STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

DAVID SOARES, District Attorney of Albany County, Representing all elected District Attorneys; and the DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK,[1]

Plaintiffs,

- against -

THE STATE OF NEW YORK; and CARL E. HEASTIE, in his official capacity as the Speaker of the New York State Assembly; and the Commission on Prosecutorial Conduct,

Defendants.

DECISION AND ORDER

Index No. 906409-18

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[1] The caption of this case initially listed as a plaintiff Robert Masters, an Assistant District Attorney in Queens County purporting to represent all Assistant District Attorneys. By letter dated January 10, 2020, plaintiffs' counsel informed the Court that Masters was no longer an ADA, and that defendant did not object to his removal from the caption. As a result, the caption is hereby amended to reflect this change. Defendant has not previously, and does not now, challenge plaintiffs' standing to raise the matters at issue, and the change of caption has no substantive impact on the case.

David A. Weinstein, J.:

The action before me arises out of plaintiffs' verified amended complaint, dated April 1, 2019, which seeks a declaratory judgment and injunctive relief finding the recently enacted and amended Article 15-a of the New York Judiciary Law in violation of the New York State Constitution. The statute provides for the creation within the State's Executive Department of the State Commission of Prosecutorial Conduct (the "Commission" or "CPC"), with the authority to investigate and review the conduct of district attorneys ("DAs") and assistant district attorneys ("ADAs"), and to determine whether such conduct "departs from the applicable statutes, case law, [and] New York Rules of Professional Conduct 22 NYCRR 1200.00, including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers)" (*see* Jud Law § 499-a).

Plaintiffs are Albany County District Attorney David Soares, purporting to represent all DAs in the State, and the District Attorneys Association of the State of New York ("DAASNY").[2] The named defendants are Carl E. Heastie, in his official capacity as the Speaker of the New York State Assembly, along with the State of New York and the yet unformed Commission – although only the Speaker has appeared. The parties have cross-moved for summary judgment, which motions are the subject of this Decision and Order. Before addressing those motions, I will summarize the history and content of the statute.

Article 15-a of the Judiciary Law

The statute creating the Commission on Prosecutorial Conduct was first enacted as Chapter 202 of the Laws of 2018. While the legislation was pending before the Governor,

[2] Since this is not a putative class action, it is not apparent how an individual plaintiff can claim to represent other individuals not parties to the action. Since defendants do not raise this issue, and as DAASNY – the organization comprising New York DAs – is a plaintiff, this is of no moment to the matters before me.

comments were solicited from and submitted by the Office of the New York Attorney General ("OAG"). Those comments were set forth in a memorandum on August 13, 2018, which opined that the bill contained "multiple constitutional defects." On August 20, 2018, Governor Cuomo signed the bill into law, but in an accompanying approval memorandum cited certain of these alleged defects, which the Legislature had agreed to fix via chapter amendment. The Legislature then passed amendments to the legislation, and on March 27, 2019 those amendments were signed into law by Governor Cuomo as Chapter 23 of the Laws of 2019 ("Chapter 23").[3]

The Statute, as amended, added Article 15-a to the Judiciary Law, creating the CPC as an entity "within the executive department" (Jud Law § 499-a). The Commission is to be composed of eleven members appointed as follows: four by the Governor, one each by the four legislative leaders, and three by the Chief Judge of the Court of Appeals (Jud Law § 499-c[1]). Of the gubernatorial appointees, two are required to have experience in public defense, and two are to have prosecutorial experience (Jud Law § 499-c[1][a]). The same balance is required for the four legislative appointees (Jud Law § 499-c[1][c]). Two of the Chief Judge's appointees must be retired judges (Jud Law § 499-c[1][b]). Eight members of the Commission constitute a quorum, and the votes of six members will be needed for such actions as authorizing investigations, approving dispositions and appointing referees (Jud Law § 499-c[6]).

The process for the Commission to open and pursue an investigation is as follows: The Commission may receive or "initiate" complaints concerning "the conduct, qualifications, fitness to perform, or performance of official duties of any prosecutor" (Jud Law § 499-f[1]), with

[3] It is unnecessary, for present purposes, to go into the ins and outs of the various objections raised by the OAG and others, the particular changes made in the chapter amendment process and the contents of the two approval messages issued by the Governor. For present purposes, what matters is the contents of the law ultimately enacted. While plaintiffs cite statements made in the OAG's memo, I have considered them only as to the legal arguments presented therein.

"prosecutor" defined to include both DAs and ADAs. In addition, following receipt of a written complaint, the Commission "shall conduct an investigation," except that it may dismiss the complaint if "on its face [it] lacks merit" (*id.*). The Commission can require a prosecutor under investigation to appear before it and give testimony under oath, with the right to be represented by counsel (Jud Law § 499-f[3]). Additionally, the Commission can subpoena books and records, and take testimony of other witnesses under oath (Jud Law § 499-d[1]). It has the power to confer immunity on witnesses, provided it gives at least 48 hours notice and the opportunity for consultation to the Attorney General and "the appropriate district attorney" (Jud Law § 499-d[2]). The Commission may also seek assistance from other law enforcement bodies, and issue rules and procedures that govern its operations (Jud Law § 499-d[3], [5]).

The statute provides a mechanism for a DA's office to address CPC actions that it believes are interfering with its investigative work. A prosecutor's office may, by affirmation made with "specificity and particularity," inform the Commission that a CPC investigation "substantially interferes" with a criminal investigation being carried out by the DA (Jud Law § 499-d[1]). If it does so, the Commission "shall only exercise its powers in a way that will not interfere with [a DA's] active investigation or prosecution and in no event shall the commission exercise its powers prior to the earlier of: (a) the filing of an accusatory instrument with respect to the crime or crimes that led to such prosecuting agency's investigation and underlie the complaint; or (b) one year from the commencement of the occurrence of the crime or crimes that led to such prosecuting agency's investigation and underlie the complaint" (*id.*).

If the Commission determines that the findings of its investigation necessitate a hearing, it "shall direct that a formal written complaint signed and verified by the [Commission] administrator be drawn and served upon the prosecutor involved" (Jud Law § 499-f[4]). The

statute sets forth various procedures by which a prosecutor may in advance of a hearing obtain relevant documents, including "exculpatory evidence" (*id.*). The prosecutor is also given the right at the hearing to cross-examine witnesses, present evidence, and be represented by counsel (*id.*). The hearing is not public, unless the prosecutor demands that it be so, and all materials related to the investigation are to be kept confidential unless and until the Commission issues a disposition involving some sanction (*id.*; Jud Law §§ 499-g & 499-h). The complainant, however, may appear within the discretion of the Commission, or if he or she is subpoenaed by the prosecutor (Jud Law § 499-f[4]). The parties may agree to waive the hearing, and instead have a determination made on a stipulated statement of facts (Jud Law § 499-f[5]). The Commission may carry out certain of its appointed tasks via appointment of referees, or three-member panels, except that a panel cannot confer immunity, nor may it authorize a complaint, investigation or imposition of final recommendation or sanction (*see* Jud Law § 499-e).

Following the hearing, the Commission may (1) dismiss the complaint; (2) "determine that the prosecutor be admonished or censured"; or (3) "recommend to the governor that a prosecutor be removed from office for cause" (Jud Law § 499-f[6]-[7]). The Commission may reach one of these determinations upon a finding that a prosecutor has engaged in "misconduct in office, as evidenced by [the prosecutor's] departure from his or her obligations under appropriate statute, case law, and/or New York Rules of Professional Conduct, 22 NYCRR 1200, including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers), persistent failure to perform his or her duties, conduct prejudicial to the administration of justice (Jud Law § 499-f[1]). In addition, it may recommend that a prosecutor be retired for "mental or physical disability preventing the proper performance of his or her prosecutorial duties" (*id.*).

A Commission determination of admonition, censure or recommended removal is served on the presiding justices of the Appellate Division, and on the prosecutor (Jud Law § 499-f[7]). At that point it becomes public, along with the record of the proceedings (*id.*). The prosecutor may "accept the determination of the commission or make written request . . . within thirty days after receipt of such determination, for a review thereof by the presiding justices of the appellate division" (*id.*). If the prosecutor accepts a determination of recommended removal or retirement, or does not appeal it to the presiding justices of the Appellate Division, the Governor nonetheless "independently determines" whether the prosecutor will be removed or retired (*id.*). If the prosecutor requests review by the presiding justices, they may "accept or reject the determined sanction; impose a different sanction including admonition or censure, recommend removal or retirement . . .; or impose no sanction" (Jud Law § 499-f[8]). The statute also gives the presiding justices the right to temporarily suspend a prosecutor when there is a recommendation for removal or retirement, or "when he or she is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude" (Jud Law § 499-f[9][a]-[b]). Such suspension is with pay "unless the court directs otherwise"[4] (Jud Law § 499-f[9][c]).

Again, any recommendation of removal or retirement is transmitted to the Governor, who will "independently determine whether the prosecutor should be removed or retired" (*id.*). The Governor's power in this regard is premised on his constitutional authority, set forth in Article 13, Section 13(a) of the State Constitution, which allows the Governor to remove a District Attorney from office provided that individual is given "a copy of the charges against him or her

[4] The reference here to "the court" is unclear, since the determinations at issue are made by the presiding justices of the various Appellate Divisions, not by any particular "court."

and an opportunity of being heard in his or her defense"[5]

The Litigation and Pending Motions

This suit before me was commenced to challenge Chapter 202, naming as parties the State of New York, the Governor, the four legislative leaders, and the Commission. The parties stipulated to hold the case in abeyance pending the Legislature's consideration of a potential chapter amendment. Following enactment of Chapter 23, the Governor and three of the legislative leaders entered into stipulations whereby they were dropped as defendants, and they agreed they would abide by the outcome of the Court's ruling.[6] The Attorney General declined to represent the State in this case, and thus it has not participated in the litigation as such. As a result, only Speaker Heastie remains an active defendant, and is referred to below as "the defendant."

After the stipulations were filed, plaintiffs made the summary judgment motion at issue. In their pleadings and motion papers, plaintiffs contend that Article 15-a violates the State Constitution in that it (1) infringes on the due process and equal protection rights of prosecutors; (2) unlawfully interferes with the core functions of DAs; (3) violates the separation of powers doctrine; (4) impermissibly requires the Chief Judge to make appointments to the Commission; (5) intrudes on the exclusive authority of the Appellate Division over attorney discipline; and (6) assigns tasks to the judiciary beyond what is constitutionally permitted (Amended Complaint ["Am Compl"] ¶¶ 54-95). On these grounds, plaintiffs seek a declaration that the statute is

[5] The Statute contemplates that the may Governor determine that a "prosecutor" should be removed, a term that encompasses not only DAs as specifically referenced in the Constitution, but also ADAs. This aspect of the legislation is not generally addressed in the parties' submissions. Defendant's gloss on this provision at oral argument is discussed below, *infra note 37*.

[6] Then-Minority Leader Brian Kolb agreed in his stipulation that the 2019 amendments to the bill "did not cure all of the constitutional defects" and therefore Article 15-A "remains unconstitutional." (NYSCEF, Document 59, ¶ 2). Accordingly, Kolb stated that the order sought by plaintiffs should be entered (*id.* ¶ 4). The other stipulating defendants took no position on the current motions.

unconstitutional and a permanent injunction against the creation of the CPC and the implementation of Article 15-a (*id.* ¶¶ 96-105). Plaintiffs support their motion with the affirmation of counsel (Affirmation of Jim Walden Esq., dated July 22, 2019 ["Walden Aff"]) and an accompanying memorandum of law (Memorandum of Law In Support of Plaintiffs' Motion for Summary Judgment ["Pl MOL"]).

