Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

v.

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

Defendants.

Index No. 907537-18

The Honorable Christina L. Ryba

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

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PRELIMINARY STATEMENT

Proposed amicus curiae, Carl E. Heastie, both individually and in his official capacity as Speaker of the Assembly of the State of New York, respectfully submits this memorandum of law in opposition to Plaintiffs' request for a preliminary injunction.

Plaintiffs seek a preliminary injunction barring only payment of long-overdue increases in legislative and executive branch salaries, the first phase of which came into effect on January 1, 2019 upon recommendation of the Committee on Legislative and Executive Compensation. Plaintiffs' requested preliminary injunction would leave the other, pay-diminishing aspects of the Committee's recommendations in place, such as the immediate elimination of most legislative stipends and the restriction on outside income for legislators beginning on January 1, 2020.

With respect to the salary increases, Plaintiffs' application must be denied. Part HHH of Chapter 59 of the Laws of 2018, which created the Committee on Legislative and Executive Compensation and directed it to determine whether legislative salaries "warrant an increase," was a constitutionally permissible delegation of the Legislature's pay-setting authority. This is confirmed by the Third Department's recent affirmance of this Court's decision approving a judicial salary increase recommended by the nearly identically structured Commission on Legislative, Judicial, and Executive Pay. *Ctr. For Jud. Accountability, Inc. v. Cuomo*, No. 527081, 2018 WL 6797292 (3d Dep't Dec. 27, 2018). The Committee here acted squarely within that constitutionally authorized delegation when it recommended an increase in legislative salaries, which have not been increased in nearly 20 years.

Because Plaintiffs' Motion is aimed only at temporarily enjoining the pay increases, and because Plaintiffs' arguments as to the pay increases fail, that is reason enough to deny the Motion. To the extent that the Committee made recommendations other than the salary

increases, those recommendations are severable and cannot justify a preliminary injunction—particularly when the relief Plaintiffs seek is targeted at the salary increases alone.

The preliminary injunction must also be denied because Plaintiffs cannot demonstrate irreparable harm. Improper disbursement of state funds is a monetary injury that can be recompensed through monetary means. It is not irreparable. In any event, the alleged harm is insufficiently imminent. It will take much of the year for the amount paid to legislators pursuant to the Committee's recommendation ($110,000, beginning January 1, 2019) to exceed the amount that would have been paid under the old system ($79,500 plus stipends).

Plaintiffs' preliminary injunction motion should be denied.

RELEVANT FACTS AND PROCEDURAL HISTORY

Legislative Pay In New York State Has Fallen Behind

Prior to the pay increase that took effect on January 1, Albany's elected legislative officials made $79,500 a year, and had done so without a raise since the 1990s. Committee Rep. at 10-11; N.Y. Leg. Law § 5. The last pay increase had been enacted in 1998—when $79,500 had the buying power of roughly $122,000 in today's dollars. *See* https://www.bls.gov/data/inflation_calculator.htm. In the two decades since, legislative salaries remained stagnant while the median household income in New York climbed by 67%. Committee Rep. at 10-11. Today, "the $79,500 base salary for lawmakers … has a purchasing power of $51,401 over 1998 when it was enacted." *Id*. at 11. "By any economic measure, the compensation of New York's … Legislative branch officials has failed to keep pace with the rate of inflation"—much less the cost-of-living increases in categories like health care, child care, and transportation. *Id*. at 10-11.

The Legislature Delegated Its Pay-Setting Authority To The Committee on Legislative And Executive Compensation

The New York Constitution gives the Legislature authority to set compensation for State

officials, including its own members, members of the Judiciary, and statewide elected officials, including the Governor and Lieutenant Governor. N.Y. Const. art. III, § 6 (Legislature); art. XIII, § 7 (Statewide Elected Officials); art. VI, § 25 (Judiciary).

The Legislature has sometimes enacted statutes that set compensation rates directly. This was the case in 1998, when the Legislature enacted a law raising judicial, legislative, and executive salaries. *See* 1988 N.Y. Laws, Ch. 630. At other times, the Legislature has set compensation rates by creating specialized committees or commissions. The Legislature has generally directed these independent bodies to make compensation recommendations that will have the force of law unless modified by statute.

