xecutive agents" are tasked with "carry[ing] out the law"; "the Legislature makes laws and the Executive enforces them." *Tremaine*, 252 N.Y. at 39, 43.

As the Appellate Division explained, the Act grants COELIG "wide discretion" to "determine[e] the methods of enforcement" of the Covered Statutes. *Rapp*, 44 N.Y.2d at 163; R.951. Those methods of enforcement include investigating potential violations of the Covered Statutes, Exec. L. §94(10)(a)–(f), charging or forbearing from charging individuals with violations of law, *id.* §94(10)(h), (l), issuing determinations—not mere opinions or recommendations—declaring whether a person has violated a Covered Statute, *id.* §94(10)(p), and choosing from an array of remedial options, none of which are mutually exclusive.[6] Specifically, COELIG may impose civil penalties on persons it targets, which can range from $10,000 to $40,000 per violation (depending on the statute) and can recover the entire amount of any benefit COELIG deems attributable to the violation. Exec. L. §94(10)(n)(i), (ii). In determining penalty amounts, COELIG may broadly consider "any other factors the commission deems appropriate." §94(10)(n)(v). This is a paradigmatic executive power—"no function cuts more to the heart of the executive's constitutional power than its discretion to seek the imposition of penalties." *Avignone v. Valigorski*, 70 Misc.3d 905, 912 (City Ct. Cohoes County 2020).

[6] Exec. L. §94(10)(p)(ii) (authorizing COELIG to impose a penalty "in addition to" taking disciplinary action).

COELIG can also order censure, suspension, termination, or "other appropriate discipline" against enforcement targets, §94(10)(p)(ii), and seek judicial enforcement of its orders, §94(5)(a) and (14). These functions are also fundamentally executive in nature. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200 (2020) ("[T]he Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power[.]"); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (referring to the executive's "discretionary power to seek judicial relief" as "the ultimate remedy for a breach of the law").

B. The Act Impermissibly Deprives the Governor of Power to Appoint or Remove COELIG's Members, and to Otherwise Oversee COELIG's Enforcement of the Covered Statutes.

1. The Act impermissibly deprives the Governor of appointment power.

The power to "*appoint* the agents charged with the duty" of "enforcement" is an "*executive* function[.]" *Springer*, 277 U.S. at 202; *see Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (the power of "*appointing* ... those who execute the laws" is "in its nature Executive"). As the Constitution makes clear, the Governor has the duty to "take care that the laws are faithfully executed," art. IV, §3, and the Governor is "supreme within [the] field of [executive] action," *Tremaine*, 252 N.Y. at 39. To ensure the Governor can "oversee … the administration of the various entities in the executive branch,"

Rapp, 44 N.Y.2d at 162, she must retain authority over appointments to executive agencies. *See* Federalist No. 47 (Madison) ("the appointment to offices, particularly executive offices, is in its nature an executive function").

The Act nakedly usurps the Governor's appointment power and engrafts it onto the legislative leaders and private parties. First, the Act vests the ultimate authority of appointment over COELIG members in a group of *private persons* (law school deans), who vote up-or-down on nominees named by certain elected officials. The private persons are in no way accountable to anyone else, let alone the People, in the exercise of their appointment authority. *See* Exec. L. §94(3)(l) (IRC members "shall neither be public officers nor be subject to the requirements of the public officers law"); §94(3)(i) (only IRC has authority to remove IRC members); §94(2)(c) (IRC members are New York law school deans). Worse still, the private persons given appointment powers have *carte blanche* to exercise their authority without any guiding principles or standards, let alone intelligible ones. §94(3)(g). The blank check given to the IRC showcases the lawlessness of the Act's appointment provisions.[7]

[7] To be sure, several state bodies have structures in which the Governor's appointment power is exercised within the confines of the recommendation of others, including legislative members. But the Governor is free to decline to appoint any particular person recommended. And a few state bodies allow private entities to make appointments. Unlike COELIG, however, none of those bodies is authorized to perform core executive functions. *See infra* Part I.D.4.

Second, even as it gives private individuals the ultimate appointment authority, the Act bestows upon legislative leaders the power to nominate (for the IRC's up-or-down vote) the majority of COELIG's members (6 of 11). The Governor is consigned to nominate a mere 3 of COELIG's 11 members. Consequently, legislative agents—the members appointed on nomination of the legislative leaders—constitute a quorum and can control the full panoply of COELIG's enforcement powers, including the power to seek penalties. In any given matter, the legislative agents may exercise those powers (or determine not to) regardless of whether the three members nominated by the Governor agree with the legislative agents' enforcement decisions or actions. This legislative usurpation of executive power is plainly unconstitutional. *See Under 21, Catholic Home Bur. For Dependent Children v. City of New York*, 65 N.Y.2d 344, 355–56 (1985) ("[T]he doctrine of separation of powers … does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch."); *Tremaine*, 252 N.Y. at 43 (rejecting "an attempt by the Legislature to confer administrative power upon" its own "agents to carry out the law").

The Act's constitutional infirmities abound. COELIG—made effectively an agent of the legislative branch—is empowered to impose civil penalties, sanctions, and other severe disciplinary action on *executive branch* officers and employees, including the Governor and other constitutional officers. Granting agents of one

branch sweeping powers to sanction officials or employees of another branch necessarily vitiates established separation-of-powers principles. Indeed, for that very reason a constitutional amendment was required to empower the Commission on Judicial Conduct—a body composed of a majority of executive and legislative appointees—to impose disciplinary sanctions against members of the judiciary for ethics violations. *See* art. VI, §22. Absent such an amendment, the foundational dictates of separation of powers would have spurned an empowerment of two branches against the third.

To see that principle in action, one need look no further than the Act itself. In tacit recognition of the legislative branch's own separation-of-power prerogatives, the Act denies COELIG any power "to impose penalties or discipline upon *members of* or candidates for member of *the legislature or legislative employees* for any violation" of the Covered Statutes. Exec. L. §94(10)(p)(i). In this way, the Act recognizes—even as it transgresses—the elementary principle that the separation of powers bars one branch from being subjected to the disciplinary authority of another. Legislation that respects the separation of powers to the benefit of one branch and at the expense of another turns this vital doctrine on its head. *See Morton*, 156 N.Y. at 144–45 (the separation of powers envisions "a division of power among the among the three co-ordinate branches of government, each operating as a restraint upon the other, *but still in harmony*").

2. The Act impermissibly strips the Governor of any power to remove COELIG members or to otherwise oversee their enforcement of the Covered Statutes.