Defendant Speaker Heastie has filed papers in opposition to plaintiffs' motion and in support of his cross-motion for summary judgment in defendant's favor as to all issues raised by plaintiffs and for dismissal of the complaint, also consisting of the affirmation of counsel (Affirmation of Daniel P. Mach, Esq., dated August 26, 2019 ["Mach Aff"]) and a memorandum of law (Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant Carl E. Heastie's Cross-Motion for Summary Judgment ["Def MOL"]). The parties have both made reply submissions in support of their respective motions (Plaintiffs' Memorandum of Law in Opposition to Cross-motion and in Further Support of Motion ["Pl Reply MOL"]; Reply Memorandum of Law in Further Support of Defendant Carl E. Heastie's Cross-Motion for Summary Judgment ["Def Reply MOL"]). In addition, the Court granted the motions of three groups of organizations and individuals leave to submit briefs in support of defendant Heastie as amicus curiae.[7]

On December 4, 2019, the parties appeared before me for oral argument. With the Court's leave, they submitted supplemental letter briefs addressing matters raised at the

[7] The first such group consists of the New York State Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, DKT Liberty Project, the Legal Aid Society, Brooklyn Defender Services, the Bronx Defenders, the Chief Defenders Association of New York, Robert F. Kennedy Human Rights, and Discovery for Justice. The second is composed of the Innocence Project, the New York Law School Post-Conviction Innocence Clinic, the Exoneration Initiative, It Could Happen to You, Jabbar Collins, Shawn Lawrence, and Wayne Martin. The third amicus brief was filed by Professors Bruce A. Green, Ellen C. Yaroshefsky, and Steven Zeidman. While each of these briefs raises different issues and concerns, the primary thread running through them is the contention that existing mechanisms for policing prosecutorial misconduct are inadequate.

argument. The matter is now fully ripe for decision.

Discussion

The parties agree that there are no disputed questions of material fact relevant to the motions before me, which address only matters of law or statutory interpretation (PL MOL 16; Def MOL 38). I may, therefore, render a final determination on the parties' arguments (*see Spilka v Town of Inlet*, 8 AD3d 812, 813 [3d Dept 2004]).

All statutory enactments by the New York State Legislature are imbued with a "presumption of constitutionality" (*Matter of Moran Towing Corp v Urbach*, 99 NY2d 443, 448 [2003]). As such, facial constitutional challenges – like the one brought by plaintiffs in this case – "are disfavored" (*Overstock.com, Inc. v New York State Dept. of Taxation and Fin.*, 20 NY3d 586, 593 [2013]).

Thus, a challenge to a duly enacted statute requires the challenger to satisfy "the substantial burden of demonstrating that[,] in any degree and in every conceivable application, the law suffers wholesale constitutional impairment" (*Center for Jud. Accountability, Inc. v Cuomo*, 167 AD3d 1406, 1409 [3d Dept 2018], *appeal dismissed* 33 NY3d 993 [2019] [internal quotation and citation omitted]). The challenger must establish that there is "no set of circumstances under which the [legislation] would be valid" (*Overstock.com, Inc.*, 20 NY3d at 593 [citations and internal quotation marks omitted]). A reviewing court also "must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (*id.* at 593 [citation omitted]; *see also People v Hodgdon* 175 AD3d 65, 69 [3d Dept 2019], *lv granted* 34 NY3d 981 [2019] [a court is "required to 'make every effort' to interpret a statute 'in a manner that avoids a constitutional conflict' "], *quoting People v Davidson*, 27 NY3d 1083, 1094 [2016]).

Since this is a facial challenge, I may not find Article 15-a unconstitutional merely because its application may be so in regard to a specific factual situation; such an argument must be presented via an "as applied" challenge, in a lawsuit by an individual directly affected by the alleged defect (*see People v Stuart*, 100 NY2d 412, 421 [2003] [explaining the difference between facial and as-applied challenges]). In the case before me, I "must examine the words of the statute on a cold page and without reference to the [parties'] conduct" (*id.*).

With these standards of review in mind, I proceed to assess the plaintiffs' arguments. After considering each of the challenges separately, I will assess whether any constitutional shortcomings in the statute may be remedied by severance of the offending language, or by applying a narrowing construction, as defendant urges in the alternative. I cannot rule on such matters, however, until I have conducted a full overview of each of the challenges now before me.

I. Due Process

Plaintiffs claim that Article 15-a violates their right to procedural due process (Pl MOL 42-44). Their primary assertion in this regard is that the statute "fails to identify any standards by which the CPC is to decide whether to initiate an investigation, hold hearings, find that a complaint has been sustained, or determine whether or how to impose disciplinary sanctions against a prosecutor" (Am Compl ¶ 93). According to plaintiffs, the statute fails to provide for "basic procedural protections, including evidentiary rules and standards of proof and review" (Pl MOL 43).

In regard to the first issue, plaintiffs rely on the Seventh Circuit's pronouncement in *White v Roughton* (530 F2d 750 [7th Cir 1976]) that due process requires "a determination of the issues according to articulated standards," and cannot vest "virtually unfettered discretion" in the

decision maker[8] (*id.* at 754; *see* PL MOL 42-43). In New York law, the same principle has been construed as requiring legal standards "sufficiently definite so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms" (*see Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 256 [2010] [citation and internal quotation marks omitted]).

To succeed on a facial challenge along these lines, plaintiffs must show that the statute "is expressed in terms of such generality that 'no standard of conduct is specified at all' " (*Brache v Westchester County*, 658 F2d 47, 50-51 [2d Cir 1981], *cert denied* 455 US 1005 [1982], quoting *Coates v City of Cincinatti*, 402 US 611, 614 [1971]). That is not so here. The bases upon which sanction may be imposed "include violation of Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers), persistent failure [of the prosecutor] to perform his or her duties, conduct prejudicial to the administration of justice," and "mental or physical disability preventing the proper performance of his or her prosecutorial duties." The first two grounds are set forth in the ethical rules governing lawyers, and have long been construed by New York courts (*see e.g. Matter of Rain*, 162 AD3d 1458, 1460-1461 [3d Dept 2018] [upholding of sanction imposed on prosecutor, inter alia, for violation of Rule 3.8]; *In re Joyce*, 72 AD3d 202 [2d Dept 2010] [sanctioning attorney under the "conduct prejudicial to the administration of justice" standard]). Indeed, the phrase "prejudicial to the administration of justice" is found in Article 4 of the Judiciary Law governing disciplining of attorneys, including prosecutors (Judiciary Law § 90[2]; *see also* 22 NYCRR § 1200.0 [Rules of Professional Conduct] Rule 8.4: Misconduct). This standard is routinely applied when lawyers are disciplined for such actions as: failing to comply with legitimately sought discovery and court orders (*Matter of Jauregui*, 175

[8] The parties agree that federal due process standards are identical for present purposes to those applicable in New York State law (*see* PL MOL 42 n 43; Def MOL 59 n 35).

AD3d 34 [1st Dept 2019]); making arguments on summation that "exceeded the bounds of fair advocacy" (*Matter of Rain*, 162 AD3d at 1459); issuing misleading public statements critical of a court order entered in a pending criminal matter (*In re Soares*, 97 AD3d 242 [4th Dept 2012]); and making false representations (*Matter of Muscatello*, 87 AD3d 156 [2d Dept 2011]). Given the extensive history and caselaw interpreting this language, it cannot be said to be so vague as to be entirely standardless.

As to the language regarding persistent failure to perform one's duties and physical and mental disability, the same phrasing has been part of the Commission on Judicial Conduct's authority since 1978, and has been enforced by that body (*see* NY Const art VI, § 22[a]; Jud Law § 44 [1]; *Matter of Fiore*, 2005 WL 2396927 [CJC 2005] [construing "persistent failure to perform duties" provision]; *Quinn v State Commission on Judicial Conduct*, 54 NY2d 386 [1981] [discussing disability provision]).

Individual cases may undoubtedly raise questions about the application of the language cited above. And the statutory language providing that the jurisdiction of the Commission includes but "is not limited to" the areas specifically delineated by statute (Jud Law § 499-a) – leaving open the possibility that the Commission may claim the power to investigate and sanction whatever it may define as "misconduct" – presents potential bases for future "as applied" challenges. But I cannot say on the face of the law that it violates the due process clause by failing to set forth any standard of conduct in "every conceivable application," as I must to sustain the challenge before me (*see supra* p 9; *see also Franza v Carey*, 115 Misc 2d 882, 885 [Sup Ct, NY County 1982], *affd as modified on other grounds* 102 AD2d 780 [1st Dept 1984], *appeal dismissed* 64 NY2d 886 [1985] ["if a statute clearly prohibits and defines certain

conduct, a facial vagueness claim is defeated"]).[9]

To the extent plaintiffs base their due process claim on the charge that the statute fails to set forth the *procedures* by which the CPC shall operate, that contention also cannot sustain a facial due process claim at this stage, since legislation "need not be detailed or precise as to the agency's role" (*Garcia v New York City Dept of Health & Mental Hygiene*, 31 NY3d 601, 609 [2018] [internal citation and quotation omitted]). Rather, "an agency can adopt regulations that go beyond the text of its [enabling legislation], provided they are not inconsistent with the statutory language or its underlying purpose" (*id.* [internal quotation and citation omitted]).

Here, the governing statute provides the Commission with the necessary authority to "adopt, promulgate, amend and rescind rules and procedures, not otherwise inconsistent with law, necessary to carry out the provisions and purposes of this article," which would allow it to explicate its procedures with greater specificity (Jud Law § 499-d[5]). That is precisely how the Commission on Judicial Conduct has operated, setting the burden of proof, rules of evidence and rules of procedure via regulation, even when not set forth in its governing statute (*see* Judiciary Law, Article 2-A; 22 NYCRR 7000.6[i]). Further, Article 15-a provides a charged party with a variety of procedural protections, including notice, discovery, the right to counsel, and the right to present evidence and cross-examine witnesses (*see* Jud Law § 499-f[3]-[4]; Def MOL 60-61).

In short, the Commission is the appropriate body, in the first instance, to determine "the best methods for pursuing [the] objectives articulated by the legislature" (*Matter of LeadingAge N.Y., Inc. v Shah*, 32 NY3d 249, 260 [2018]). Plaintiffs cannot prevail on a facial challenge premised on the absence of procedural rules in the statute, when the regulations which can set

[9] Although plaintiffs' briefs did not specifically characterize this claim as one challenging the statute as "void for vagueness," caselaw cited in their brief applies this doctrine (*see* PL MOL 43, citing *United States v Davis*, 139 S Ct 2319 [2019]).

forth such rules have not yet been promulgated.

II. Equal Protection

Plaintiffs further contend that Article 15-a violates DAs' and ADAs' right to equal protection under the law, because the protections they receive under the statute are less than those that "protect all other attorneys from arbitrary investigation and discipline," and in particular because they will be subject to ethical oversight and regulation by the CPC distinct from that applicable to prosecutors who are not part of a district attorney's office (*see* Pl MOL 44-45). They note specifically that special prosecutors, the Attorney General, Assistant Attorneys General, county-level prosecutors, juvenile-justice prosecutors, and federal prosecutors are not under the jurisdiction of the CPC (*id.*).

Under the 14th Amendment of the U.S. Constitution, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The same prohibition is set forth in Article I, Section 11 of New York's Constitution. A challenge to a statute under the equal protection clause pursuant to either state or federal law is evaluated using either a "strict scrutiny" or a "rational basis" standard of review, depending on the nature of the classification at issue (*see People v Aviles*, 28 NY3d 497, 502 [2016]). A "strict scrutiny" analysis is reserved for instances when "governmental action disadvantages a suspect class or burdens a fundamental right" (*id.*).

Plaintiffs make a vague attempt to claim the mantel of "strict scrutiny," on the ground that the statute impinges on the due process rights of DAs and ADAs, and therefore "burdens a fundamental right" (*see* Pl Reply MOL 56; Oral Argument Transcript ["Tr"] 87). Since I have rejected plaintiffs' due process claims, that argument must fall as well. In any case, if this argument were to prevail, every procedural due process claim would morph into an equal

protection claim, entailing a strict scrutiny analysis as to whether the class of individuals involved in whatever procedure is at issue was narrowly tailored and justified by a compelling interest. There is simply no caselaw I can find (or to which plaintiffs point) that so holds.