In 2010, the Legislature created a Commission on Judicial Compensation to examine the adequacy of judicial pay in the state courts and to "determine whether any of such pay levels warrant adjustment." 2010 N.Y. Laws, Ch. 567, § 1. In 2015, the Legislature repealed the enabling legislation from 2010 and created a new Commission on Legislative, Judicial and Executive Compensation ("Quadrennial Commission") to convene every four years to "examine, evaluate and make recommendations with respect to adequate levels of compensation and non-salary benefits" for judges, members of the Legislature, certain Statewide elected officials, and Executive Branch officers named in Executive Law § 169. 2015 N.Y. Laws, Ch. 60, § E. In 2015, the Quadrennial Commission recommended salary raises for the Judiciary but did not address legislative and executive compensation. This Court and the Third Department upheld the constitutionality of those judicial salary increases, which are now fully in effect, holding that the Legislature permissibly delegated its pay-setting authority to the Quadrennial Commission. *Ctr. For Jud. Accountability*, 2018 WL 6797292, at *3.

In 2018, the Governor proposed to the Legislature and the Legislature passed, as part of

the budget, an act that created a new Committee on Legislative and Executive Compensation (the "Committee"), which recommended the legislative pay increases at issue here. The Committee's enabling statute, Part HHH of Chapter 59 of the Laws of 2018 ("Part HHH"), is almost identical to the statute that created and guides the Quadrennial Commission. *Compare* Part HHH *with* 2015 N.Y. Laws, Ch. 60, § E. Part HHH established the Committee as an independent body with the authority to "examine, evaluate, and make recommendations with respect to adequate levels of compensation, non-salary benefits, and allowances" for New York legislators, statewide elected officials, and certain Executive Branch officials named in Executive Law § 169 (referred to as "Commissioners"). Part HHH § 1. Committee members included the State Comptroller, the New York City Comptroller, the current Chairs of the State and City University Boards of Trustees, and the Chief Judge of New York, who ultimately opted not to serve. *Id.*; Compl. at 1, n.1.

Under Part HHH, the Committee must formulate its recommendations by "examin[ing] the prevailing adequacy of pay levels, allowances pursuant to section 5-a of the legislative law [typically called "stipends"], and other non-salary benefits, for members of the legislature, statewide elected officials, and [state Commissioners]." Part HHH § 2.1. The Committee must also determine whether, on January 1, 2019, salaries "warrant an increase." *Id.* § 2.2. In conducting this analysis, the Committee must consider "all appropriate factors," including a non-exclusive list of eight factors set out in the statute. *Id.* § 2.3.

Part HHH authorized the Committee to include cost-of-living and phased-in salary adjustments in its recommendations, so long as no adjustments occur after January 1, 2021. *Id.* § 2.4.a. Phased-in adjustments are conditioned under Part HHH upon "performance of the executive and legislative branch" and the "timely legislative passage of the budget for the

preceding year." *Id.* § 2.4.b.

The Committee's recommendations regarding compensation for legislative and certain executive officials were to take effect on January 1, 2019, unless first modified or abrogated by statute. *Id.* § 4.2. The Legislature opted not to act, so those recommendations now have the force of law. As required by the New York Constitution, the Committee's compensation recommendations for the Governor and Lieutenant Governor will become effective upon a joint resolution of the Legislature. Committee Rep. at 16. In all cases, it is the Legislature and the Governor following standard constitutional practice that ultimately determines—by their intentional action or inaction—if the Committee's recommendations take effect.

The Committee's enabling statute provides that it will be repealed and the Committee dissolved on December 31, 2018. Part HHH § 6. At that point, the Quadrennial Commission is to "resume its responsibility to review and examine … salaries and allowances." *Id*. The Committee's recommendations are to remain in force unless amended or repealed by statute or by a subsequent recommendation of the Quadrennial Commission. *Id.* § 7.

Upon Consideration Of The Enumerated Statutory Factors, The Committee Recommended A Salary Increase For The Legislature, Statewide Elected Officials, And Commissioners

In November and December 2018, the Committee held four public meetings, all of which were broadcast over the Internet. Committee Rep. at 1, 22-27; *see Archived Committee Meeting Materials*, N.Y. St. Compensation Committee 2018, https://nyscompensation.ny.gov/archived.html. At these meetings, the Committee reviewed and discussed "a broad range of pertinent data, beginning with the factors delineated in the statute." Committee Rep. at 1. This data included cost of living and inflation analyses, comparisons of compensation of New York elected officials with those in other states, and data regarding private-sector wage growth. *Id.* at 23-24. Pursuant to Part HHH § 3.1, two of the meetings included public hearings where "the

public [was] afforded an opportunity to provide comments." *Id.* at 22-25. The Committee also received and reviewed written submissions from the public. On December 10, 2018, the Committee submitted a report of its findings and recommendations to the Governor and Legislature. *Id.* at 1; *see* Part HHH § 2.4.