"In this country the power of removal is an executive power, and in this state it has been vested in the governor by the people." *Guden*, 171 N.Y. at 531; *see Matter of Richardson*, 247 N.Y. 401, 410 (1928) (Cardozo, C.J.) ("the removal of a public officer" is "an executive act"); *Seila Law*, 140 S. Ct. at 2191–92 (the "power to remove" officers of "an independent agency that wields significant executive power" belongs to the President). Indeed, "the power of appointment"—which, as shown, belongs to the Governor—"carries with it, as a necessary incident, the power of removal." *Myers*, 272 U.S. at 126. The power of removal is intimately intertwined with the power of supervision. As is obvious, "[i]t is the power to supervise—and, if need be, remove—subordinate officials that allows a new [Governor] to shape his administration and respond to the electoral will that propelled him to office." *Collins v. Yellen*, 141 S. Ct. 1761, 1796 (2021); *see In re B. Turecamo Contracting Co.*, 260 A.D. 253, 258 (2d Dep't 1940) (Governor's "take care" duty "[n]ecessarily … implies power on the part of the Governor to supersede a district attorney"). Although the Legislature is not devoid of authority to specify grounds for the exercise of the removal power, the power belongs to the Governor alone, and must be retained by her. *See Guden*, 171 N.Y. at 531 ("the power of removal" "was intended to be vested *exclusively* in the governor").

By express design, the Act violates those established principles by rendering COELIG immune from executive removal and oversight. The Act provides that COELIG's members may be removed *only* by a majority vote of the members, and only on specified grounds. Exec. L. §94(4)(c). Thus, the Governor has *no* power to remove and oversee COELIG's members. Nor does the Act permit the Governor to remove the Executive Director, to whom the members may delegate broad enforcement authority. §94(6)(b); R. 647 (¶97 & n.16). Consequently, if COELIG abuses its enforcement authority or otherwise exercises it in a manner inconsistent with the faithful execution of the laws, the Governor is powerless to take corrective measures to vindicate her constitutional duty to "take care that the laws are faithfully executed." art. IV, §3.

The unambiguous command of Article IV, Section 3 is that the Governor "shall take care that the laws are faithfully executed"—*all* the laws, not some subset of the laws chosen at whim by the Legislature. Nonetheless, the Act effectively amends the Governor's constitutional duty; it is deemed a duty to "take care that the laws, other than the Covered Statutes, are faithfully executed." And if the Legislature can thus amend the constitutional text, no principled basis exists that would prevent the Legislature from further diluting that duty—and the Governor's attendant accountability to the electorate—by carving out other laws from the constitutionally undifferentiated body of laws that the Governor must

"take care" are "faithfully executed." Moreover, in accordion-like fashion, the Legislature could thereafter include laws anew in accordance with perceived political expediencies. That is shockingly unconstitutional.

Further highlighting the extent to which the Act insulates COELIG from executive oversight, it infringes on the Governor's constitutional power to influence agency policies through the power of the purse conferred on the Governor by executive budgeting. *See* art. VII, §§1–6; *Pataki v. N.Y. State Assembly*, 4 N.Y.3d 75, 83 (2004). Specifically, the Act includes a provision that purports (1) to require the Governor to "separately state the recommended appropriations for [COELIG]" in her annual appropriation bills; and (2) to preclude the Governor from including in her appropriation bills a provision permitting the "separately stated appropriations" from being "decreased by interchange with any other appropriation." Exec. L. §94(1)(f).[8]

C. COELIG's Justification of the Act's Flagrant Constitutional Defects Is Unavailing.

COELIG trots out a number of red herrings and asks the Court to fashion a new constitutional rule overlooking the Act's egregious defects. If COELIG's position were accepted, the result would be a constitutional anathema: the

[8] Thus, the Act purports to limit the scope of the Governor's powers conferred by Article VII, §§1–6, as "constructor" of all items of appropriation to the executive budget. R.46(¶20).

Legislature would be granted unprecedented authority to exempt any number of laws from the Governor's constitutional "take care" duty and transfer core executive law-enforcement power from the Governor to "independent" commissions whose members could be exclusively nominated by the Legislature. COELIG thus asks this Court to bless "an attempt by the Legislature to confer administrative power upon" its own "agents to carry out the law." *Tremaine*, 252 N.Y. at 43. The Constitution does not permit such a mockery of the separation of powers.

1. COELIG's defense of the Act has no limiting principles.

COELIG's defense of the Act's many transgressions against the New York Constitution's separation of powers is meritless. In COELIG's misbegotten view, the Constitution permits the Legislature to create a powerful law-enforcement agency that is "independent" from "the political branches" wherever there is "a compelling and legitimate institutional need" from a "pragmatic" perspective. Br. 21, 26–27, 35. COELIG contends that its sweeping enforcement powers and independence represent "the political branches' internal management practices" to "protect the integrity and operations of those branches." Br. 27–28. It is of no constitutional moment, per COELIG, that the legislative leaders name a majority of COELIG's members, that private individuals appoint all the members (remarkably,

COELIG cannot admit that the IRC exercises appointment power), and that the members cannot be removed by anyone other than themselves.

To see why COELIG's position must be rejected, consider what is entailed by COELIG's vision of the constitutional separation of powers. According to COELIG, the separation of powers permits the Legislature, in its unfettered discretion, to transfer the executive power to take care that the laws are faithfully executed from the Governor to an entirely unaccountable commission—which itself may be controlled by legislative agents who cannot be removed by the Governor and who are not accountable in any other way either to the Governor or to a department head accountable to the Governor. Br. 24–28. COELIG deems it permissible that, under the Act, the Governor has *no power* whatsoever to "take care" that the ethics, lobbying, and other laws subject to COELIG's purview are "faithfully executed." art. IV, §3. COELIG's position is that transferring core executive power to unaccountable commissions is constitutionally valid whenever "exigencies" require it in the view of the Legislature and the Governor who happens to be in office at the time (and who wishes to clean her hands of political accountability for carrying out her constitutional duty). Br. 24–27, 33.

To state the obvious, COELIG's warped vision of the separation of powers offers *no* limiting principles that would cabin the Legislature's authority to usurp executive powers, insulate the Governor from political accountability for her

performance of the core "take care" duty, and violate the Constitution's requirements regarding the civil department system (*infra* Part II). Under COELIG's absolutist view of legislative power, the Legislature could authorize its leaders to appoint all of the members of COELIG or any other body exercising core executive power. Indeed, under COELIG's theory, if one political party controlled both houses, the Legislature could authorize only the majority leaders to make the appointments (even if the Governor were of a different party). Nor is there anything under COELIG's logic stopping the Legislature from transferring core executive powers to enforce a host of *other* laws to COELIG, so long as "exigencies" demand it. *See* R.23 ("[N]o limiting principle … would keep the Legislature from establishing a swarm of independent commissions (where it selects the majority of the commission) to enforce the laws instead of the Governor.").