Plaintiffs' primary contention is that Article 15-a fails rational basis scrutiny, since it is a vehicle for selective enforcement, and the focus on DAs and ADAs alone is not rationally related to a legitimate governmental purpose (Pl MOL 46). That contention, too, is meritless.

To succeed on the claim that DAs and ADAs are being singled out for differential treatment, plaintiffs must show "[1] [they are] selectively treated and [2] such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person " (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 631 [2004]; *see also Westover Car Rental, LLC v Niagara Frontier Transp. Authority*, 133 AD3d 1321, 1323-1324 [4th Dept 2015] [same]). In other words, plaintiffs must establish an "impermissible motive: proof of action with intent to injure – that is, proof that the [class of persons] was singled out with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances"[10] (*Bower Assoc.*, 2 NY3d at 631 [citation and internal quotation marks omitted]). Nothing in the record on this motion reveals such invidious intent against DAs and the prosecutors they employ on the part of the statute's drafters, or that focusing the statute in this way was motivated by some sort of improper animus.

Moreover, when there is a "rational basis for differential treatment of separate classes . . .

[10] While this case concerns alleged selective conduct by an administrative official, rather than selective targeting in the statute itself, the analysis (and requirement that discriminatory intent be shown) remains the same (*see U.S. v Armstrong*, 517 US 456, 465 [1996] [selective prosecution claim "draw[s] on ordinary equal protection standards, including that the policy "was motivated by a discriminatory purpose"] [citation and internal quotation marks omitted]).

there is no violation of equal protection . . ." (*Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 59 [2011] [finding rational basis for differential treatment under amended workers' compensation statute between private insurers and State Insurance Fund and self-insurers]; *see also People v Salzar*, 112 AD3d 5, 10 [1st Dept 2013], *lv denied* 22 NY3d 1090 [2014] [governmental action that results in disparate treatment will not support an equal protection claim if the action bears a rational relationship to a legitimate government purpose]).

Here, the record provides sufficient basis upon which the distinctions drawn by the legislation can meet the low bar required in a rational basis analysis (*see Port Jefferson Health Care Facility v Wing*, 94 NY2d 284, 289 [1999] [rational basis analysis is "lowest level of judicial review"]). First, it was clearly permissible for the Legislature to create a special investigatory body for prosecutors, but not for other attorneys. Prosecutors have unique responsibilities that set them apart from other lawyers, the essential characteristic of which is the discretion he or she possesses as to whether and how to bring criminal charges (*Hodgdon*, 175 AD3d at 68). That power can result in an individual's loss of liberty for many years, and thus there is a rational basis for the Legislature to determine that the oversight imposed on prosecutors should be different from that for other attorneys. Indeed, the ethical rules set by the ABA Model Rules of Professional Conduct adopted by New York and all other jurisdictions contain a separate set of rules for prosecutors from that of other members of the bar (*see* NY Rules of Professional Conduct, Rule 3.8 [Special Responsibilities of Prosecutors and Other Government Lawyers]; *see also Matter of Sedore v Epstein*, 56 AD3d 60, 67 [2d Dept 2008] ["The duty of a prosecutor is . . . somewhat different from that of an attorney retained by a party, as the canons of professional ethics recognize"]).

The Speaker has also shown a rational basis for the distinction drawn by the statute

between DAs (and ADAs) and other prosecutors. As defendant points out, local district attorneys are the primary agents of law enforcement, and prosecute the lion's share of crimes in this State (*see* Def MOL 65 ["District Attorneys and their offices are the primary enforcers of criminal statutes in New York"]). To aid them in carrying out this function, the Legislature has provided DAs with significant and unique powers and duties under Article 18 of the County Law. Moreover, as the Speaker points out, previous proposals on criminal justice reform have made recommendations targeted specifically at DAs (*see* New York State Criminal Justice Task Force, *Report on Attorney Responsibility in Criminal Cases*, February 2017 at 10-14 [making various recommendations applicable specifically to DA Offices and defense providers, without reference to other prosecutors]).

The primary example proffered by plaintiffs of an allegedly irrational distinction made via the legislation is that between DAs and ADAs on the one hand, and the Attorney General and assistant attorneys general on the other.[11] But the Attorney General and a district attorney are distinct constitutional officers, with different responsibilities and subject to separate governing statutes. Most important for present purposes, the criminal jurisdiction of the AG is limited to certain areas (such as environmental crimes and antitrust) and matters referred to it, while the jurisdiction of a DA is plenary (*see People v Cuttita*, 7 NY3d 500, 507 [2006] ["the Attorney General's historical authority to instigate criminal proceedings has over time been transferred to county district attorneys[, and a]s a result, the Attorney General now has no power to prosecute crimes unless specifically permitted by law"]). While plaintiffs point out that the AG may be

[11] Plaintiffs' argument as to other prosecutors excluded from the CPC's ambit is also without basis. Prosecutors of juvenile crime have far more limited sanctions at their disposal than DAs. In particular, individuals convicted in juvenile proceedings are not "denominated . . . criminal[s]" and are not subject to civil disabilities, and the resulting records are subject to broad sealing provisions (*see* Family Ct Act § 380.1). Federal prosecutors are regulated by the federal government, and their conduct is outside the purview of the New York State Legislature. "Special prosecutors" are appointed only for particular matters. It was not irrational to exclude those holding these offices from the statute's reach.

appointed a special prosecutor with general authority to prosecute, that requires a specific designation by the Governor or agency head[12] (*see* Exec Law 63[2]-[3]).

Simply describing the differences in these offices makes clear that there are rational reasons why the Legislature may choose to impose a different oversight process for DAs than for other prosecutors. Moreover, "in fashioning a remedy for a perceived evil, the Legislature may take one step at a time, addressing itself to the [aspect] of the problem which seems most acute" (*see Forti v New York State Ethics Commn.*, 75 NY2d 596, 613 [1990] [citation and internal quotation marks omitted]). As a result, plaintiffs have failed to show that the distinctions drawn by the Legislature in this instance are "so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the [government's] actions were irrational" (*Kimel v Florida Bd. of Regents*, 528 US 62, 84 [2000] [citation omitted]).

III. Intrusion into the Jurisdiction of the District Attorneys

Plaintiffs' next contention is that the creation of the CPC impermissibly interferes with the manner in which DAs carry out the constitutional responsibilities of their office. According to plaintiffs, Article 15-a intrudes into matters properly falling under a DA's authority by "impair[ing] prosecutorial discretion and interfer[ing] with the operation of District Attorneys' offices . . . [m]ost notably by dictat[ing] through disciplinary sanctions, and the threat of sanctions, how District Attorneys investigate and prosecute crimes" (Pl MOL 16-17). To consider the merits of these claims, I must first determine what matters are assigned exclusively to the DA as a matter of constitutional dictate.

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[12] Plaintiffs argue that defendant must spell out the rational basis for the law in its submission, or the Court may not rely upon it (*see* Pl MOL 57 n 48 [Speaker may not raise other rationales for distinguishing DAs in reply submission, since he has not done so in his memorandum in chief]). But that is not how rational basis analysis works. It is the party challenging the statute who has the burden to "negative every conceivable basis which might support it" (*FCC v Beach Communications, Inc.*, 508 US 307, 315 [1993] [citation omitted]). Beyond pointing out that there are other prosecutors not subject to the Commission's oversight, plaintiffs have failed to make such showing.

The language of the Constitution provides no aid in this regard. It states only that "in each county a district attorney shall be chosen by the electors once in every three or four years as the legislature shall direct" (NY Const art XIII, § 13[a]). District attorneys are therefore "constitutional officers . . . whose responsibilities are a matter of statewide concern" (*Matter of Hoerger v Spota*, 109 AD3d 564, 568 [2d Dept 2013], *affd* 21 NY3d 549 [2013] [citation omitted]). But the Constitution "does not attempt to prescribe the function pertaining to the office of district attorney," although "it is to be implied that the powers of the office consist in general of the prosecution of criminal offenses within the county" (*Matter of Turecamo Contr. Co., Inc.*, 260 AD 253, 274 [2d Dept 1940], *appeal denied* 259 AD 1094 [2d Dept 1940]). Thus, as a general rule, it is the Legislature that provides for the specific powers and duties of the district attorney via the County Law, which is "of course statutory, not a constitutional provision" (*id.*; *see also Matter of Johnson v Pataki*, 91 NY2d 214, 225 [1997], *citing Matter of Schumer v Holtzman*, 60 NY2d 46, 53 [1983] ["the delineation of law enforcement functions [including those of the DA] has consistently been left to the Legislature"]; County Law § 700[1] ["it shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the court of the county for which he or she shall have been elected or appointed"]). In other words, "[t]he powers of the [d]istrict [a]ttorney [] are conferred upon her by statute" (*Matter of Schumer*, 60 NY2d at 53).

That said, two recent decisions have made clear that a DA has a constitutionally-protected province which cannot be invaded by the legislative or judicial branches. Thus, in *Matter of Soares v Carter* (25 NY3d 1011 [2015]), the Court of Appeals held that "[u]nder the doctrine of separation of powers," courts cannot compel a criminal prosecution as "[s]uch a right is solely within the broad authority and discretion of the district attorney's executive power to conduct all

phases of criminal prosecution" (*id.* at 1013). Put otherwise, "[i]t is within the sole discretion of each district attorney's executive power to orchestrate the prosecution of those who violate the criminal laws of this state"[13] (*id.* at 1014). The Third Department subsequently ruled that an "essential characteristic" of the DA's authority, vested in him or her by the State Constitution, is the "discretionary power to determine whom, whether and how to prosecute" (*Hodgdon*, 175 AD3d at 68, citing *People v Davidson*, 27 NY3d 1083 [2016]; *see also Matter of Soares v Carter*, 113 AD3d 993, 996 [3d Dept 2014], *affd* 25 NY3d 1011 [2015] [district attorney has "unfettered discretion to determine whether to prosecute a particular suspect"] [citation omitted]; *Sedore*, 56 AD3d at 65 [authority to prosecute has rested with DA since 1801, and "[i]t is well settled that the decision whether to prosecute is entrusted in the sole discretion of the District Attorney"] [citation omitted]). This is an "essential function" of the office, which the Legislature "has no authority to transfer . . . to a different officer chosen in a different manner" (*Hodgdon*, 175 AD3d at 68-69 [internal quotation and citation omitted]).

On the other hand, "[t]he office of the district attorney is plainly subject to comprehensive regulation by state law . . . since the state has a fundamental and overriding interest in ensuring the integrity and independence of the office of district attorney" (*Matter of Hoerger v Spota*, 21 NY3d 549, 553 [2013]). Therefore, while the Legislature may not dictate who a DA's Office may prosecute, it may take steps to ensure that it does so in conformity with legal and ethical rules.

Finally, a DA's discretion – even in regard to who may be charged – is "not unfettered" (*see Wayte v United States*, 470 US 598, 608 [1985]). In particular, a prosecutor may not

[13] The Court cited both County Law § 700(1) and Article XIII, Section 13 of the State Constitution for this proposition. By referring to "separation of powers," however, the opinion makes clear that this authority of the DA is of constitutional dimension, and does not merely derive from statute.

proceed in a manner "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights" (*id.* [citations omitted]).

Given these principles, no inherent invasion of the DA's authority is fostered by the creation of a separate Commission to ensure that a local prosecutor does not "depart[] from the applicable statutes, case law," and the Rules of Professional Conduct (Jud Law § 499-a). Such oversight does not on its face dictate who, when or how the DA may pursue a prosecution, but may be read only as ensuring that any prosecution that is undertaken is conducted free from misconduct – safeguards that are within the purview of the Legislature to create (*see Matter of Soares*, 113 AD3d at 996 [public has an interest in preventing a prosecutor from engaging in bad faith]).

Plaintiffs point to a number of specific provisions of Article 15-a which it maintains would permit direct interference in the DA's investigatory process. These include: granting jurisdiction to the Commission to opine on the qualifications of ADAs; the Commission's power to offer immunity to witnesses upon notice to the DA or Attorney General; its ability to release confidential information under certain circumstances while a criminal investigation is still pending; and its authority to allow a complainant (potentially a criminal defendant in a pending case or target of an ongoing investigation) to be present at a hearing on disciplinary charges brought against a prosecutor.