The recommendations included an increase in base pay for members of the Legislature, phased in annually from 2019 to 2021, with the 2020 and 2021 increases conditioned upon timely passage of the budget. Committee Rep. at 14-15. Assuming the Legislature permitted the Committee recommendations to take effect—which it did—salaries would be set at $110,000 on January 1, 2019, $120,000 one year later, and $130,000 the following year. *Id.* at 14-15.

The Committee also recommended similarly sized pay increases for Commissioners and statewide elected officials, such as the Attorney General and Comptroller. *Id.* at 16-18. And the Committee recommended, subject to approval by the Assembly and Senate, that the salaries for the Governor and Lieutenant Governor should increase to $200,000 on January 1, 2019, $225,000 in 2020, and $250,000 in 2021. *Id*. at 16.

In addition to the legislative and executive pay increases, all of which Plaintiffs seek to enjoin, the Committee made recommendations that would limit overall compensation for legislators. Specifically, the Committee recommended that all but 15 stipends under Legislative Law § 5-a be eliminated on January 1, 2019, and that, beginning on January 1, 2020, outside income for legislators be capped at 15% of base salary and outside income from employment where the legislator has a fiduciary duty be banned altogether. *Id.* at 14-15.

Plaintiffs Seek A Preliminary Injunction Barring Full Payment Of Legislative Salaries

On December 14, 2018, Plaintiffs filed a complaint against the State of New York and Thomas P. DiNapoli, as State Comptroller, challenging multiple aspects of the Committee's

recommendations and seeking declarative and injunctive relief. Compl. at 3, 17-18. The complaint alleges that Part HHH is an unconstitutional delegation of legislative power, that the Committee exceeded its authority under Part HHH in violation of the New York Constitution and State Finance Law § 123, and that the Committee violated Public Officers Law § 107 (the "Open Meetings Law"). *Id.* at 15-18.

On December 21, 2018, Plaintiffs lodged an order to show cause seeking a temporary restraining order and preliminary injunction that would bar defendants during the pendency of this action from "transferring or disbursing state funds to legislators, statewide elected officials, and state [Commissioners]" at the increased levels proposed by the Committee. *See* Proposed Order to Show Cause (Doc. 4) at 1-2; Pls' Memo. in Support of Order to Show Cause (Doc. 9) at 16. Significantly, Plaintiffs seek preliminary relief only as to the pay raises (i.e., "disbursing [of] state funds"). Plaintiffs' motion does not seek to preliminarily enjoin other aspects of the Committee's recommendation, such as the stipend reduction and the outside income restrictions.

Justice Ryba denied the application for a temporary restraining order and set the preliminary injunction application returnable on January 11, 2019. Order to Show Cause (Doc. 12).

ARGUMENT

"Preliminary injunctive relief is a drastic remedy which is not routinely granted." *Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 736 (3d Dep't 2003). Such "extraordinary relief" requires the moving party to "demonstrate, by clear and convincing evidence, that there exists: (1) a likelihood of ultimate success on the merits of the underlying action; (2) the movant will suffer irreparable injury absent the granting of the preliminary injunction; and (3) a balancing of the equities favors the moving party." *Concerned Home Care Providers, Inc. v. N.Y. State Dep't*

of Health, 41 Misc. 3d 278, 289 (Sup. Ct., Suffolk County 2013) (citing *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988)); *see Pantel v. Workmen's Circle*, 289 A.D.2d 917, 918 (3d Dep't 2001). "[T]emporary injunctions which in effect give the same relief which is expected to be obtained by final judgment, if granted at all, are granted with great caution and only when required by urgent situations or grave necessity, and then only on the clearest of evidence." *Russian Church of Our Lady of Kazan v. Dunkel*, 34 A.D.2d 799, 801 (2d Dep't 1970).

I. Plaintiffs Cannot Establish Irreparable Harm

Plaintiffs contend that a preliminary injunction is necessary to avoid the supposedly irreparable injury of improper payment of money to legislative and executive officials. According to Plaintiffs, the injury is irreparable because recovery or restitution of state funds would be "complicated and expensive." Mot. at 15. Plaintiffs' argument misunderstands the high bar for irreparable injury.