As just one example of what COELIG's theory would permit, consider the following hypothetical. Where the Legislature was controlled by Party A, an outgoing Governor was of Party A, and a Governor was elected from Party B, COELIG's theory would allow the Legislature to quickly enact a law—with the lame-duck Governor's assent—transferring enforcement authority for wide swathes of the law from the Governor to "independent" commissions, the majority of whose members are appointed by the majority leaders of the Legislature and

who are all unaccountable to the Governor. *Cf. Democratic Party of Wisconsin v. Vos*, 966 F.3d 581, 583–84 (7th Cir. 2020) (after Democrats "were elected as the governor and attorney general of Wisconsin," "the Republican-controlled legislature enacted two laws … which strip the incoming governor and attorney general of various powers and vest legislative committees that remained under Republican control with formerly-executive authority"); *see* R.24, n.6 (recognizing the same "danger to the democratic process posed by the commission's sweeping view of legislative power"). Then, when the political dynamics change, the Legislature could reverse course and place those commissions back under the control of a Governor of the same party. Alternatively, the same legislative power-grab scenario could follow the election of a Governor whose platform lambasted the Legislature.

Take it even further. The endpoint of COELIG's logic is that, as long as purported "exigencies" require it, the Legislature could reduce the executive departments to one, create a vast number of "independent" commissions authorized to enforce all the laws, empower the legislative leaders to appoint all or a majority of their members, render the members not removable by and otherwise completely unaccountable to the Governor, and place the commissions all in a single department—headed by someone to whom the commissions are not accountable. Thus, under COELIG's theory, as Supreme Court observed, "the Legislature could

act as effectively [without the Governor] as with h[er], by simply requiring [independent commissions] to execute its laws." R.24. "This would destroy the delicate balance of power between branches that the Constitution commands." *Id.* (citing *Burby*, 155 N.Y. at 282). Indeed, under COELIG's view, the Legislature could have passed the statute creating the Commission on Judicial Conduct, 8 of whose 11 members are legislative and executive appointees, *without* a constitutional amendment.

In response to the foregoing, all COELIG was able to muster before the Appellate Division—which it tellingly omits here—is that there would be no "special need" for those hypothetical commissions. COELIG 3d Dep't Reply Br. 5. That is, of course, no limiting principle at all. COELIG also asserted that the hypothetical commissions "may violate the separation-of-powers doctrine" if their appointment and removal powers were "concentrated in the two majority-party legislative leaders" but not the legislative leaders in the minority party. *Id.* COELIG cites no authority for the novel and idiosyncratic view that depriving the executive of its authority to enforce the laws is benign so long as minority legislative leaders have some (unspecified) share in the usurped executive power. In any event, COELIG's begrudging concession that such a structure "may" violate the separation of powers proves it has no limiting principle.

2. The Act impermissibly usurps executive power.

Touting "several factors, taken together" that COELIG deems significant, COELIG claims that that the Act does not "usurp the executive power." Br. 3. As purported limiting factors, COELIG claims that (1) "the [A]ct's purpose was to further a compelling and legitimate institutional need" for COELIG to be "independent from the political branches it monitors" and merely constitutes "an effort … at self-regulation," *id.* 26–27; (2) Governor Hochul "assented" to the Act, *id*. 28, (3) "executive officials retain meaningful … influence over [COELIG]," *id.* 29; and (4) "the Legislature's own ability to influence the Commission is restricted," *id.* 31.

None of these factors offer any colorable, still less principled, limitation, and many assertions are wrong or irrelevant. *First*, COELIG's position is, in effect, that for at least the ethics and lobbying laws there is an unstated exception lurking in the Constitution's allocation of executive power to the Governor as to the enforcement of the ethics and lobbying laws. COELIG does not even attempt to explain why, if its position were adopted, there could not be *other* laws also as to which the Legislature could deem it expedient to insulate an enforcing agency from the Governor. Why the ethics and lobbying laws and not the health laws, or the enforcement of any other law as to which the Legislature can claim that the influence of the Governor should be checked? The most COELIG can offer is the vacuity that the ethics laws are different. Accepting COELIG's rationale would set

the stage for an endlessly proliferating series of "exigencies" justifying delegating enforcement of other laws to commissions controlled by legislative agents and insulated from the Governor.

Tellingly, COELIG offers *no* explanation for why COELIG, but not the Legislative Ethics Commission—which has jurisdiction to enforce the ethics laws against the Legislative Branch—is required to be "insulated … from the political branches it monitors." Br. 3. Nor does COELIG even attempt to explain why its claimed "independence" requires the *Legislature* to nominate the majority of COELIG members, rather than the Governor. Indeed, COELIG does not say that it is malign for the members of the Legislative Ethics Commission to consist of 4 *members of the Legislature* and 5 members appointed by the legislative leaders. Legis. L. §80. Instead, COELIG incoherently maintains that only the influence of the Executive Branch can be so problematic that it can be extirpated.

The Act's intentional diminishment of the executive in the name of "independence" is an undisguised encroachment on the executive power. *Compare* Federalist No. 51 (Madison) ("[I]t is evident that each department should … be so constituted that the members of each should have as little agency as possible in the appointment of members of the others."). As noted, COELIG offers no cogent explanation why creating an unaccountable commission to discipline and punish the Executive Branch controlled by legislative nominees can be done by statute,

but why it was necessary for the Commission on Judicial Conduct to be empowered by constitutional amendment.[9]

Moreover, COELIG's arguments about the policy rationale for an independent ethics agency necessarily invite the Judiciary to overstep its constitutional role and evaluate the merits of the Legislature's position. *See* R.951 (courts "may not utilize the Legislature's motive or the beneficial purposes of this legislation to overlook" a violation of the separation of powers). The Act's violation of the separation of powers between the legislative and executive branches cannot be justified by a violation of the separation of powers between the judicial and other branches. *See Cohen*, 94 N.Y.2d at 11 (the "unique role" of "courts" is as "final arbiter of true separation of powers disputes"). Indeed, COELIG's view of policy is beside the point—as Supreme Court noted, "the

[9] COELIG asserted below that the reason "an amendment was necessary" to create the Commission on Judicial Conduct (CJC) was that "the pre-existing judicial disciplinary body" it replaced, the Court on the Judiciary (which consisted only of members of the judiciary), was provided for in the Constitution. COELIG 3d Dep't Reply Br. 15–16. COELIG is wrong. The Court on the Judiciary was succeeded by the Temporary State Commission on Judicial Conduct, which was created by statute. L. 1974, ch. 739. While both the temporary and permanent commissions featured a hybrid-branch appointment process, the temporary commission could not impose sanctions, while the permanent commission can. Thus, contrary to COELIG, a constitutional amendment was needed to create the permanent CJC because of the combination of its hybrid appointment process and ability to penalize members of the Judiciary.

Legislature has done by statute what was required to be done by constitutional amendment." R.28.