On the first point, plaintiffs take issue with the provision permitting CPC to "on its own motion, initiate an investigation of a prosecutor with respect to his or her qualifications, conduct, fitness to perform or the performance of his or her duties" (Judiciary Law § 499-f[2]), arguing that it grants the Commission "free reign to review District Attorneys' hiring decisions" (Pl MOL

19). But there is no need to read the provision so broadly. As long as investigations are undertaken as a means to protect the integrity of the district attorney's office, they would fall within an area of appropriate legislative concern (*see Matter of Hoerger*, 21 NY3d at 553). This would be the case, for example, in instances where an ADA had failed to obtain a law license, allowed an attorney registration to lapse, or was otherwise ineligible for the office he or she held (*see Matter of Curry v Hosley*, 86 NY2d 470 [1995] [district attorney must be licensed to practice law to hold office]). Since it is possible to read the statute narrowly so as to avoid any improper interference with the operation of a DA's office, this is not the stuff that can sustain a successful facial challenge (*see Boreali v Axelrod*, 71 NY2d 1, 9 [1987] ["however facially broad, a legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers doctrine permits"]).

In regard to the CPC's power to offer immunity, its use may certainly interfere with a DA's discretion to determine who to prosecute, since an immunized witness may not subsequently be charged for matters falling within the grant of immunity. But this alone cannot be held to violate the DA's constitutional authority. The power to facilitate the giving of relevant testimony by granting immunity is a tool commonly granted to investigatory bodies besides a DA – including to the Legislature itself (*see* Leg Law § 62-b [Legislature]; Enviro Conserv Law § 71-0517 [Department of Environmental Conservation]; Jud Law § 42[2] [Commission on Judicial Conduct]; Elec Law § 3-102[6] [State Board of Elections]; *see also People v Cahill*, 126 AD 391, 395 [2d Dept 1908] ["The principal object of immunity statutes is to give immunity to witnesses called in an investigation against any crime that may be revealed thereby, so that they may not shield themselves behind constitutional privilege, but may be required to testify, to the end that the investigation may be carried on"]). Indeed, courts have recognized the Legislature's

power to expand via legislation the circumstances in which immunity can be offered, and have never intimated that in doing so it treads unlawfully on the prerogatives of DAs (*see Matter of Doyle*, 257 NY 244, 252 [1931] [Cardozo, C.J.]["The purpose of the Constitution was . . . not to foreclose the Legislature from establishing additional [testimonial immunities]"]; *see also People v Buffalo Gravel Corporation*, 195 NYS 940, 948 [Sup Ct, Sullivan Cty 1922] ["Such [testimonial immunity] statutes when sufficiently broad, have been invariably held to be constitutional"]).[14] Further, the existence of numerous bodies that can offer immunity contradicts plaintiffs' contention that the grant of immunity power in the present statute "stands in contrast to standard criminal procedure, where courts confer immunity 'only when expressly requested by the district attorney to do so' " (PL MOL 20 n 24 [citing Crim Proc Law § 50.30]). There is nothing at odds with "standard practice" to allow investigatory agencies to immunize witnesses when relevant to their particular responsibilities.

Plaintiffs' argument appears to rest on the assumption that the immunity will be used to immunize the target of a DA's investigation or prosecution. But there is no reason that this need be so. And if the DA believes the Commission is improperly using immunity to interfere with matters appropriately placed within its discretion, it is entitled to advance notice of such, and therefore has the ability to challenge it in Court (*see* Jud Law § 499-d[2]).

Similarly, in the event a DA believes that the public release of certain information obtained by the Commission or the presence of a particular individual at a hearing will substantially interfere with an investigation, he or she can notify the CPC, and CPC must refrain from interference (*see* Jud Law § 499-d[1]; *see also* Tr 96 [acknowledgment by defendant that

[14] *Buffalo Gravel* addressed a claim that there was a purported conflict between an immunity statute and the witness's right against self-incrimination. For present purposes, the salient point is that laws allowing investigative bodies to grant immunity are common, and there is no apparent caselaw finding them to violate DAs' constitutional authority to decide who to prosecute.

statute leaves protection of DA's work product privilege intact]). While there is significant ambiguity as to how this procedure will operate in practice (*see* Tr 34-37] [position of defendant that Commission not required to follow DA's view on what constitutes interference]), that is a matter than can be addressed through litigation as the statute is applied.[15] None of the above provisions cited presents a *facial* violation of the DA's authority under the State Constitution.

There is one wrinkle in this analysis which bears noting. The memorandum in support of Chapter 202 indicated that the sponsors' intent in creating the Commission was, in part, to "oversee [the] discretion" possessed by district attorneys "in determining who to prosecute" (Memorandum in Support, Chapter 202, Justification). And at oral argument, counsel for the Speaker affirmed that he believed the statute gave the Commission this authority (Tr 16-17).

Counsel went on to make clear the limitations on any such power, in that the Commission has no authority to "countermand decisions," to "control a prosecution" or "mandate that a prosecution happen or not happen" (*id.* at 17-18). Moreover, in a post-argument submission, Speaker Heastie clarified his position as follows:

> "Article 15-a does not give the CPC carte blanche to second-guess such discretionary policy choices [such as declining to prosecute low-level drug offenders]. It allows the CPC to investigate only instances where those decisions violate the 'for cause' standard of § 499-f(1). A prosecutor's decision not to prosecute certain crimes based on limited resources or good-faith policy considerations is not 'misconduct in office . . .' [and] could be challenged on an as-applied basis' " (Defendant's Post-Argument Letter of 12/11/19 ["Def Post-Arg Ltr"]) at 3.

If the Legislature in fact intended to vest in the Commission the jurisdiction to

[15] However it is construed, this provision is not necessarily a cure-all for any potential interference issues, since a DA may not be aware of the pendency of a CPC investigation, or of steps about to be taken by the Commission which may impede the exercise of the DA's authority. The point here is that there is no way to determine on the face of the statute whether and to what degree the Commission's work may impact DA investigations, and how the mechanisms available to the DA to prevent such impact will function in practice.

investigate and sanction those matters broadly falling within a prosecutor's discretion, and which do not exceed the constitutional limits on such discretion – that is, which were not intentionally discriminatory as set forth in *Wayte*, *supra* – such would cross the boundary into a prosecutor's constitutional authority as defined in *Mater of Carter* and *Hodgdon*.[16] But there is no provision in the statute that clearly grants the CPC the authority to investigate and sanction such discretionary choices. Any challenge to the statute on this basis is thus premised upon a hypothetical future exercise of authority, which is appropriate for an as applied challenge[17] (*see Stuart*, 100 NY2d at 422 [in a facial challenge, the Court "will not strain to imagine marginal situations in which the application of the statute is not so clear"] [citations omitted]).

IV. Other Separation of Powers Challenges

In addition to challenging the statute for its alleged intrusion into the authority of the DA, plaintiffs raise other separation of powers arguments, concerning in particular the claim that Article 15-a will allow the Legislature and judiciary to usurp matters constitutionally vested in the executive branch by granting the legislative and judicial appointments combined a majority

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[16] I do not find persuasive defendant's contention that the Commission's pronouncements could never interfere with the constitutional prerogatives of a DA because it has only the power to publicly denounce (through admonition or censure), or to make recommendations or removal that the Governor is free to reject *de novo* (*see* Tr 24). The whole point of the statute, as reinforced in the submissions of both defendant and amici, is that it will implement an oversight system that will be strong enough to detect and deter misconduct [*see* Def MOL 2 [Article 15-a will put in place a "system of review and oversight in order to seek to reduce the instances in which prosecutorial zeal may result in violations of the law or professional ethical rules"]; Amici Innocence Project, et al MOL 3-4 ["The Commission will provide necessary review of conduct by prosecutors who fail to meet the high standards required by their role, and discourage prosecutors from engaging in misconduct in the first place"]). Defendant cannot portray the Commission as a powerful watchdog when counsel wishes to stress the policy goals it will effectuate, and then as a toothless advisory body when it wishes to stress its limitations. In any case, plaintiffs' contention that a public finding by an officially sanctioned body condemning the actions of a DA or ADA will have significant impact, and can potentially have "devastating consequences" for that individual's professional life, is persuasive (Tr 26). That does not make it impermissible; it merely means the Commission's actions must stay within constitutional limitations.

[17] I note *infra* p 26 that a separation of powers challenge is generally appropriate for facial review, since this doctrine serves as a structural safeguard. The problem in this instance, however, is that a separation of powers problem will only arise in the first instance if the statute is construed in a particular manner, which is not compelled by the statutory text.

of the Commission members (*see* Pl MOL 28 [" the statute improperly tasks legislative leaders and the Chief Judge with appointing CPC members, who are indisputably officers of the executive branch"]).

The separation of powers doctrine "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" (*Matter of LeadingAge New York, Inc.*, 32 NY3d at 259 [citation omitted]). Pursuant to this doctrine, the aim of the State Constitution "is to regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers, thereby ensuring an even balance of power among the three" (*Matter of Maron v Silver*, 14 NY3d 230, 258 [2010] [citation and internal quotation marks omitted]). The Legislature is required to "make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Matter of LeadingAge New York, Inc.*, 32 NY3d at 259), leaving the Judiciary to determine the respective rights and obligations of parties appearing before it in a particular matter (*see Klostermann v Cuomo*, 61 NY2d 525, 536 [1984] [the appropriate forum to determine rights and obligations under the law is the judicial branch]). Each of these three branches, while not required to operate in a vacuum, must not be "allowed to arrogate unto itself powers residing entirely in another branch" (*Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344, 356 [1985]).

A separation of powers violation is appropriate for review in a facial challenge, as it is a "*structural safeguard*, rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified" (*Matter of Maron*, 14 NY3d at 260-261 [emphasis in original], citing *Plaut v Spendthrift Farm, Inc.*, 514 US 211, 239 [1995]). At the same time, I must construe the statute "whenever possible, so that it is no broader than that which the separation of

powers doctrine permits" (*Boreali*, 71 NY2d at 9).

Plaintiffs' arguments in this regard are premised initially on Article V of the State Constitution, which provides that except as to certain constitutionally delineated agencies, "the head of all other departments and the members of boards and commissions . . . shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law" (NY Const art V, § 4). Plaintiffs contend that the CPC is subject to this constitutional command, and the appointment of its members therefore must be by the Governor with the advice and consent of the Senate, with their removal reserved for the Governor. This provision, however, is meant to apply only to such commissions or boards that serve as "heads of departments" in the executive branch, but not to every other "subsidiary board or commission within the twenty permanent Departments" (*Matter of Cappelli v Sweeney*, 167 Misc 2d 220, 230-231 [Sup Ct, Kings County 1995], *affd on op below* 230 AD2d 733 [2d Dept 1996]).

Matter of Cappelli traced the origins of this section to a 1915 reform proposal ultimately developed via the Reconstruction Commission chaired by Robert Moses and ratified by the voters in 1925. The proposal made clear that section 4 applied only to " 'heads,' be they single individuals or the members of boards or commissions, of the [then] seventeen proposed constitutional Departments" (*id.* at 227). The intent of the provision, as explicated by the Moses Commission, was "not to require Senate confirmation of each and every member of every subordinate bureau, board or commission within the Departments" (*id.* at 229). Moreover, "the amendment left to the Legislature the responsibility to devise the precise details of the new scheme" (*id.* at 230). Given that the CPC is not the head of any of the twenty executive departments, under *Capelli* it must be considered an executive branch subsidiary commission,

and thus not subject to Article V, Section 4.

Plaintiffs make a number of arguments as to why *Matter of Capelli* is not dispositive on this issue, but all are unavailing. First they contend that Article V, Section 4 "at the *very least* demonstrates that the State Constitution was designed to guarantee lines of accountability within the executive branch so that the Governor may effectively ensure the faithful execution of the laws and be held responsible for any failures to do so," and thus "it would be irrational for [this section] to require gubernatorial appointment of department heads for the purpose of ensuring executive branch accountability if the officers performing executive duties within those departments were not appointed by, and did not answer to, the department heads or the Governor himself" (Pl Reply MOL 19 n 22 [emphasis in original]). Plaintiffs contend that the Governor's right to make such appointments derives not only from Section 4, but from the general executive power granted the Governor by the Constitution (Art IV, § 1), which vests him or her with the authority to "take care that the laws are faithfully executed" (Art IV, § 3) (*see* Pl MOL 26-27).