The required irreparable injury must be "immediate, specific, non-speculative and non-conclusory." *Grumet v. Cuomo*, 162 Misc. 2d 913, 930 (Sup. Ct., Albany County 1994). An irreparable injury is one that cannot be adequately compensated for in damages or when there is no standard for measuring the damages. *Samuelsen v. Yassky*, 29 Misc. 3d 840, 848 (Sup. Ct., N.Y. County 2010); *accord Walsh v. Design Concepts, Ltd.*, 221 A.D.2d 454, 455 (2d Dep't 1995). When the injury can be compensated through a determinable amount of money damages, the harm is not irreparable. *EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 (2d Dep't 2007).

The disbursement of state funds is, by definition, not irreparable. It is the disbursement of money and thus is something that can be compensated through money. Moreover, the amount of "injury" is quantifiable—down to the penny. The Plaintiffs' alleged injury is therefore not the sort of "irreparable injury" that courts contemplate when granting preliminary relief. *See, e.g.*,

SportsChannel Am. Assocs. v. Nat'l Hockey League, 186 A.D.2d 417, 418 (1st Dep't 1992) (holding that plaintiff failed to establish irreparable injury even if monetary damages were only calculable "with some difficulty"); *Gribbins v. Rushford Lake Recreation Dist.*, 96 A.D.3d 1369, 1371 (4th Dep't 2012) (holding that plaintiffs failed to establish irreparable harm because they had an adequate remedy in the form of monetary damages).

In addition, the alleged harm is not "immediate." It will take much of the year for the 2019 salary increases to exceed the amount that would have been paid under the old salary structure. Accordingly, there is no need to grant a preliminary injunction at this time.

II. Plaintiffs Cannot Demonstrate A Likelihood Of Success On The Merits

Plaintiffs argue that Part HHH, which created the Committee and authorized it to increase legislative pay, was an unconstitutional delegation of legislative authority. Plaintiffs also argue that the Committee's recommendations, including the legislative pay increases, exceeded the bounds of Part HHH and, in so doing, invaded an area reserved by the Legislature.

Plaintiffs are wrong on both points. Part HHH was a permissible delegation of authority and the Committee's recommendation to increase legislative pay was within the bounds of that statute. Plaintiffs therefore cannot establish a likelihood that the legislative pay increases are invalid. *Infra* §§ II.A, B. Plaintiffs are also wrong that the Committee violated the Open Meetings Law regarding the legislative pay increase. *Infra* § II.C. To the extent that Plaintiffs challenge other aspects of the Committee's recommendations, those are severable from the core increase in legislative base salary. *Infra* § II.D.

A. The Legislature constitutionally delegated its pay-setting authority.

This Court affords enacted statutes a strong presumption of constitutionality, grounded in part on "an awareness of the respect due the legislative branch." *Dunlea v. Anderson,* 66 N.Y.2d

265, 267 (1985). Thus, a facial constitutional challenge to a statute will fail unless the plaintiff can demonstrate beyond a reasonable doubt that "in any degree and in every conceivable application, the law suffers wholesale constitutional impairment." *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (quotation marks omitted). "In other words, the challenger must establish that no set of circumstances exists under which the [statute] would be valid." *Id*. (quotation marks omitted).

As relevant here, "there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature." *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976). "It is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation is violated." *Clark v. Cuomo,* 66 N.Y.2d 185, 189 (1985). So long as "the Legislature make[s] the critical policy decisions" and the executive branch "implement[s] those policies," the "constitutional principle of separation of powers" have been honored. *Bourquin v. Cuomo,* 85 N.Y.2d 781, 784 (1995).

Plaintiffs contend (Mot. at 7-8) that the Legislature's pay-setting authority is an exception to the general rule permitting delegation because the New York Constitution states that certain salaries and compensation may be "fixed by law." N.Y. Const. art. III, § 6. But Plaintiffs cite no case law establishing that certain legislative subjects are non-delegable. Creating and empowering a committee to make recommendations that will "have the force of law" only if the Legislature does I "modify[] or abrogate[]" the recommendations is simply another way for the Legislature to fulfil the constitutional mandate that salaries be "fixed by law." Part HHH § 4.2. Any doubt on this matter was settled by the Third Department in *Center For Judicial Accountability*, which upheld the judicial pay increase recommended by the Quadrennial

Commission even though the Constitution provides that judicial pay must be "established by law." N.Y. Const. art. VI, § 25. If the Legislature can delegate its authority to set judicial salaries, it can delegate its authority to set legislative pay as well.