Second, COELIG argues the Act does not violate the separation of powers because Governor Hochul "assented" to the legislative intrusion into the Governor's constitutional powers. Br. 28.[10] Hogwash. The constitutional principles here are pellucid: the Governor may not cure an encroachment by the Legislature into her constitutional duties and powers. As this Court has instructed, "the end cannot justify the means, and the Legislature, even with the Executive's acquiescence, cannot place itself outside the express mandate of the Constitution." *Matter of King v. Cuomo*, 81 N.Y.2d 81 N.Y.2d 247, 254 (1993); *see N.Y. State Bankers Ass'n v. Wetzler*, 81 N.Y.2d 98, 104–05 (1993) (rejecting argument that constitutional structural "requirement … may be waived if the executive and legislative branches agree on it"). Although "an individual President might find advantages in tying his own hands," "the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment." *Free Enter. Fund*, 561 U.S. at 497. The Governor "cannot … choose to bind [her] successors by diminishing their powers, nor can

[10] COELIG now claims only that this factor "weighs in favor" as opposed to is "dispositive" of the Act's constitutionality. Br. 28.

[she] escape responsibility for [her] choices by pretending that they are not [her] own." *Id.*

COELIG thus badly misapprehends the deep logic underlying the separation of powers—constitutional authority is delineated "to protect the *public's* interests, not those individuals who occupy the offices of those Branches at varying times." *Cohen*, 94 N.Y.2d at 13. Indeed, if any sitting Governor's assent were enough to neutralize a separation of powers violation, then *no* statute could be struck down as usurping the executive power.

What is more, the separation of powers ensures clear lines of political accountability to the People. The Governor, as head of the executive branch, is accountable for her exercise of the take-care duty. Because Governors necessarily make difficult enforcement decisions, a sitting Governor might be "happy to wash [her] hands of these decisions" by insulating herself from oversight and control of subordinates. *Arthrex*, 141 S. Ct. at 1989–90 (Gorsuch, J., concurring in part). But what the Act designedly produces here is insulation *between* the Governor and the People to whom she is accountable. Although the Constitution forbids such duty-shirking, COELIG would turn a constitutional vice—the Governor's assent to encroachment—into a constitutional virtue.

Third, COELIG's claim that the Act permits the Executive Branch "a meaningful influence" over COELIG's composition, oversight, and funding is

risible. Br. 29. COELIG insists that the Governor can nominate a mere 3 of 11 nominees each term—along with the Attorney General and Comptroller nominating a mere two further—and that this affords the Governor a sufficiently "significant role in the Commission's composition." *Id.* at 29.[11] And COELIG points to the Governor's statutory authority under Executive Law §6 to "examine and investigate the management and affairs" of any "department" or "commission." *Id.* at 30.

That is worlds away from a "significant" role. And even if it were "significant," the Constitution does not consign the Governor to a mere "*significant role*" in the duty to "take care" that the laws are "faithfully executed." Rather, "[t]he executive power of the State [is] vested in the Governor." *Rapp*, 44 N.Y.2d at 162. That necessarily entails the power to appoint those who control enforcement—here, the majority of members—as well as the power to oversee and remove them. Were it otherwise, the Governor could not meaningfully exercise her "power to enforce legislation," in which she "is accorded great flexibility in determining the methods." *Id.* at 163.

[11] The Governor has *no* such ability "each term." After the first class of members, the Governor's nominees all serve 4-year terms, staggered so that each Governor will nominate only two members in a 4-year term. *See* Exec. L. §94(4)(a).

Indeed, COELIG now performs an about-face that is as awkward as it is telling. In 2018, the Office of the Attorney General ("OAG")—invoking state and federal law—concluded that a bill "vesting oversight of an executive function in a hybrid disciplinary body appointed by executive, legislative, and judicial actors, with a majority appointed by the Legislature … violates the separation of powers—and would do so even if the commission were limited to enforcing applicable legal and ethics rules of conduct." R.581. The OAG also concluded that "the grant of executive power … without executive oversight also may violate the principle of separation of powers." R.584; *see* R.579 (disapproving of proposed commission with "a majority appointed by members of the Legislature" as "an exercise of legislative power over the executive branch with no warrant in the Constitution").

Further, COELIG's insistence that the Act is valid merely because of one blunt instrument—the power to reduce the appropriation to fund COELIG—is tantamount to insisting that a surgeon with a saw needs no other instruments to operate. Indeed, "altering the budget … of an agency as a whole is a problematic way to control an inferior officer." *Free Enter. Fund*, 561 U.S. at 504. Moreover, COELIG ignores the blatantly unconstitutional encroachment on the Governor's constitutional budgetary powers. *Supra* Part I.B.2.

All this also shows the complete inadequacy of COELIG's attempts to conjure a limiting principle. The supposedly ameliorative facts that the Governor retains authority under Executive Law §6 and the power of the purse could apply to any of the scenarios earlier discussed.

Last, as for COELIG's claim that the Legislature's role in controlling COELIG is constrained, this is both wrong and irrelevant. It is wrong because a majority of the members are nominees of the legislative leaders. To claim these legislative nominees are independent from the influence of the Legislature is not credible—indeed, the very justification proffered for the Act is that allowing the Governor too many nominees would give the Governor too much influence. And it is irrelevant because the violation here entails transferring the Governor's executive power to an agency that is unaccountable, either directly or indirectly, to her.

COELIG can eke no support from *Cohen v. State* or *Delgado v. State*. Br. 28–29. *Cohen* upheld a law by which the Legislature conditioned the timing of its own compensation on passage of the budget. 94 N.Y.2d at 10. Far from assenting to encroachment, the Legislature "decided to restrict itself and discipline its own work and power[,]" in a way that "balances the overall power to protect the *public's* interests, not those individuals who occupy the offices of those Branches at varying times." *Id.* at 13–14 (emphasis in original). Unlike the Act here, the

law in *Cohen* marked no "ultra vires surrender of power to any other Branch." *Id.* at 14.

Delgado upheld a law that was alleged to have unconstitutionally delegated legislative authority to a temporary committee on compensation. 39 N.Y.3d 242 (2022) (plurality op.). The Court rejected the argument that the law unconstitutionally stripped the Governor of law-making authority—the determinative factor being that the law "tightly circumscribed the Committee's discretion" in a way that preserved the Governor's role in the compensation-setting process. *Id.* at 255; *accord id.* at 274 (Wilson, J., concurring) ("The Committee's tightly cabined authority meant that its discretion reached minimally beyond what the Governor would have foreseen[.]"). Here, by contrast, the Act empowers COELIG to enforce the Covered Statutes without any control by the Governor.

* * *

The nebulous factors on which COELIG relies reveal the absence of any limiting principles that would forestall even more extreme usurpations of the executive power. COELIG's position cannot be accepted. As this Court has instructed, "the Separation of Powers Doctrine 'is a *structural safeguard* …. In its major features … it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially

defensible in the heat of interbranch conflict.'" *Maron*, 14 N.Y.3d at 260-61 (quoting *Plaut v Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995)).