Plaintiffs acknowledge that there is no controlling authority in New York law regarding whether appointments to subsidiary boards with executive functions must be made by the Governor (see Pl MOL 30 ["the New York Court of Appeals does not appear to have directly confronted this issue"]). Instead, they rely on federal caselaw construing the United States Constitution, as well as decisions from other states. And, indeed, the caselaw is clear that under the Federal Constitution, Congress is generally barred from making appointments to boards or commissions carrying out executive functions, including investigation, enforcement and adjudication (*see Buckley v Valeo*, 424 US 1, 120-143 [1976] [finding violation of separation of powers in grant of majority of appointments to Federal Election Commission to Speaker of the House and President Pro Tempore of Senate, given the FEC's "wide ranging enforcement"

power]; *see also Springer v Government of Philippine Islands*, 277 US 189, 203 [1928] [finding unconstitutional the creation of a governing body with legislative appointees; "public agents . . . charged with the exercise of executive functions [are] beyond the appointing power of the Legislature"]).

For a number of reasons I find that this line of caselaw does not bar the kind of legislative and judicial appointments provided for under the statute here.

First, that line of cases is based on detailed explication of the history of the federal constitution, and its Appointments Clause (*see e.g. Buckley*, 424 US at 134 [Congress may not "vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so"]). Such a reading does not necessarily translate into the New York constitutional framework[18] (*see Matter of Jennings v New York City Council*, 10 Misc 3d 1073[A], *4 [Sup Ct, NY County 2006] [the federal doctrine of separation of powers "has a broad impact on the Federal government because such doctrine is needed to balance and explicate the separate pieces of the divided sovereignty of the Federal government under the relatively skeletal U.S. [Constitution]" but "[t]he State's more detailed constitution . . . limits in significant part the need for such analysis"]; *see also* Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 NYU Ann Surv Am L 329, 330-331 [2003] ["State courts may follow federal precedent in interpreting state provisions dealing with the structure and operation of state government, . . . [but] are under no obligation to do so"]). To the contrary, reading this caselaw as a general bar on legislative appointments to bodies carrying out some executive functions would upend wide swaths of New York law and longstanding practice.

[18] Plaintiffs correctly point out that New York courts often cite federal caselaw on separation of powers issues (*see* Pl Reply MOL 11). But that does not indicate that federal cases interpreting specific and different language and history of the Federal Constitution must be controlling here, notwithstanding that New York's historical practices and constitutional provisions on this very question are different.

Numerous New York commissions and boards, including the Joint Commission on Public Ethics ("JCOPE") and the now defunct State Commission of Investigation ("TCI") have included legislative appointees to carry out the sort of tasks which *Buckley* found to fall under the authority of the executive (*see* Exec Law § 94 [JCOPE]; Unconsol Law § 7501 [TCI]), and the Legislature has been granted appointments to other bodies carrying out such classically executive roles as administering authorities (*see e.g.* Public Auth Law § 1020-d [Long Island Power Authority Board]; State Fin Law § 161 [State Procurement Council, setting guidelines for agency procurement]). Moreover, countless other entities fulfilling executive functions have members which must be appointed by the Governor on "nomination" or "recommendation" of legislative leaders, a practice requiring the Governor to choose individuals identified by the legislative branch [*see e.g.* Elec Law § 3-100 [Board of Elections]; NY Rac Pari-M Law § 102 [Gaming Commission]). This is almost certainly incompatible with the way the Supreme Court has read the US Constitution (*see Buckley*, 424 US at 126 ["any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by s 2, cl. 2, of that Article," i.e., by the President with advice and consent of senate]). Yet the practice of granting the Legislature the right to nominate or appoint a minority of members to boards and commissions carrying executive functions is deeply ensconced within New York's governmental structure (*cf. Free Enterprise Fund v Public Co. Accounting Oversight Bd.*, 561 US 477, 505-506 [2010] [noting, in finding process for removal of federal agency officials insulated from the President to be unconstitutional, that there was no "historical precedent" for such a structure]).

The mere fact that a practice has long existed without court challenge does not by itself demonstrate its constitutionality (*see Bordeleau v State*, 18 NY3d 305, 318 [2011] [Pigott, J.,

dissenting] ["[u]nconstitutional acts do not become constitutional by virtue of repetition, custom or passage of time"]; *accord Hussein v State*, 19 NY3d 899, 904 [2012] [Ciparick, J., concurring]). But in this case, I am faced with a longstanding and broadly adopted practice, apparently unchallenged in the frequent litigation involving the actions of bodies with legislative appointees,[19] and the question before me is not whether that practice (appointments by non-executive officials to board having executive functions) violates a specific constitutional command, but whether it is inconsistent with broad separation of powers principles. The courts have recognized that under those principles "the duties and powers of the legislative and executive branches cannot be neatly divided into isolated pockets" (*Borquin v Cuomo*, 85 NY2d 781, 784 [1985] [citations omitted]). In particular, the Court of Appeals has "steadfast[ly] refus[ed] to construe the separation of powers doctrine in a vacuum, instead viewing the doctrine from a commonsense perspective" under which "[t]he exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers" (*id.* at 785 [citation omitted]).

Thus, in determining whether plaintiffs have met their heavy burden of showing that the arrangement enacted by this legislation violates separation of powers principles on the statute's face, it is relevant that as a practical matter New York has not historically applied the same bright line restriction against legislative appointments as that adopted by the Supreme Court's construction of the federal charter. Indeed, the New York Constitution *itself* includes provision for appointments by the executive, legislative and judicial branch to the body on which the CPC

[19] In *People v Gallagher* (143 AD2d 929 [2d Dept 1988]), the Appellate Division upheld against a "separation of powers" challenge a ruling by the trial court vacating the appointment of a Special Prosecutor based on an objection by TCI. The exact nature of the challenge – and if it implicated the appointment structure of TCI – is not set forth in the opinion.

is modeled: the Commission on Judicial Conduct (see NY Const art VI, § 22[b][1]). While plaintiffs contend that this indicates that constitutional amendment is the proper means to allow for such appointments (Tr 47), a more persuasive reading is that the drafters saw no contradiction between the bedrock principles of separation of powers established in the State Constitution, and legislative appointments to a minority of positions on a Commission carrying out investigatory as well as adjudicative functions.

Plaintiffs argue that the Commission is distinct from other such bodies found in New York law, in that the judicial and legislative appointees make up a majority of the Commission's members, and thus could authorize investigations and impose sanction without any support from gubernatorial representatives whatsoever (*see* Tr 46 [distinguishing JCOPE on ground that at least two gubernatorial nominees must approve certain of its actions]). But this highlights a significant problem with plaintiffs' argument: it is premised on the argument that non-executive appointees cannot constitutionally be able to control a CPC determination, since the Commission would be performing purely "executive" functions. But the matters given to its authority concern the oversight and discipline of attorneys – matters which have always fallen within the bailiwick of the *judiciary*.

The CPC's functions include the conduct of hearing and imposition of sanctions, matters long recognized as quasi-judicial (*see Wiener v Weintraub*, 22 NY2d 330, 332 [1968] [grievance committee investigating complaints of attorney misconduct and conducting hearings thereon was acting in quasi-judicial capacity]; *Erdmann v Stevens*, 458 F 2d 1205, 1208 [2d Cir 1972], *cert denied* 409 US 889 [1972] [conduct of disciplinary proceedings against attorneys "amounts to a judicial inquiry"]). Moreover, the power of the courts to oversee and discipline the legal profession is well-established in New York law. That power dates back to the first New York

State Constitution enacted in 1777, which provided that attorneys would be "regulated by the rules and orders of the said courts[]" (*People ex rel. Karlin v Culkin*, 248 NY 465, 471-472 [1928] [Cardozo, C.J.]). Although the clause was withdrawn from the next iteration of the State Constitution that followed in 1821, Chief Judge Cardozo found this authority to be an "implied" aspect of the courts' powers, and in any case was "explicitly confirmed" by statute thereafter (*id.* at 477). Indeed, as set forth at length *infra* section VII, plaintiffs assert – and I find – that the specific oversight granted the Commission over prosecutors' compliance with the Rules of Professional Conduct conflicts with the constitutional role given the Appellate Division over such matters. Plaintiffs cannot argue at the same time that granting the judiciary appointments to a Commission tasked with policing misconduct in the Court system interferes with the executive's prerogatives in this area. The only possible separation of powers concern raised by the structure of the Commission therefore involves the presence of legislative appointments – and those constitute a minority, incapable of acting without support from the other branches' designees, and a common feature of New York's administrative state.

Furthermore, any separation of powers concerns are diminished by fact that the Commission has no power to impose any sanction beyond a public censure, and a recommendation for removal that the Governor must review de novo. Thus, the matters entrusted within the CPC's authority do not intrude on the Governor's constitutional prerogatives. In addition, the legislative oversight it creates is over local officials, not a co-equal branch of State Government. While, as set forth below, public censure is not a toothless or insignificant consequence, the fact that the CPC can do no more than pronounce and recommend limits the degree to which it threatens to overturn the constitutional balance between the three branches of government (*see Free Enterprise Fund*, 561 US at 507 n 10 [distinguishing

administrative law judges from other officials subject to constitutional requirements of executive appointment and removal to the extent some "possess purely recommendatory powers"]).

Plaintiffs also argue that the statute violates separation of powers principles by not granting the Governor the right to remove all CPC Commissioners. They again cite Article V, Section 4 for this proposition, but as stated above, that provision does not apply to the appointees in this case. If plaintiffs' submission can be read to claim some more comprehensive right of the executive to "appoint[] and remov[e] executive branch officers" (Pl MOL 27), that argument is based on the progeny of the federal separation of powers precedents cited above, and in particular *Free Enterprise Fund*. That case found unconstitutional a process for removal of executive branch officials which ultimately insulated the removal determination from the President him or herself. But the decision was premised on the President's right to "appoint[], oversee[] and control[] those who execute the laws" (561 US at 492, citing 1 Annals of Cong. 463). The right to remove was, in short, found to be part and parcel of the President's right to appoint and supervise executive branch official. For reasons stated above, I do not find any blanket constitutional rule in New York State that compels gubernatorial control over all members of investigative and quasi-judicial bodies. For the same reasons, the Supreme Court's rulings on the executive's right to remove such officials are inapposite.

Lastly, plaintiffs argue that since the Governor is the head of the Executive Department, the Legislature cannot provide for legislative appointees to an agency housed there (see Pl Reply MOL 8 ["The CPC embodies executive power [as] . . . it resides within the Executive Department, the unit of the executive branch that is headed directly by the governor and reserved for 'purely executive and administrative' functions"]). But both the State Constitution and *Matter of Cappelli* merely talk about the principles governing appointment to the State's "twenty

departments"; neither requires that there be an "Executive Department," much less indicates that a different set of constitutional rules applies if one of those departments is so labeled, or is headed directly by the Governor. Indeed, in practice entities with both legislative and executive appointees have been housed within many different state departments, including the Executive Department (see Envir Conser Law § 44-0105[1] [Hudson River Valley Greenway Communities Council, placed in the Executive Department, consists of members appointed by the Governor, Legislature, select counties, and the Mayor of the City of New York]; Exec Law § 702[1] [Most Integrated Setting Coordinating Council, placed in the Executive Department, has members appointed by both the Governor and Legislature]).

In sum, I find that New York separation of powers concerns are not controlled by federal precedent, and given the history and practice of this State, the limited powers assigned to the CPC, and the traditional role played by the judiciary in regulating attorney conduct, no facial violation of separation of powers principles has been brought about by Article 15-a.