When there is a statutory delegation, it is "incumbent upon the legislative authority to set forth standards to indicate to an administrative agency the limits of its power." *Sleepy Hollow Lake, Inc. v. Public Service Comm'n*, 43 A.D.2d 439, 443 (3d Dep't), *lv. denied*, 34 N.Y.2d 519 (1974). Those standards, however, can be quite broad. In *Sleepy Hollow*, the Third Department held that delegation to uphold and advance the "public interest" provided a constitutionally sufficient standard for guiding the exercise of administrative power to order that wiring be placed underground. *Id*. at 443-44. Similarly, the Court of Appeals found that "protection and promotion of the health of the inhabitants of the state" was a constitutionally sufficient standard on which an agency could revoke a hospital's operating certificate. *Levine*, 39 N.Y.2d at 516-17.

Part HHH far surpasses the standards previously approved by the Court of Appeals and the Third Department. Part HHH begins by specifying that compensation levels must be "adequate" and directs the Committee to "examine, evaluate and make recommendations with respect to adequate levels of compensation" for legislators, statewide elected officials, and state Commissioners. Part HHH § 1. It then sets forth eight non-exclusive factors for the Committee to consider in determining whether the "annual salary … of members of the legislature … warrant an increase," *id.* § 2.2: "[1] the parties' performance and timely fulfillment of their statutory and Constitutional responsibilities; [2] the overall economic climate; [3] rates of inflation; [4] changes in public-sector spending; [5] the levels of compensation and non-salary benefits received by executive branch officials and legislators of other states and of the federal government; [6] the levels of compensation and non-salary benefits received by comparable

professionals in government, academia and private and nonprofit enterprise; [7] the ability to attract talent in competition with comparable private sector positions; and [8] the state's ability to fund increases in compensation and non-salary benefits." *Id.* § 2.3. The enabling statute also places substantive limitations on any recommended pay increase, mandating that any phased-in salary increase "be conditioned upon performance of the executive and legislative branch and upon the timely legislative passage of the budget"—as that term is defined. *Id.* § 2.4(b)-(c). Finally, the statute authorizes the Legislature to modify or abrogate the recommendations before they take effect in accordance with the usual process for passing and enacting a statute. *Id.* § 4.2.

That Part HHH is a constitutional delegation of the Legislature's authority is confirmed by the Third Department's decision upholding the Legislature's delegation of pay-setting authority to the Quadrennial Commission. *Ctr. For Jud. Accountability*, 2018 WL 6797292, at *3. As with Part HHH, the Quadrennial Commission's own enabling statute directed it "to examine … the prevailing adequacy of judicial compensation and to make recommendations regarding whether such compensation warrants adjustment." *Id.* The statute required the Quadrennial Commission to consider almost the exact same factors Part HHH mandated the Committee to consider. *Id.* And, just as with Part HHH, the Quadrennial Commission's recommendation on judicial pay would not take effect until after the Legislature had an opportunity to consider and reject the Commission's recommendations. *Id.* Taking all of that into account, the Third Department "conclude[d] that the statute does not unconstitutionally delegate legislative power to the [Quadrennial] Commission." *Id.* For all the same reasons, the same conclusion is inescapable here for Part HHH and the Committee's legislative pay increases.

B. The Committee complied with Part HHH and did not impermissibly usurp the Legislature's policymaking authority in recommending an increase to legislative salaries.

Part HHH directed the Committee to "examine, evaluate, and make recommendations with respect to adequate levels of compensation … for members of the legislature" and to "determine whether, on January 1, 2019, the annual salary … of members of the legislature … warrant an increase." Part HHH §§ 1, 2.2. There can be no doubt that the Committee acted within its statutory mandate in recommending that legislative pay be increased to $110,000 on January 1, 2019.[1]

Plaintiffs are also unlikely to succeed in challenging the 2019 legislative pay increase on separation-of-powers grounds. In *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), the Court of Appeals set forth four "intertwined factors for courts to consider when determining whether an agency has crossed the hazy 'line between administrative rule-making and legislative policy-making.'" *Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 610 (2015). These four factors "are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power." *Id*. at 612. No single *Boreali* factor, "standing alone, is sufficient to warrant the conclusion that the [Committee] has

[1] Plaintiffs cannot possibly demonstrate imminent, irreparable harm with respect to the legislative salary increases due to be phased in on January 1, 2020 and January 1, 2021. Nevertheless, we note that the 2020 and 2021 increases also fall within the terms of Part HHH and also constitute a permissible exercise of delegated authority for the reasons discussed in Section II.B. Plaintiffs argue that the 2020 raise violates the prohibition against legislative salaries being "increased or diminished during, and with respect to, the term for which [a legislator has] been elected." N.Y. Const. art. III, § 6. But as the Court of Appeals determined in upholding a legislative pay raise passed in 1998 to take effect in mid-1999, "the Constitution lays no constraint on the authority of one Legislature … to make provision *prospectively* for allowances to be received by the officers and members of the two houses during a succeeding legislative term." *Cohen v. State*, 94 N.Y.2d 1, 9 (1999). The 2020 pay increase is precisely this kind of permissible, prospective pay increase. The 2021 pay increase does not implicate the ban on mid-term increases, as January 1, 2021 marks the start of a new legislative term.

usurped the Legislature's prerogative." *Boreali*, 71 N.Y.2d at 11. Here, the *Boreali* factors confirm the validity of the Committee's recommendation to increase legislative pay.