D. COELIG Misconstrues New York's Precedent and Practice

COELIG maintains that "New York's constitutional history, precedent, and practice" permits the Legislature to create a powerful law-enforcement agency outside the control of the executive branch. Br. 33. COELIG is wrong.[12]

1. COELIG relies on outdated and inapplicable authority.

COELIG claims that its structure is constitutionally sound because "New York's first Constitution" vested appointment and removal power in the erstwhile Council of Appointments (which was abolished in 1821). Br. 36–37. It asserts that even after the Council was abolished the Legislature retains "power over appointments." Br. 39. Not so.

[12] COELIG also sets up a strawman of Respondent's position on what the constitutional text and history require. Respondent does not contend that the Constitution "require[s] that the Governor have power to directly control every executive entity" or provides the Governor with "a paramount, indefeasible power of appointment and removal." Br. 35. Respondent has consistently maintained that the Governor must have authority to appoint, oversee, and control officials exercising core executive law-enforcement authority, but such officials may be accountable to the Governor *indirectly—i.e.*, accountable to an official who is in turn accountable to the Governor—and the Legislature, consistent with the constitutional scheme of checks and balances, may play a role in cabining how the Governor may use her power, such as recommending appointees or requiring removal for cause.

As Chief Judge Wilson has noted, Alexander Hamilton "describe[d] the federal executive power as congruent with the powers of the Governor of New York under the 1777 State Constitution." *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 291 (2018) (Wilson, J., dissenting).[13] The federal framers understood that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." Madison, 1 Annals of Cong. 481 (1789). Although the New York Constitution for a time installed some executive power in the Council of Appointment, it did not thereby change the well-understood meaning of executive power or the duty to take care that the laws are faithfully executed. That is why this Court has held, for example, that "article IV, §3 of the Constitution" affords "the Governor with discretionary authority to supersede the District Attorney in a matter." *Johnson v. Pataki*, 91 N.Y.2d 214, 223 (1997).

COELIG claims that 1821 and 1846 Constitutions preserved "the Legislature's residual power over appointments" in a "catch-all clause." Br. 39.

[13] Indeed, New York's early constitution "provid[ed] for the strongest executive among the states at the time." *Cappelli v. Sweeney*, 167 Misc. 2d 220, 225 (Sup. Ct. Kings County 1995). New York served as a "model" for the federal framers. *See* John Yoo, *Unitary, Executive, or Both?*, 76 U. Chi. L. Rev. 1935, 1973-76 (2009) (New York chose "a vigorous executive" that "influenced ... the work of the Philadelphia Convention" and "provided [a] model[] for the [federal constitutional] delegates" to create "a restored executive to check the excesses of the legislature [and] appoint and manage government personnel").

COELIG relies heavily on *Lanza v. Wagner*, 11 N.Y.2d 317 (1962), which ostensibly supports its claim that the Legislature may delegate the appointment power to private persons. Br. 48–50. *Lanza* expressly relied on Article IX, Section 9 of the Constitution—the former "home-rule" provisions, first introduced in the Constitution of 1846 to preserve the right of "cities, towns and villages … to select their local officers." 11 N.Y.2d at 325. That provision prescribed the method for selecting "all county officers" and "[a]ll city, town and village officers" whose election or appointment was not already provided for by the Constitution. *Id.* (quoting former art. IX, §9). It further provided: "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." 11 N.Y.2d at 325.

The Court noted that Section 9's broad grant of power contained "no limitation to any particular person or class of person upon whom alone the legislature may impose this obligation." *Id.* at 330. On that textual ground, *Lanza* found "no constitutional bar" for creating a state agency with a "selection board" of "private" individuals. *Id.* at 333.[14]

[14] *Lanza* reached that conclusion even though the provision was included in the constitutional article pertaining to local government and even though the general "all other officers" language followed "county officers" and "city, town, and village officers"—varieties of local, not state, officers.

The constitutional text that the *Lanza* Court relied upon no longer exists. In 1963, a year after *Lanza,* Article IX was repealed and replaced with language that omits the "all other officers" language, and thus makes even clearer that it applies only to local government officers. *See* art. IX, §2(b)(3)(c) ("All officers of every *local government* whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law."). COELIG's reliance on *Lanza* is badly misplaced. *See Northrup v. Kirwan*, 88 Misc. 2d 255, 259 (Sup. Ct. Monroe County 1976) (declining to rely on cases decided prior to the 1963 amendment when interpreting the current home-rule provision), *aff'd*, 57 A.D.2d 699 (4th Dep't 1977).

Even as it embraces repealed language, COELIG dismisses the 1925 reorganization amendments. Those amendments established a two-tiered civil department structure: (1) "subordinate … commission[s] within the departments" "*under*" (2) "'heads of Departments'" who form "the Governor's 'Cabinet'" and are appointed by the Governor with the approval of the Senate. *Cappelli*, 167 Misc. 2d at 226, 229. The whole point of this scheme was, as *Cappelli* noted, "*to give the power to the Governor to efficiently execute the laws*." *Id.* at 226; *see id.* at 232 (Article V's "clear intention" was to "confer greater power and, concomitantly, greater accountability upon the Governor."); *infra* Part II; R.459-

70. The clear design of the amendments to Article V was to establish a civil department structure that makes executive-branch commissions—especially those tasked with law-enforcement powers—accountable to the Governor either directly or indirectly. Indeed, as the Attorney General recognized in 2018, "article V prohibits [] an entity exercising executive powers that is not subject to supervision or accountable to any executive officer (*e.g.*, the head of a department)." R.584. COELIG, despite nominally being placed within the Department of State, is accountable to only itself.

Remarkably, then, COELIG's sole authority for the notion that the Legislature may appoint executive law-enforcement officers (or "delegate" such power to private persons) is a repealed constitutional amendment.[15] What remains is the long-established principle that appointment to executive office is an executive function—and Article V. *See People ex rel. Killeen v. Angle*, 109 N.Y. 564, 575 (1888) ("[A]n amended constitution must be read as a whole, and as if every part had been adopted at the same time and as one law[.]").

[15] COELIG highlights that the proposed amendments in 1916 and 1917 to limit the home-rule provision "to *local officers* only" were "never adopted." Br. 45. But the 1963 amendments did just that. Nor is COELIG helped by the boilerplate savings clause, *id*. 53, which states only that the 1963 amendment "will have no effect upon *the other provisions* of the Constitution," *i.e.*, those other than the former home-rule provision.

2. Federal authority undergirds the conclusion that the Act is unconstitutional.

COELIG claims that Supreme Court (and Respondent) improperly "relied primarily on federal caselaw" in deeming the Act unconstitutional. Br. 34–38. COELIG's complaint that Supreme Court's analysis was faulty to the extent it invoked federal authority is inane. *See* R.951, n.2.