V. The CPC and the State's Civil Department Structure

As initially created in Chapter 202, the Commission was not assigned to one of the State's departments. To address this issue, the 2019 amendments placed the Commission within the "Executive Department" (Jud Law § 499-a). Plaintiffs argue that this "superficial change did not cure the problem," and that the statute as amended violates the requirement in Article V, Section 2 of the State Constitution that "[t]here shall be not more than twenty civil departments in the state government" (*see* Pl MOL 35). Specifically, plaintiffs maintain that because the Commission "remains unaccountable to any civil department head, the Governor, or any other superior authority within the executive branch, it contravenes the structure and purpose of the civil department system" (*id.* at 36).

Defendant contends that the purely cosmetic task of announcing the placement of a body within one of the twenty departments is "absolutely . . . all [that is] required" to comply with Article V, Section 2, while speculating that such placement is not meaningless, since it "may have implications for all manner of administrative and budgetary aspects of the operation of that branch in terms of who they go to for getting allocations from the state's budget and how they go about appointing various individuals who may work as employees of CPC and so forth" (Tr 52).

This argument presents troubling questions regarding the implementation of the constitutional requirements of this section. It is clear, on the one hand, that the 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 through reducing the then-existing "miscellaneous collection of 187 offices, boards, commissions and other agencies ... independent of one another and most ... subject to no direct and effective supervision by a superior authority" into a consolidated set of departments (*see Matter of Capellii*, 167 Misc 2d at 227-228). On the other hand, it is equally clear that the practice of complying with the resulting constitutional language by merely "labeling" a commission or board as being housed within a particular department, notwithstanding that it is run by its own board, is entirely commonplace[20] (*see e.g.* Exec Law § 94 [placing Joint Commission on Public Ethics in the Department of State, although run by board appointed by Legislature, Governor, Attorney General and Comptroller]; Work Comp Law §§ 76 & 77 [continuing State Insurance Fund within the Department of Labor, subject to board appointed by Governor, including upon recommendation of various legislative leaders and outside groups]; *see*

[20] Another means used to avoid the limitation, apparently common at one time, was to create longstanding but ostensibly "temporary" bodies, which are exempt from the limitation to twenty departments (*see McCardle v Curran*, 74 Misc 2d 163 [Sup Ct, Albany County 1973].

also supra p 35).

As *Matter of Capelli* makes clear, however, while the purpose of the amendments to Article V was to consolidate the far flung state agencies into a limited number of departments, it gave "the Legislature the responsibility to devise the precise details of the new scheme" (167 Misc 2d at 230). Over time, the Legislature has interpreted that provision loosely, to allow for the creation of new boards essentially independent of the departments where they are housed. Not a single case has struck down the creation of a body as outside the limitations of Article V, Section 2, and to do so would involve the Courts in the particularly inappropriate task of monitoring the structure of State government, either abolishing non-confirming boards or requiring that they have some kind of non-cosmetic relationship with the department where they have been placed. Given the historical record, and the dearth of any legal authority for this far-reaching alternative, I cannot say that the statute violates Article V, Section 2 (*see id.* at 232 [looking at prior decades of practice in determining appropriate construction of Article V, Section 4]).

VI. Article 15-a and Powers of the Chief Judge

Plaintiffs argue that the powers of the Chief Judge of the Court of Appeals are limited by the State Constitution, and do not encompass the authority granted the Chief Judge by Article 15-a to make member appointments to the CPC (Pl MOL 36). This argument, however, runs contrary to the constitutional provisions governing the powers and duties of the Chief Judge, and those which grant the Legislature authority to regulate the court system.

Pursuant to Article VI, Section 28(a) of the Constitution, the Chief Judge of the Court of Appeals is "chief judge of the state of New York and shall be the chief judicial officer of the unified court system." Section VI, Section 28(b) further provides for the appointment of a chief

administrator, through whom the Chief Judge is responsible for the supervision and the administration and operation of that system (*see Corkum v Bartlett*, 46 NY2d 424, 428-429 [1979] [citing Article VI, Section 28[b] and finding that administrative powers of the Chief Judge over the unified court system "are complete"]). This constitutional grant of administrative power "is not to be read in [a] hyperrestrictive manner" (*id.* at 430).

This authority, however, is subject to Article VI, Section 30 of the Constitution, which provides that the Legislature has the same authority to regulate the jurisdiction of the courts as it did prior to the enactment of the current Constitution, as well as to regulate their practice and procedure (*Bloom v Crosson*, 183 AD2d 341, 344 [3d Dept 1992], *affd* 82 NY2d 768 [1993]; *see also Cohn v Borchard*, 25 NY2d 237, 247 [1969] ["authority to regulate practice and procedure in the courts lies principally with the Legislature"]). Thus, under New York's "constitutional scheme, the authority to regulate the courts is split between the Legislature and the Chief Judge" (*Bloom*, 183 AD2d at 344).

Pursuant to this authority, the Legislature may vest the judiciary with new powers that are "reasonably incidental to the performance of judicial duties" (*In re Richardson*, 27 NY 401, 410 [1928] [Cardozo, C.J.]). This standard applies specifically to a statute vesting judges with the power of appointment (*see id.* at 418]).

Richardson derived this standard from *People v Hall* (169 NY 184 [1901]), which upheld a statute authorizing the Appellate Division to appoint Commissioners of Jurors. Among other things, *Hall* noted that the State Constitution of 1846 contained a provision stating that judges of the court of appeals and justices of the supreme court should not "exercise any power of appointment to public office," but that provision was then omitted from the Constitution of 1870, and replaced with language barring judges from "hold[ing] any other office or public trust" (*id.* at

195). Language materially the same remains in the Constitution today, stating that judges may not "hold any other public office or trust except an office in relation to the administration of the courts" (*see* NY Const art VI, § 20[b][1]). The 19th Century clause precluding judges from exercising any appointing authority remains absent from the constitutional text.

Hall found that this change in language made clear that a judge "is no longer prohibited absolutely from appointing to public office,"[21] provided such appointment is relevant to Court administration (169 NY at 195). *Hall* held this to be true in regard to the appointment before it, since it "aids the judges in the performance of their judicial functions" (*id.* at 196).

The same principle applies here. The judiciary, and the Chief Judge at its head, has the "inherent power to address actions which are meant to undermine the truth seeking function of the judicial system and place in question the integrity of the courts and our system of justice" (*CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014]; *see also Moxham v Hannigan*, 89 AD2d 300, 302 [4th Dept 1982] ["it cannot be disputed that a Judge [including the Chief Judge] has the overriding duty to preserve the integrity and honor of the judicial system"]). The Legislature's assignment to the Chief Judge of appointing authority to a Commission tasked with oversight of misconduct by prosecutors in judicial proceedings is consistent with that inherent power.

Further, the grant of such appointment power to the Chief Judge is neither unusual nor a departure from prior practice. The Constitution itself tasks the Chief Judge with making appointments to the Commission on Judicial Conduct and Commission on Judicial Appointment (*see* NY Const art VI, §§ 2, 22), and both the Legislature and the Office of Court Administration in its own rules have given the Chief Judge appointment authority to boards involved with the

[21] Although the Court made this point specifically in relation to Supreme Court Justices, the same principle applies with equal force to judges of the Court of Appeals, including the Chief Judge.

oversight of the court system (*see* NY Exec L § 833 [Indigent Legal Services Board]; NY Legis L § 1-1 [1-t] [Advisory Council on Procurement lobbying]; NY Ct Rules, § 137.3 [Fee Dispute Resolution Program]; NY Ct Rules, § 51.1 [Permanent Commission on Access to Justice]).

In sum, granting the Chief Judge appointments to the Commission does not exceed the Legislature's authority to give the judiciary the power to make appointments "reasonably incidental to" and in aid of the performance of judicial functions.[22]

VII. Conflict with the Appellate Division's Role in Attorney Discipline

Plaintiffs also challenge the statute on the ground that it would interfere with what they characterize as the exclusive authority of the Appellate Division over matters of attorney discipline, in so far as the CPC has the authority to admonish and censure attorneys, as well as recommend their removal, on the basis of violations of attorney disciplinary rules. Defendant's argument in this regard is based on Article VI, Section 4(k) of the New York Constitution, which provides as relevant here that "[t]he appellate divisions of the supreme court shall have all the jurisdiction possessed by them on the effective date of this article [i.e. September 1, 1962] and such additional jurisdiction as may be prescribed by law." It is plaintiffs' contention that this provision locked in the exclusive authority the Appellate Division held over attorney discipline at that time, and that the powers granted to the CPC render the Appellate Division's authority in this area non-exclusive, thereby unconstitutionally reducing its jurisdiction (*see* PL MOL 42 ["Article 15-a not only destroys the Appellate Division's exclusive authority to say what constitutes attorney misconduct, it also impermissibly shrinks the Appellate Division's jurisdiction (because those claims will no longer be decided by an Appellate Division attorney

[22] In making this finding, I do not, of course, express any view as to whether the statute will actually advance these goals. The point is that given the legislative purpose underlying the creation of the CPC, it was permissible to give the Chief Judge the authority to make appointments thereon.

grievance committee)"]).

To address this argument, I must answer four questions: (1) whether the jurisdiction of the Appellate Division over discipline has been written into the Constitution by the enactment of Article VI, Section 4(k); (2) whether any such constitutionalized jurisdiction requires that the Legislature preserve the *exclusivity* of that authority as a constitutional mandate; (3) whether such exclusivity is broad enough to cover actions that do not impact an individual's law license, such as the admonition, censure and recommendation of removal which may be issued by the Commission; and (4) whether the role played by Appellate Division judges set forth in the statutory scheme sufficiently preserves its jurisdiction, so as to avoid any constitutional violation.[23]

I answer the first three questions in the affirmative, and the last in the negative. As a result, I find that by this argument plaintiffs have identified a constitutional flaw in the statute. The explanation requires some historical background.

As noted *supra* pp 32-33, the task of overseeing attorney discipline has been the province of the judiciary since before New York was a State.[24] After the Appellate Division was created following the Constitutional Convention of 1894, in 1912 the Legislature vested it by statute with the power to "censure, suspend from practice or remove from office any attorney and counselor at law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud,

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[23] As discussed in the following section, no Appellate Division plays a role in reviewing the decisions of the Commission as such; rather, the statute creates a new appellate body, consisting of the four presiding justices of the various Appellate Divisions, which may review the determinations of the CPC should the prosecutor choose to appeal. To keep distinct the issues addressed in this section and the next, I will presume for purposes of the present discussion that the presiding justices may constitute the "Appellate Division," and will leave for later the question of whether this contention is, in fact, legally sustainable.

[24] Justice Cardozo, writing prior to enactment of the constitutional clause at issue, noted the question at the heart of the present dispute, but declined to rule on it: "whether the power may be withdrawn or modified by statute" (*People ex rel Karlin*, 248 NY at 477).

deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice," along with other sanctionable offenses (*see In re Robinson*, 209 NY 354, 355 [1912]). Such authority was implicitly imported into the State Constitution in 1925, when the Appellate Division was granted "such original or appellate jurisdiction as is now or may hereafter be prescribed by law", a change interpreted as 'influenced by a desire to preserve the jurisdiction of the Appellate Divisions as broadly as it was then constituted' " (*People v Pollenz*, 67 NY2d 264, 268 [1986], citing 9 New York Constitutional Convention of 1938, Problems Relating to Judicial Administration and Organization, at 97 [Poletti ed.]).

The same intention underlay the amendment to the Constitution creating the present Section 4(k). A proposal in 1957 to create a tribunal separate from the Appellate Division was shelved "for fear that the creation of a separate court with a new definition of appellate and original jurisdiction might unwittingly result in the loss of some jurisdiction" (*id.* at 268 [citation omitted]). A second proposal to restrict the Appellate Division's jurisdiction to that "provided by law" was rejected as well (*id.*). The result was the current formulation, which was clearly intended to "constitutionalize" the then-existing jurisdiction of the Appellate Division (*see People v Lopez*, 6 NY3d 248, 260 [2006]). That is, section 4(k) "fixed the floor of the jurisdiction of the Appellate Division as it existed on September 1, 1962" (*see People v Farrell*, 85 NY2d 60, 65 [1995]).