Factor one. The first *Boreali* factor is whether the agency did more than balance costs and benefits according to preexisting guidelines and instead made "value judgments entailing difficult and complex choices between broad policy goals to resolve social problems." *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 610 (quotation marks and brackets omitted). That factor clearly favors the Committee's legislative salary increases.

The Legislature made the policy decision that legislative pay should be "adequate" in view of specific statutory factors, including "rates of inflation," "the levels of compensation … received by … legislators of other states and of the federal government," "the ability to attract talent," and "the state's ability to fund increases in compensation." Part HHH § 2.3. The Committee considered those guidelines and determined that increasing legislative pay to $110,000 on January 1, 2019 would implement the legislature's policy goal of ensuring "adequate" pay for legislators. Committee Rep. at 10-13. This is therefore unlike *Boreali*, where Public Health Council enacted a comprehensive code to govern tobacco use in public despite no "legislative guidelines at all for determining how the competing concerns of public health and economic cost are to be weighed." 71 N.Y.2d at 12. Here "the basic policy decisions" underlying the legislative pay increase were "made and articulated by the Legislature." *See N.Y. State Health Facilities Ass'n v. Axelrod*, 77 N.Y.2d 340, 348 (1991).

Plaintiffs seem to agree that the legislative salary increase itself does not amount to an impermissible value judgment under *Boreali*, arguing instead that the Committee acted without legislative guidance in making *other* recommendations, such as eliminating certain stipends and implementing restrictions on outside income. The Speaker need not take a position on those

subsidiary recommendations, except to note that they are not implicated by Plaintiff's request for a preliminary injunction and therefore do not have to be considered at this time.

Factor two. The second *Boreali* factor is "whether the agency wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance or whether it simply filled in the details of broad legislation describing the over-all policies to be implemented." *Acevedo v. N.Y. State Dep't of Motor Vehs.*, 29 N.Y.3d 202, 223-24 (2017) (quotation marks and brackets omitted) (upholding regulation addressing the relicensing of suspended DUI drivers, subject only to the commissioner's weighing "the interest of the public safety and welfare"). An agency does not write on a blank slate if the Legislature has provided "a clear legislative policy decision." *Id.* at 224; *see Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 609 ("As long as the legislature makes the basic policy choices, the legislation need not be detailed or precise as to the agency's role."). When the Legislature provides clear policy direction, agencies can have the "power and flexibility" to "make subsidiary policy choices consistent with the enabling legislation"—the Legislature is not required to provide "rigid marching orders." *Citizens for Orderly Energy Policy, Inc. v. Cuomo*, 78 N.Y.2d 398, 410 (1991).

Here, the Committee's recommendation to increase legislative pay is clearly consistent with the text and purpose of the enabling statute, which directs the Committee to "examine, evaluate and make recommendations with respect to adequate levels of compensation" in light of a non-exclusive set of factors. Part HHH § 1. Far from a clean slate, this is a case where "the basic policy decisions underlying" the legislative pay increase were "made and articulated by the Legislature," with the details filled in and implemented by the Committee. *Bourquin v. Cuomo*, 85 N.Y.2d 781, 785 (1995) (quotation marks omitted).

Factor three. The third *Boreali* factor considers whether the Legislature has repeatedly

but unsuccessfully tried to resolve the same problem, "which would indicate that the matter is a policy consideration for the elected body to resolve." *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 611-12. A challenger's burden in establishing this factor is particularly steep, given that "[l]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences." *Bourquin*, 85 N.Y.2d at 787-88 (quotation marks omitted).

Thus, *Boreali*'s third factor is present when there has been prolonged legislative deadlock on precisely the same subject where the agency has chosen to regulate—such as the situation in *Boreali*, where forty bills to prohibit smoking in specific public places failed "in the face of substantial public debate and vigorous lobbying" over more than a decade. 71 N.Y.2d at 7. This factor is "afford[ed] limited probative value" given the "dearth of successful legislation." *Acevedo*, 29 N.Y.3d at 225. The Legislature's rejection of a few bills on the same subject of a regulation, however, will not support invalidation of that regulation. In *Acevedo*, for instance, the Court of Appeals found that the third *Boreali* factor could not limit a regulation restricting the relicensing of drunk drivers, even though the Legislature had previously rejected three bills on that subject. 29 N.Y.3d at 225.