"One of the fundamental principles of government underlying our Federal Constitution is the distribution of governmental power into three branches—the executive, legislative and judicial…. We have consistently recognized that this principle of separation of powers is included by implication in the pattern of government adopted by the State of New York." *Under 21*, 65 N.Y.2d at 355–56; *see Matter of LaGuardia v. Smith*, 288 N.Y. 1, 5–6 (1942). In *Under 21*, this Court invoked United States Supreme Court caselaw and Supreme Court Justice Joseph Story's Commentaries on the Constitution. *Id.* Moreover, as noted, Hamilton "describe[d] the federal executive power as congruent with the powers of the Governor of New York under the 1777 State Constitution." *Shah*, 32 N.Y.3d at 291 (Wilson, J., dissenting). And this State's "basic concept of separation of powers[] derived from the original Constitution of 1777." *Id.* at 278 n.2 (Wilson, J., dissenting).

Unsurprisingly, therefore, this Court has frequently invoked federal authority in construing the New York Constitution's separation of powers. *See*,

e.g., *Cohen*, 94 N.Y.2d at 13 (citing The Federalist and *Plaut*, 514 U.S. 211); *Berle*, 49 N.Y.2d at 523 (citing *Youngstown Co. v. Sawyer*, 343 U.S. 579, 588 (1952)); *see also* R.11 (citing cases).

Contrary to COELIG, Respondent's position does not ignore that New York's Constitution "has a separate history and structure and must be interpreted accordingly." Br. 34 (quoting *Delgado*, 39 N.Y.3d at 281 (Wilson, J., concurring)). As the Appellate Division observed, "Supreme Court did not overlook that 'the classic separation of powers between the executive and legislative branches is modified to some degree by our [state] Constitution." R.951, n.2; *see* R.11. The use of federal authority to analyze executive power and the Act's defects is entirely proper. Indeed, Supreme Court would have been remiss if it had done otherwise.

* * *

All of the above shows why COELIG's position is untenable. "Free government consists of three departments, each with distinct and independent powers, designed to operate as a check upon those of the other two co-ordinate branches." *In re Davies*, 168 N.Y. 89, 101–02 (1901) (citing New York and federal caselaw); *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 480 (1885) ("the executive power has been committed to the executive department"). And "[t]he executive power of the State, vested in the Governor, is broad." *Rapp*, 44

N.Y.2d at 162. "To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

3. COELIG cannot wave away the Act's removal defects.

As shown above, the Act violates the separation of powers by depriving the Governor of her removal powers with respect to COELIG's members. *Supra* Part I.B.2. What little COELIG offers to forestall this conclusion is meritless.

In COELIG's view, the Governor has *no* constitutional power to remove executive officials who enforce the laws, while the Legislature has total "power to prescribe when and how an executive officer may be removed," including by forbidding the Governor to remove executive officials. Br. 58–60. COELIG studiously avoids *Matter of Guden*, in which this Court squarely held that "the power of removal is an executive power, and in this state it has been vested in the governor by the people." *Guden*, 171 N.Y. at 531 (citing art. IV, §1); *see id.* ("It does not require argument to persuade the mind that the power thus conferred is executive … and that it was intended to be vested exclusively in the governor."). Indeed, as Chief Judge Cardozo has explained, "the removal of a public officer" is "an executive act." *Richardson*, 247 N.Y. at 410. That authority is in line with

federal caselaw. *See Myers*, 272 U.S. at 122. COELIG has no response to this precedent.

Contrary to COELIG, the Constitution's vesting of executive power and the take-care duty in the Governor grants her the power to oversee officials who enforce the laws, including the power of removal. While the Constitution at times allows the Legislature a say, it does not permit the Legislature to revoke the Governor's power of removal wholesale. The constitutional provisions COELIG cites do not suggest otherwise. *See* art. V, §4 (creating an exception to the Governor's appointment and removal power for the head of the Department of Education); art. XIII, §2 (providing as a default rule that when the Constitution or statute is silent as the duration of an office, "such office shall be held during the pleasure of the authority making the appointment"); art. XIII, §13(a) (providing that the Governor may remove any elected sheriff, among others, only upon notice and an opportunity to defend charges).

Next, even as it claims federal caselaw is not "applicable" here, COELIG invokes federal caselaw for the proposition that the Act's removal defects do not entitle Respondent to relief because he cannot "show that the alleged [removal] defect harmed him." Br. 62 (citing *Collins*, 594 U.S. 220). This falls flat. As an initial matter, the Act's manifold defects show that COELIG's structure is void *ab initio*—COELIG's members were unlawfully appointed and unlawfully

unaccountable. In any event, while New York courts have expressly invoked federal cases on executive removal power, COELIG cites no New York court that has applied the remedial rule some federal courts have adopted. To the contrary, this Court has explained that "the Separation of Powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Maron*, 14 N.Y.3d at 260 (quotation marks omitted).

4. COELIG's reliance upon other agencies is unavailing.

Supreme Court correctly determined that COELIG is an "anomaly" because it exercises executive authority without being accountable, directly or indirectly, to the Governor. R.17. The Appellate Division likewise rejected the "[a]nalogies [COELIG] attempts to draw to other committees and commissions." R.952. COELIG does no better in this Court.

COELIG points to two decisions from 1897 and 1910, which rejected a constitutional challenge to the Board of Commissioners of Pilots and the State Board of Pharmacy, respectively. Br. 40–43; *Sturgis v. Spofford*, 45 N.Y. 446, 499-51 (1871); *State Bd. of Pharm. v. Bellinger*, 138 A.D. 12 (2d Dep't 1910). These cases, and the entities they discuss, pre-date the 1925 reorganization amendments, which were designed to enhance the Governor's power to "efficiently execute the laws" by making executive-branch commissions accountable to the Governor. *Cappelli*, 167 Misc.2d at 226, 232; *infra* Part II. Moreover, *Sturgis* and

Bellinger relied on the since-repealed "[a]ll other officers" language of the former "home-rule" provision, *supra* Part I.D.1, to address a narrower question about the Legislature's power to confer appointment power on private persons under the Constitution of 1894. *Sturgis*, 45 N.Y. at 450; *Bellinger*, 138 A.D. at 15 (following *Sturgis*). Neither case involved the separation of powers issues at play here.[16]

The other entities cited are worlds away from COELIG. The Advisory Board for the Bureau of Narcotics Control, the New York City Board of Education, the Legislative Ethics Commission (LEC),[17] and the State Commission on Prosecutorial Conduct (CPC)[18] do not (or did not) exercise core executive authority.[19] In marked contrast to COELIG, these entities do not (or did not) displace the Governor's constitutional take-care duty.

[16] The Board of Commissioners of Pilots, which exists in similar form today, appears to be an unconstitutional anomaly.