As noted above, this jurisdiction included the power to discipline attorneys. In light of section 4(k), such authority "can only be limited by constitutional amendment" (*id.* at 262 n 7). Otherwise, the Legislature is barred "from reducing the jurisdiction of the Appellate Division in any way" (*Pollenz*, 67 NY2d at 268).

The Speaker asserts that Section 4(k) only preserves the jurisdiction of the Appellate

Division over appeals from final judgments, and "does not address the scope of the Appellate Division's authority over attorney discipline at all" (Def MOL 55). But there is nothing in the provision that sets forth any such limitation. To the contrary, the drafters of this provision could easily have said that the Appellate Division has "all the *appellate* jurisdiction" that it held at the time Section 4(k) was enacted; instead, it preserved "all the jurisdiction" held by that Court except as to appeals from non-final orders. No exclusion is made for jurisdiction over discipline, and defendant points to no caselaw or legislative history which would suggest that it is not covered by the provision's expansive language.[25] To the contrary, *Pollenz* specifically notes that "[j]urisdiction is a word of elastic, diverse, and disparate meanings" that should not be given a "narrow definition" and that section 4(k) provides generally that the Legislature may not "contract" the Appellate Division's jurisdiction (*id.* at 269, 270). Thus, I find that the Appellate Division's authority over attorney discipline was indeed "constitutionalized."

As to the second question raised above, there is no doubt that as of the effective date of the amendment, the Appellate Division's jurisdiction to "say what constitutes professional misconduct" by members of the bar was exclusive (*see Erie County Water Auth.*, 304 NY 342, 346 [1952] ["The members of the profession of the Bar in this State are officers of the New York Supreme Court and the Appellate Division of that court has exclusive jurisdiction to say what constitutes professional misconduct on their part"] [citing both Judiciary Law § 90[2] and *Matter of Karlin*]).

At least until enactment of Article 15-a, the Appellate Division's authority over attorney

[25] Defendant cites *Pollenz* for the proposition that the decision " 'was intended to render inapplicable the general rule that the right to appellate review is purely statutory' and to 'prohibit legislative curtailment of Appellate Division jurisdiction over appeals from final judgments' " (Def MOL 56, *citing* 67 NY2d at 268-269). That is true as far as it goes, but *Pollenz* nowhere indicates that this is *all* the language was intended to do, or that it does not address other aspects of the Appellate Division's jurisdiction. Defendant is also correct that the caselaw addressing the Appellate Division's exclusive authority over discipline cites to Judiciary Law § 90. But this ignores the fact that Section 4(k) has been found to "constitutionalize" the pre-existing statutory jurisdiction of the Appellate Jurisdiction.

discipline continued to be recognized exclusive as a matter of law (*see Taub v Committee on Professional Standards, Third Judicial Dept.*, 200 AD2d 74, 77 [3d Dept 1994] ["attorney misconduct and discipline . . . are matters within the exclusive jurisdiction of the Appellate Division"]; *see also Hill v Committee on Professional Standards of the Third Judicial Dept.*, 5 AD3d 835, 836-837 [3d Dept 2004] [petitioner could not challenge disciplinary investigation in Supreme Court proceedings, but had to do so in the Appellate Division since the latter court "has exclusive jurisdiction over the attorney disciplinary process"]).

That exclusivity is complicated by the fact that trial courts and administrative agencies are consistently called upon to construe the ethical rules relevant to matters before them, in such areas as determining whether an attorney should be disqualified from representing witnesses for violation of solicitation rules (*Rivera v Lutheran Medical Center*, 73 AD3d 891 [2d Dept 2010]); whether an attorney has an impermissible conflict of interest because of prior representation (*see Patrolmen's Benevolent Association v New York State Public Employment Relations Board*, 175 AD3d 1703 [3d Dept 2019]); and whether an attorney can communicate with unrepresented parties (*Niesig v Team I*, 76 NY2d 363 [1990]).[26] The Second Department addressed this seeming contradiction in the following language (with citations and internal quotation marks omitted):

> "In making a finding as to whether ADAs . . . are violating ethical rules, [the trial judge] would not purport to be determining an application for discipline of those ADAs. Were he to do so, he clearly would be acting in excess of [his] authorized powers because only the Appellate Division of the Supreme Court is authorized to entertain applications to discipline attorneys guilty of professional misconduct. That is not to say, though, that the Appellate Division of the Supreme Court is the only court authorized to consider or make a finding with respect to whether an

[26] Each of these cases passed through the Appellate Division, but the construction of the ethical rules they raised had to be performed in the first instance by the trial court or administrative agency.

> attorney has engaged in professional misconduct. Indeed, trial-level courts often make such findings"[27] (*Brown v Blumenfeld*, 89 AD3d 94, 102 n 5 [2d Dept 2011]).

In other words, while a court or administrative agency may opine on questions of professional misconduct as incident to and necessary to decide matters properly before that tribunal, the exclusive jurisdiction of the Appellate Division over attorney discipline does not allow any other body to impose sanction as a form of discipline for professional misconduct, not ancillary to some question falling otherwise within its jurisdiction. For a body besides the Appellate Division to do so would be, in the words of the *Brown* Court cited above, "in excess of [its] authorized powers" (*id.*; *see also Matter of Taylor v Adler*, 73 AD3d 937, 938 [2d Dept 2010], *appeal denied* 15 NY3d 712 [2010] ["only the Appellate Division of the Supreme Court and not an IAS, special, trial, or other term of the Supreme Court has jurisdiction over attorney disciplinary matters"]).

Nor does defendant's point that violations of ethics rules may be fodder for other legal actions, such as malpractice suits or criminal prosecutions (Def MOL 57) undermine the conclusion that the Appellate Division has ultimate authority for disciplinary matters, since such cases generally do not require a construction of the Rules of Professional Conduct, and if they do, it is ancillary to the underlying proceeding.[28]

With these principles in mind, I find that such exclusive jurisdiction has been constitutionalized by section 4(k). In this regard, I am not persuaded by the Speaker's assertion

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[27] In *Brown*, the Court found the trial Court acted in excess of its jurisdiction in excluding a videotaped statement on the ground that it was taken by an ADA in violation of the Rules of Professional Responsibility, rather than applying the appropriate provisions of the Criminal Procedure Law.

[28] Along the same lines, the Legislature may pass substantive rules governing the practice of law (*Forti v New York State Ethics Commn.*, 75 NY2d 596, 615 [1990]; *see also* NY Const art VI, § 30 [noting that Legislature has power to "regulate practice and procedure in the courts"]). That does not contradict the key point made here: the only entity that may render decision on whether a particular attorney has violated the code of professional conduct in New York State, and determine the appropriate sanction, is the Appellate Division.

that the amendments effected by this legislation cause no diminution of the powers of the Appellate Division in violation of this section, since the Appellate Division retains the same power, only it must share such authority with another government body. This conclusion is supported by analogy to caselaw construing the provisions of the Home Rule Law that bar the abolition, transfer or curtailment of a mayor's powers absent referendum (*see e.g.* Home Rule Law § 23[f]). In this context, courts have held that a measure that "diminishes *or divides* any power enjoyed" by the mayor violates this provision (*Mayor of City of New York v Council of City of New York*, 1995 WL 478872, *6 [Sup Ct, NY County 1995]), *affd* 235 AD2d 230 [1st Dept 1997], *lv denied* 89 NY2d 815 [1997]; *see also Mayor of City of New York v Council of City of New York*, 6 Misc 3d 533, 536 [Sup Ct, NY County 2004] [under such provision "an elected official may not be required to share his or her statutory power with other officials"]).

Indeed, the 1995 litigation between the Mayor and City Council of the City of New York is remarkably on point with many of the matters in the present dispute. At issue was whether the City Council could enact Legislation to create an Independent Police Investigation Board with responsibilities to investigate police corruption that overlapped with those of the New York City Police Commissioner. Although the City Council argued (like defendant here) that this was a mere "advisory body, devoid of any policy making powers (*Mayor of the City of New York*, 1995 WL 478872, at *5), the Court nevertheless found that the powers of the new body "compete[d] with the right and obligation of the Mayor, through his appointees, to act so as to ensure the effectiveness and integrity of the Police Department" (*id.* at *6). In particular, the Court found that the "explicit retention by the Police Commissioner of his powers to investigate and discipline do not make the Board's intrusion into the management of the Police Department's affairs any less offensive," since it created a "[d]ivision of or sharing of powers formerly residing

in one . . . body" and thus constituted "as much a curtailment of those powers as . . . an outright transfer" (*id.*).

This is precisely what happens in regard to the Appellate Division's authority over the discipline of prosecutors under the present legislation. The Appellate Division presently has exclusive jurisdiction over attorney discipline, including the ability to issue "public censures" of attorneys who violate the disciplinary rules. Article 15-a would create a parallel body, which would have the same power to determine whether there have been violations of the Rules of Professional Responsibility, and to impose censure for such violations. Indeed, under the law as enacted the conduct could be referred to both the disciplinary committee of Appellate Division and the CPC, with the former determining no violation had occurred, and the latter censuring the prosecutor. It is hard to see how this does not reduce the jurisdiction of the Appellate Division to pronounce on such questions. As the *Mayor of the City of New York* case makes clear, the creation of such overlapping and potentially conflicting authority diminishes the jurisdiction of the Appellate Division, in violation of Article VI, Section 4(k) of the State Constitution.

Defendant suggests that since none of the Commission's available sanctions can impact a prosecutor's law license, the CPC's work does not intersect with that performed by the Appellate Division. By this logic, since all the CPC's sanctions essentially involve nothing more than the Commission expressing an opinion about the conduct at issue, it no more interferes with the exclusive authority of the Appellate Division than does any other government official in expressing his or her viewpoint about a lawyer's conduct (*see* Tr 24 ["the censure and admonishment that we have in the statute are effectively critiques of the work of the ADA, they're not someone taking over that job [of the Appellate Division in disciplining attorneys]).

But that is *not* all that the CPC does; it makes an official finding as to whether particular

misconduct runs afoul of the disciplinary rules, and imposes a specific kind of discipline – public censure – which is among the sanctions at the Appellate Division's disposal (*see* Judiciary Law § 90[2] [listing "public censure" among outcomes which may be imposed in attorney guilty of disciplinary violations]). In this way, the Commission conflicts with the principle that "the four Appellate Divisions of that Court shall have exclusive jurisdiction in their respective Judicial Departments to say what constitutes professional misconduct" (*see Midner v Gulotta*, 405 F Supp 182, 289 [ED NY 1975]; *see also Taub*, 200 AD2d at 274 [Supreme Court lacked subject matter jurisdiction to rule in declaratory judgment action as to whether Appellate Division's Committee on Professional Standards correctly found attorney had violated rules of professional conduct, "[i]nasmuch as attorney misconduct and discipline therefor are matters within the exclusive jurisdiction of the Appellate Division"]).[29] Specifically, the problem is that the Commission does in regard to the Rules of Professional Responsibility *exactly* what the Appellate Division is tasked with doing: it determines whether a violation has occurred, and imposes sanction thereon.

Defendant also argues that the CPC does not interfere with the Appellate Division's exclusive authority over discipline since the Appellate Division judges may hear appeals from the CPC's determinations, and thus "their role under Article 15-A is consistent with their oversight of attorney professional ethics more generally" (Def MOL 58). That argument is unpersuasive for two reasons. First, Article 15-a allows for the Commission's determination to become final if not appealed by the prosecutor – which appeal the prosecutor may well forego, since it potentially subjects him or her to a worse consequence (*see* Jud Law § 499-f). If this occurs, the process set forth in the statute contemplates that the Commission can issue final determinations construing the rules of attorney ethics and imposing sanction without any

[29] *Taub* found the Court could rule on whether the discipline was constitutional under the First Amendment, but that is an entirely different question.

involvement by the Appellate Division or the judges thereof at all.[30] This is not, in short, a case where the Commission is engaging in fact-finding, but leaves the ultimate determination to the Appellate Division. Rather, the Commission has the ability to issue a final ruling on whether or not an attorney has violated the Rules of Professional Conduct, and to sanction that attorney with one of the very consequences which the Appellate Division has at its disposal.