Here, Plaintiffs do not even attempt to demonstrate a history of failed legislative attempts to raise salaries. Indeed, they fail to identify a single unsuccessful bill addressing legislative pay increases. Rather, they rely on a statement by the Speaker reporting inter-party disagreement as to whether to propose such a bill in the first place. This is nothing like the kind of repeated legislative failure needed to invoke the third *Boreali* factor and support an inference that pay increases are beyond the committee's purview.

Factor four. The fourth *Boreali* factor is "whether the agency used special expertise or competence in the field to develop the challenged regulations." *Greater N.Y. Taxi Ass'n*, 25

N.Y.3d at 612. Plaintiffs are mistaken in suggesting that this factor goes to the qualifications of the Committee members—though it bears noting that the Committee included the New York State and New York City comptrollers, who are precisely the persons with the relevant expertise to evaluate "changes in public-sector spending" and "the state's ability to fund increases in compensation," two factors identified in Part HHH. The Committee also included the current Chairs of the State and City University Boards of Trustees, both of whom have significant experience and expertise regarding compensation in academia and the challenges of "attract[ing] talent in competition with comparable private sector positions," two other statutory factors.

This factor is really about whether the regulation in question was premised on some kind of technical evaluation as opposed to the pure value judgments reserved for the Legislature. *Acevedo*, 29 N.Y.3d at 226. Here, the Legislature directed the Committee to evaluate several technical considerations, including "rates of inflation" and comparative legislative compensation structures. Part HHH § 2.3. And, like in *Acevedo*, the Committee was directed to "utilize … data" in determining how to implement the Legislature's policy. Part HHH § 3.4.

The Committee Report makes clear that its development of the challenged salary increases was based on an analysis of economic factors and nationwide legislative compensation structures. Beginning at the first meeting, Committee Member Stringer took responsibility for investigating and presenting "data for the Committee to consider, including how the relevant elected officials' salaries compares to other states' salaries for their elected officials, the projected change in salaries over time based on cost-of-living and spending growth, and comparable private sector wage growth." Committee Rep. at 22. The investigation and analysis of this data continued in each meeting and ultimately drove the development of the challenged salary increases. Committee Rep. at 23-27. Because the Committee's decision involved special

expertise and the Committee, in fact, relied on such expertise, the fourth *Boreali* factor also indicates that the legislative pay increases are permissible.

C. The Committee complied with the Open Meetings Law.

The Committee is a public body and it conducted its business over the course of four public meetings in accordance with New York's Open Meetings Law. The Open Meetings Law mandates that "[e]very meeting of a public body shall be open to the general public." Public Officers Law § 103(a). The exception to this rule is that an "executive session" may be called to conduct business for certain enumerated purposes, including "matters leading to the appointment[] [or] employment … of a particular person." *Id.* §§ 105, 105(1)(f).

Plaintiffs assert—without explanation—that the Committee's executive session during its first meeting was "not permitted under the law." Mot. at 3. But in this circumstance, the Committee was statutorily authorized to conduct an executive session to discuss the potential employment of counsel. *See* Public Officers Law § 105(1)(f). The Committee confirmed its purpose for holding the executive session during its second meeting when it introduced and approved Alan Klinger as counsel to the Committee. *See November 28, 2018 Public Meeting* (Recorded Webcast), NY St. Compensation Committee 2018 (Nov. 28, 2018), https://bcove.video/2P9sAfY (01:37-03:36). The Committee's executive session was therefore in full compliance with the Open Meetings Law.

Plaintiffs also contend that the Committee violated the Open Meetings Law by conducting deliberations and producing a final report without a public meeting. Mot. at 6. This assertion is belied by the record. First, the Committee conducted four public meetings, and it opened the floor to public testimony for two of those sessions. Second, Committee members discussed, at length, various issues related to potentially increasing legislative salaries in all four

of its public meetings. Third, during its fourth and final public meeting, the Committee summarized its prior hearings and meetings before individual Committee members made recommendations proposing to, among other things, increase legislative salaries. *December 6, 2018 Public Meeting* (Recorded Webcast), NY St. Compensation Committee 2018, https://youtu.be/B0FIIREjp5s (00:23-02:28). Lastly, the Committee voted and approved the proposed recommendations at the end of its final meeting, and it stated the approved recommendations would comprise the components of a final report that would be sent to the Governor and Legislature. *Id.* at 29:58-30:22. Given these facts, it is clear that the Committee conducted its work with regard to the salary increases at issue in Plaintiffs' motion openly and in accordance with the Opens Meeting Law.