[17] The LEC's authority to punish members for violating internal rules is not an exercise of executive power. *See Cohen*, 94 N.Y.2d at 14 (recognizing the power of the legislative branch to "regulat[e] its own affairs and proceedings" without implicating separation-of-powers concerns). Thus, the LEC vindicates the constitutional principle that one branch cannot be disciplined by another absent an amendment.

[18] *See Soares*, 68 Misc 3d at 277 ("[T]he matters entrusted within the CPC's authority do not intrude on the Governor's constitutional prerogatives."); R.15–16 (distinguishing *Soares*).

[19] COELIG also cites *Litchfield v. McComber*, 42 Barb. 288 (Gen. Term. 1864), an even less apt case. The statute there authorized the LIRR—a tax creditor to the State—to appoint an officer to collect unpaid taxes owed to the LIRR. *Litchfield*

5. Other States' caselaw supports Respondent, not COELIG.

Even as it complains about Respondent's citation to federal caselaw, COELIG extensively refers to the caselaw of other states. However, COELIG tellingly omits on-point and contrary state caselaw. "[M]any courts have recognized an inherent general power of appointment in the executive." *Matheson v. Ferry*, 641 P.2d 674, 682 (Utah 1982) (Howe, J., concurring) (citing cases).

For example, in *Cooper v. Berger*, the North Carolina Supreme Court upheld the governor's separation-of-powers challenge to a law creating a new state board of elections and ethics enforcement. 370 N.C. 392 (2018). The court held unconstitutional statutory provisions that are far less intrusive upon the governor's "take care" duty than those here. As the court explained, the board "clearly performs primarily executive … functions" because it "has responsibility for the enforcement of laws governing … lobbying[] and ethics." *Id.* at 415. The court declared that the law impermissibly "le[ft] the Governor with little control over the views and priorities of the Bipartisan State Board" such that he could not "perform his [or her] constitutional duty." *Id.* at 414, 416.

The North Carolina law "requir[ed] that a sufficient number of [the Board's] members to block the implementation of the Governor's policy preferences be

did not involve the creation of a board or commission, let alone one that performed executive functions without gubernatorial oversight.

selected from a list of nominees chosen by the leader of the political party other than the one to which the Governor belongs, limit[ed] the extent to which individuals supportive of the Governor's policy preferences have the ability to supervise the activities of the Bipartisan State Board, and significantly constrain[ed] the Governor's ability to remove members of the Bipartisan State Board" by requiring removal be for "misfeasance, malfeasance, or nonfeasance." *Id.*

In holding those provisions unconstitutional, the court rejected the legislative leaders' argument that "the General Assembly has not retained ongoing supervision or control over the Bipartisan State Board," precisely because the law violated the separation-of-powers precept that "the Governor is entitled to appoint, supervise, and remove the relevant executive officials." *Id.* at 417. As is clear, the same analysis and logic apply here.

Many other state high courts have similarly rejected the faithless view of the separation of powers that COELIG espouses. For just a sampling, see, *e.g.*, *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 524 (2000) ("[T]he appointment power is an executive function . . . . [T]o the extent that the Act includes members of this court as officials who may appoint members of the Citizens Clean Elections Commission, it is unconstitutional."); *Ahearn v. Bailey*, 104 Ariz. 250, 253 (1969) (citing *Myers*, 272 U.S. at 117, and stating: "The

Governor …. must … have the power to select subordinates and to remove them if they are unfaithful."); *Commissioner of Admin. v. Kelley*, 350 Mass. 501, 505 (1966) ("The … appointment of a particular person to an office is the function of the executive department."); *Daly v. Hemphill*, 411 Pa. 263, 274 (1963) ("[T]he power of appointment is intrinsically and historically an executive function."); *Opinion of the Justices*, 102 N.H. 195, 198 (1959) ("The appointment and removal of civil officers is essentially an executive function."); *Application of O'Sullivan*, 117 Mont. 295, 301 (1945) ("Generally speaking, the power of appointment is an executive function, which cannot be delegated[.]"); *Tucker v. State*, 218 Ind. 614, 649, 670–71 (1941) (citing federal cases; "[T]he executive power is the power to execute the laws, to carry them into effect … and … the power to appoint the subordinate officers and employees through whom the laws are executed is a necessary incident to the power to execute the laws...."); *Murphy v. Webster*, 131 Mass. 482, 488 (1881) ("The power to appoint and the power to remove officers are in their nature executive powers."). Indeed, the Massachusetts Supreme Judicial Court—citing *Tremaine*—has explained that "to confer upon ... purely legislative officers the executive power of appointment of members of [a certain] commission or committee" exercising "executive or administrative powers" would be "violative" of the Massachusetts Constitution "as authorizing the legislative

department to exercise executive powers." *In re Opinion of the Justices*, 302 Mass. 605, 620–21, 622-23 (1939).

As this caselaw shows, COELIG's misbegotten view of the separation of powers and executive power is not the uniform baseline—nor is it what New York should follow.

II. The Act Violates the Constitution's Civil Department Structure.

The Act also transgresses Article V of the New York Constitution, which sets forth the structure of New York's civil department system. Article V of the New York Constitution requires that commissions situated in the executive branch (like COELIG) either (1) constitute their own civil department, headed by an officer appointed by the Governor with the advice and consent of the Senate, or (2) exist as a subsidiary entity within a civil department and subordinate to the department head appointed by the Governor with the advice and consent of the Senate. art. V, §§3–4. COELIG flunks this test: the Act places COELIG within the Department of State, yet it renders COELIG entirely unaccountable, and thus in no way subordinate to, its civil department head, *i.e.*, the Secretary of State.

In 1925, the Constitution was amended by a series of "reorganization" amendments reconfiguring a multiplicity of state agencies and boards—152 as of 1915—created by the Legislature "haphazardly without regard to any existing structure" and "subject to no direct and effective supervision by a superior

authority." *Cappelli*, 167 Misc.2d at 227–28. That system posed a threat to the Governor's "take care" obligation because the entities' sheer number made it "manifestly impossible for the Governor personally to exercise direct supervision over a such a multitude of agencies[,]" leaving them "practically free from effective control." R.803. The final amendments adopted in 1925 gave the Legislature a limited role in the appointment and removal power. *See* art. V, §4. But departments "considered as 'purely executive and administrative' in function," including the Executive Department and the Department of State, were rendered subject to the Governor's control. R.911. "These are the arms of the Governor by which he takes 'care that the laws are faithfully executed,' and for their acts he is held accountable." R.803.

Article V protects executive oversight by restricting the Legislature's ability to create new state agencies. Today, the Constitution permits no more than 20 civil departments. art. V, §2. The Legislature can modify the powers of existing departments, but any new agency must either (i) be placed within the structures of an existing department; or (ii) be established as a new department, with the head appointed by the Governor, subject to the constitutional check of Senate approval, and removable by the Governor in a manner prescribed by law, provided that the

cap is not exceeded. art. V, §4.[20] The reorganization amendments thus require that state agencies be accountable to their head of department or to the Governor herself. *See Cappelli*, 167 Misc.2d at 227 (noting that the "heads of departments ... appointed" under Article V, §4 "constitute the group of advisers on whom the Governor must depend for carrying out the policies of his administration"); 1926 Report of the State Reorganization Commission at 30–31 ("We recommend that the Secretary of State be given the power … to appoint the deputies and other subordinates and employees necessary to perform [his] duties and functions[.]").

That COELIG is declared to be "established within the department of state" is a charade. In reality, COELIG does not answer, and has no accountability, to the Secretary of State—rendering it, as a practical and constitutional matter, a separate department. Form does not vanquish substance. The mere fact that the Act says that COELIG is within the Department of State only confirms this constitutional defect. *See Soares*, 68 Misc.3d at 279 ("[T]he enactment of this constitutional provision was not intended merely to require the inclusion of a meaningless reference to some department in the text of legislation, but rather was directed at streamlining state government" and consolidating the various departments and agencies under the "direct and effective supervision by a superior authority."). The

[20] The only exceptions are for "temporary commissions for special purposes" and "executive offices of the governor," which are not relevant here. art. V, §3.

Act's purported inclusion of COELIG in the Department of State is a formalistic attempt to circumvent the requirements for civil departments set forth in Article V, and is void for that additional reason. *See Burby*, 155 N.Y. at 280 ("When the main purpose of a statute, or of part of a statute, is to evade the constitution by effecting indirectly that which cannot be done directly, the act is to that extent void[.]"); *Hurd v. City of Buffalo*, 34 N.Y.2d 628, 629 (1974).

A simple hypothetical demonstrates the Act is not defensible. The Public Health Law "continues[s]" the Department of Health and specifies that the head of the department "shall be the commissioner of health," Pub. Health Law §200; establishes the "functions, powers and duties" of the department and the "general powers and duties" of the commissioner, *id.* §§201, 206; and, consistent with Article V, Section 4, provides that the commissioner "shall be appointed by the governor, by and with the advice and consent of the senate," *id*. §204(1).

If COELIG passed muster under Article V, the result would be that the Legislature would have plenary power to amend the Public Health Law so as to abolish the commissioner; create a "Commission on Public Health" with the exact same powers of the Department of Health; establish the commission within the Department of State; have it headed by commissioners who are appointed just as COELIG's commissioners are; and similarly render the commissioners answerable to no one but themselves. Such a maneuver would obviously exceed "the

limitations contained in this constitution." art. V, §3. Indeed, as noted, if COELIG's position were accepted, the Legislature could reduce the departments to one, create independent commissions charged with executing the laws, and place them within the single department while making them unaccountable to any other executive officials.

Not even the Attorney General buys into its current argument on behalf of COELIG. In 2018, before the Act was passed, the Attorney General expressly recognized that "[t]he requirement that executive functions be allocated to a civil department is not simply a formality." R.584. In analyzing an earlier version of the legislation at issue in *Soares*—which did not establish the CPC in any civil department—the Attorney General concluded that the "creation of the proposed commission outside of any existing civil department is just the type of haphazard creation that article V prohibits—*an entity exercising executive powers that is not subject to supervision or accountable to any executive officer (e.g., the head of a department).*" *Id.* That reasoning applies with equal force here: nominally placing COELIG in the Department of State is substantively the same as not placing it in any civil department at all (*i.e.*, de facto making it its own civil department, but without a head appointed as constitutionally required). If, as appears, OAG has changed its mind, it should explain why.

* * *

The Act flouts foundational constitutional principles governing the separation of powers and the civil department system. Thus, Supreme Court correctly declared the challenged provisions of Executive Law §94 unconstitutional and enjoined their enforcement. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016).

III. The Act Is Unconstitutional Because the Governor May Be Punished for Infractions of the Ethics Laws Only by the Legislature Through the Impeachment Power.

The Act is unconstitutional for another reason: to the extent it permits COELIG to seek to enforce Public Officers Law §74 against the Governor and punish her for infractions of that law, it runs afoul of the separation of powers.[21] Under the Act, COELIG is controlled by legislative appointees, who are empowered to determine that Respondent is liable for a violation of Public Officers Law §74 during his service as Governor and punish him. Thus, the Act contravenes the sole mechanism through which the New York Constitution permits

[21] The Court need not reach this point if it holds for Respondent on either of the other two arguments presented.

the Legislature to discipline the Governor for ethics lapses—the power of impeachment. art. VI, §24.

"The measure of the power of our rulers in the Assembly as respects the Governor is that it may impeach him. Once impeached, that function ends." *People ex rel. Robin v. Hayes*, 82 Misc. 165, 169 (Sup. Ct. Ulster Cnty. Special Term 1913), *aff'd*, 32 N.Y. Crim R. 106 (3d Dep't 1914). Thus, only through the impeachment mechanism may the Legislature seek to punish or check the Governor for ethics violations. *Rapp*, 44 N.Y.2d at 170 (Cooke, J., dissenting in part) ("The Governor … has an affirmative duty to assure that none of his subordinates responsible for execution of executive duties are tainted by outside interests…. Should the Governor fail in this duty, he may be impeached. Apart from impeachment, the electorate may refuse to grant him another term of office.").

Moreover, in permitting COELIG to "recommend impeachment" after determining that the Governor has violated the Public Officers Law, Executive Law §94(10)(p)(ii), the Act sets the conditions for an impeachment stampede. That is, the Act's delegation to COELIG of both (1) the determination whether the Governor violated the Public Officers Law and (2) assessing whether impeachment is warranted undermines the Legislature's accountability for the exercise of its

constitutional duty to determine whether impeachment and conviction is warranted.

CONCLUSION

The Opinion and Order of the Appellate Division should be affirmed.

Dated: October 30, 2024
New York, New York

Respectfully submitted,

HOLWELL SHUSTER &
GOLDBERG LLP

By: Gregory J Dubinsky
Gregory Dubinsky
Zachary Kerner

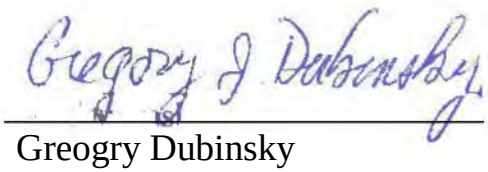
425 Lexington Avenue
New York, NY 10017
(646) 837-5151
gdubinsky@hsgllp.com

Attorneys for Plaintiff-Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to Court of Appeals Rules of Practice 500.1(j) and 500.13(c)(1), the undersigned certifies that the foregoing brief uses a proportionally spaced typeface (Times New Roman) in 14-point type and contains 13,932 words, exclusive of the contents listed in Rule of Practice 500.13(c)(3).

Dated: October 30, 2024



Greogry Dubinsky