Finally, even if there was a violation of the Open Meeting Law, that would not necessarily invalidate the Committee's actions. *See, e.g.*, *N.Y. Univ. v. Whalen*, 46 N.Y.2d 734, 735 (1978) (holding that a breach of the Open Meetings Law does not automatically trigger its enforcement sanctions); *Imburgia v. Procopio*, 98 A.D.3d 617, 619 (2d Dep't 2012) (concluding there was no good cause to invalidate the results of city's civil service commission meeting notwithstanding its violations of the Open Meetings Law). The Open Meetings Law simply gives a court, "in its discretion, upon good cause shown," the "authority" to invalidate a public body's action, "in whole or in part." Public Officers Law § 107. Courts retain wide latitude, however, in fashioning the appropriate remedy, if any, including remedies far less drastic than invalidating a public body's work.[2]

Accordingly, even if Plaintiffs could somehow demonstrate a likelihood that there was an

[2] A court may, for example, require members of the public body to participate in a training session regarding their obligations under the Open Meetings Law. *Id.*

Open Meetings Law violation, it would not necessarily demonstrate a likelihood that they will succeed in permanently enjoining the Committee's recommendations. Under those circumstances, Plaintiffs still would not meet the high bar for obtaining a preliminary injunction.

D. Any recommendations that exceeded the Committee's authority can be severed from the permissible legislative pay increases.

As explained above, Part HHH was a constitutionally permissible delegation of authority and the Committee's recommendation to increase legislative salaries was well within the bounds of the statute. To the extent that Plaintiffs challenge other aspects of the Committee's recommendations, those parts are severable from the legislative salary increases.

The test for severability is "whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920); *accord People v. On Sight Mobile Opticians*, 24 N.Y.3d 1107, 1109 (2014). Courts should first examine the statute and its legislative history to determine legislative intent, as well as the purposes of the new law, and then evaluate the available courses of action in light of that history to determine if the measure would have been enacted if partial invalidity of the statute was foreseen. *Westinghouse Elec. Corp. v. Tully*, 63 N.Y.2d 191, 195 (1984). Courts generally prefer to sever, on the theory that "[o]ur duty is to save, unless in saving we pervert." *Alpha Portland Cement Co.*, 230 N.Y. at 63.

Here, the Legislature's intent is clear: Part HHH was enacted to establish the Committee as an independent body with the authority to "examine, evaluate, and make recommendations with respect to adequate levels of compensation, non-salary benefits and allowances" for New York legislators, Statewide elected officials, and certain Executive Branch officials. *See* Part

HHH § 1. Under Part HHH, the Committee was charged to determine whether, on January 1, 2019, salaries "warrant an increase." *Id.* § 2.2.

The Committee's recommendation to increase legislative salaries is the core of what it was authorized to do. Although the Committee made various recommendations regarding other issues—recommendations not covered by the relief sought in Plaintiffs' motion—making recommendations regarding legislative and executive pay was its primary purpose. Given this background, it is clear that the Legislature would want the Committee's recommendation to increase legislative salaries enforced, even if other provisions were deemed unenforceable.

The only time when courts should not sever is if "the valid and invalid provisions are so intertwined that excision of the invalid provisions would leave a regulatory scheme that the legislature never intended." *Nat'l Adv. Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (citing *N.Y. State Superfund Coalition, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 75 N.Y.2d 88, 94 (1989)). That is not the situation here, particularly regarding the January 1, 2019 legislative pay increase at issue in Plaintiffs' motion.

Take, for example, the Committee's recommendation that legislators' outside income from certain professions should be prohibited and that non-prohibited income should be capped at 15% of base legislative salary. This recommendation is clearly severable from the January 1, 2019 salary increase, as the outside income limitations do not take effect until a year later, January 1, 2020. The 2019 raise and 2020 income limitations are not "so intertwined"; they are not even connected to each other.

Ultimately, the Committee's conclusion that current legislative salaries warrant an increase is independent and not "so intertwined" with the Committee's other, secondary recommendations. Accordingly, if these other recommendations are deemed unenforceable, the

Court can sever them from the permissible legislative pay increases without fear of rendering a statute the Legislature never intended.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

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