Second, this argument elides the fact that it is *not* the Appellate Divisions at all who hear appeals under the statute, but the presiding justice of each Appellate Division, acting together as a newly formed appellate tribunal. As a result, the provisions for appellate review set forth in Article 15-a cannot cure the conflict with the Appellate Division's authority that the establishment of the CPC creates. In addition, that structure suffers from its own constitutional defects, as discussed in the next section.

VIII. The Role of the Appellate Division Presiding Justices

Under Article 15-a, when the CPC determines that a prosecutor should be admonished or censured, or when it recommends removal, the prosecutor may seek judicial review by making a written request – not to the Appellate Division within which his or her district attorney's office is located – but instead to the "presiding justices" of all four departments comprising the Appellate Division (Jud. Law § 499-f[7]). The presiding justices then engage in a *de novo* review of the CPC's findings of fact and conclusions of law and either "accept or reject the determined sanction; impose a different sanction including admonition or censure, recommend removal or retirement . . . or impose no sanction" (*id.* § 400-f[8]). The statute further provides that "the presiding justices may suspend a prosecutor from exercising the powers of his or her office while there is a pending determination by the commission for his or her removal or retirement, or while

[30] As described *infra*, even after such a final determination, the matter may still – and in some instances *must* be – referred to the Appellate Division in any case, which can produce contradictory results.

he or she is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one of the [state] constitution" (*id.* § 499-f[9][a]).

The constitutionality of these provisions must be assessed against the backdrop of the overall constitutional structure of the Appellate Division. Under Section 4 of Article VI, the State is divided into four judicial departments (NY Const, art. 6, § 4[a]). Each department consists of a set number of justices appointed by the Governor, who also appoints a presiding justice in each department (*id.* § 4[b], [c]). The Constitution provides for only one instance in which the Appellate Division presiding justices may meet as a body: for the purpose of re-assigning cases when one department is unable to dispose of its business within a reasonable time (*see id.* § 4[g]).

A Justice of the Appellate Division cannot serve in the capacity of an appellate judge outside of the department that he or she was appointed to, unless "temporarily assigned by the presiding justice of his or her department to the appellate division in another judicial department upon agreement by the presiding justices of the appellate division of the departments concerned" (*id.* § 4 [h]). Furthermore, an Appellate Division Justice is not permitted, within the department to which he or she was appointed, to "exercise any of the powers of a justice of the supreme court, other than those of a justice out of court, and those pertaining to the appellate division [with certain limited exceptions]" (*id.* § 4[j]).[31]

The four Appellate Divisions have jurisdiction over appeals from final judgments or orders within their respective departments (*id.* § 4[k]). In addition, as noted "the appellate divisions of the supreme court shall have all the jurisdiction possessed by them on the effective

[31] The Constitution, however, expressly provides that a justice "when not actually engaged in performing the duties of such appellate justice in the department to which he or she is designated, may hold any term of the supreme court and exercise any of the powers of a justice of the supreme court in any judicial district in any other department of the state" (NY Const, art VI, § 4 [j]).

date of this article [September 1, 1962] and such additional jurisdiction as may be prescribed by law."[32]

The Speaker relies on this last clause to argue that the Legislature had the constitutional authority to create jurisdiction in the presiding justices to hear appeals from CPC (*see* Tr at 62). But the Constitution permits the Legislature to expand the authority of the "appellate divisions," the plural clearly referring to the four departments.[33] Neither one nor all four of the presiding justices constitutes the "appellate division", which, under the Constitution, is no less than seven justices in the first and second department and five justices in the third and fourth departments (NY Const, art VI, § 4[b], [e]). Moreover, in each of the departments, the Appellate Division, when deciding an appeal, shall have not more than five nor less than four of the department's justices sitting on any case (*id.* § 4[b]).

There is nothing in the Constitution which would allow the Legislature to cobble together particular judges from each Appellate Division and vest this new body with jurisdiction nowhere provided for in the Constitution itself. Indeed, the only means whereby a justice, including a presiding justice, can serve in an appellate capacity in a department outside of where he or she was appointed is spelled out in the Constitution: upon an agreement reached by the presiding justices of the respective departments (*id.* § 4[h]). To the extent one might argue that, under

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[32] To the extent the Legislature has the power to regulate the jurisdiction and proceedings of courts in law and in equity under Article VI, Section 30 of the Constitution, such power, pursuant to the Constitution, may only be utilized "as heretofore exercised [which] did not include the power to revoke or limit jurisdiction when the Constitution had otherwise provided" (*Application of Chin*, 41 Misc 2d 641, 649 [Sup Ct, Westchester County 1963]; *see also Riglander v Star Co.*, 98 AD 101, 105 [1st Dept 1904], *affd* 181 NY 531 [1905] ["The courts are not the puppets of the Legislature. They are an independent branch of the government, as necessary and powerful in their sphere as either of the other great divisions"]).

[33] At oral argument, defendant suggested that the plural could refer to all of the Appellate Division justices, or to the Court as a body (Tr at 61). If that is the case, it is unclear why the reference should not be to the "justices" rather than "divisions." Moreover, the Speaker's position at oral argument that the presiding justices could fall within the definition of "Appellate Division" is contradicted by his own earlier submission, which denied that he was advancing any such construction (*see* Def Reply MOL 3 ["Article 15-A does not call for action by the Appellate Division"]).

Article 15-a, the presiding justices are not acting in an appellate capacity, the Constitution bars them from serving as a supreme court justice in any other capacity, except in limited circumstances not applicable here (*id.* § 4[j]).

The statute's creation of an appellate body consisting solely of the presiding justices, heretofore unknown in New York law and not tasked with appellate authority by the New York State Constitution, is not a mere technical defect, but one with broad implications for the court system and the authority of the Legislature, and which would create overlapping, duplicative and contradictory processes. That is particularly the case given the authority of the Appellate Divisions – which the statute leaves intact – to oversee the same attorney disciplinary rules which the presiding justices would be called upon to construe as part of their authority under Article 15-a.

Consider the following: whenever a prosecutor is found by the Commission to have violated New York's Rules of Professional Conduct, the prosecutor will have the option to appeal to the presiding justices. At the same time, there may be – and in many cases *must* be – a referral to the *Appellate Division* disciplinary process (*see* Jud Law § 499-f[10] ["If during the course of or after an investigation or hearing, the commission determines that the complaint or any allegation thereof warrants action . . . within the powers of . . . (b) and appellate division of the supreme court . . . the commission shall refer such complaint or the appropriate allegations thereof and any evidence or material related thereto to such person, agency or court for such action as may be deemed proper or necessary"]).[34] These two judicial bodies, with overlapping

[34] Even if this could be read as not requiring a disciplinary report in a particular case, once a finding of a disciplinary violation arrives on the desk of the presiding justices, a mandatory report might be warranted (*see* 22 NYCRR § 100.3[D][2] ["A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Rules of Professional Conduct (22 NYCRR Part 1200) shall take appropriate action"]).

jurisdiction (and potentially overlapping composition, as a presiding justice could sit on both panels), will then decide the same matter, with potentially conflicting results (*see* Tr 70-71 [acknowledgment by defendant that results of Appellate Division and presiding justices may conflict]). Moreover, in the case of a disciplinary referral, the prosecutor may appeal to the Court of Appeals (*see* Judiciary Law § 90[8]), which route is not available from a determination of the new presiding justices panel that the statute would create. Thus the panel of presiding justices may reach a decision that may be in conflict with the Court of Appeals. Alternatively, the determination of the presiding justices could be held to have res judicata effect on the Appellate Division's disciplinary committee, thereby precluding it from rendering an original decision in a matter within its jurisdiction (*see* Tr at 81). In short, creating an entirely separate avenue of appellate review from that created by the Constitution, is both impermissible under, and inimical to, the constitutional framework.[35]

In his post-argument submission, the Speaker points to several additional constitutional provisions which, he avers, allow for the structure created here. He cites language in Article VI, Section 20(b), which provides an exception from the general bar against judges accepting any public office or trust for "an office in relation to the administration of the courts" (*see* Plaintiffs' Post-Argument Letter of 12/11/19 ["Pl Post-Arg Ltr"] 1). The statute at issue here gives presiding justices the role of hearing appeals and issuing rulings, which functions have never been understood as "administrative" tasks. In any event, this provision cannot be read as allowing a separate and parallel appellate process from that specifically created in the

[35] Speaker Heastie contends that arguments about the potentially conflicting outcomes fostered by the new rule reflect a mere "policy disagreement, not a constitutional challenge" (Def Reply MOL 24). But as set forth above, the creation of a new presiding justice panel is contrary to the specific structure of the Appellate Division provided for under Article VI, which is intended to be exclusive. The point of the above illustration is to show that the violation is not a mere technical defect, but one with significant consequences for attorney discipline and the constitutional process for appellate review.

Constitution under the guise of administrative work.

Defendant also contends that the creation of the "presiding justices panel" is permissible under Article VI, Section 30, which in relevant part recognizes that the Legislature has "the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised." This allows the Legislature, for example to grant courts of limited jurisdiction concurrent jurisdiction over matters assigned to Supreme Court (*see Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 184 [1990]). But the long-recognized authority to grant concurrent jurisdiction with the Supreme Court does not permit the creation of a new judicial body with judges of the Appellate Division whose role is constitutionally defined, and which is nowhere provided for in the constitutional provisions governing the Appellate Division (*see People v Correa*, 15 NY3d 213, 229 [2010] [power to vest concurrent jurisdiction in other courts does not allow for any limitation on Supreme Court jurisdiction]).[36]

In addition to this structural defect, the appellate process created by the statute suffers from two additional constitutional flaws. First, the presiding justices of Appellate Division, like any judges, cannot be directed by the Legislature to issue a determination that is not judicial in nature, meaning a pronouncement that "ends in nothing, that establishes no right and prevents no wrong, either directly or indirectly," such as an advisory opinion (*In re Davies*, 168 NY 89, 104-105 [1901]; *see also New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 529-530 [1977] [advisory opinions are not part of the Judiciary's function]). That is exactly what the statute would have the presiding justices do in certain instances here – issue a "recommendation" regarding removal, which the Governor may adopt or ignore, in his or her sole discretion. This is

[36] In his post-argument letter, the Speaker states that the presiding justices are engaging in "traditional appellate duties relating to attorney discipline" (Def Post-Arg Ltr 2). But if that is the case, it is unclear what authority the Legislature had in this instance to assign such a traditional appellate role away from the Appellate Division to a new configuration of appellate justices.

clearly outside the bounds of a judge's purview. In this regard, it is worth quoting and length the words of then-Chief Judge Cardozo, in holding unconstitutional a statute that placed upon judges the task of conducting an investigative proceeding whose purpose was to inform the Governor's determination as to whether to exercise the statutory power of removal:

> "We think there has been an attempt by [the statute at issue], to charge a justice of the Supreme Court with the mandatory performance of duties non-judicial. He is made the delegate of the Governor in aid of an executive act, the removal of a public officer. At the word of command he is to give over the work of judging, and set himself to other work, the work of probing and advising. His findings when made will have none of the authority of a judgment. To borrow Bacon's phrase, they will not 'give the rule or sentence.' They will not be preliminary or ancillary to any rule or sentence to be pronounced by the judiciary in any of its branches. *They will be mere advice to the Governor, who may adopt them, or modify them, or reject them altogether*"

(*In re Richardson*, 247 NY at 410 [citation omitted and emphasis added]; *see also id.* at 411 [Judges are "not adjuncts or advisers . . . of other agencies of government [and t]heir pronouncements are not subject to review by Governor or Legislature"]).

There is simply no way to square the contours of the judicial role described in *Richardson* with the advisory function vested in the presiding justices by the statute in this case. The role found impermissible in that case is precisely the task given the presiding justices here: advising the Governor on whether or not to remove a public official.

Defendant contends that this advisory role is no different from others assigned to the judiciary. In particular, they cite CPL §§ 190.85 and 190.90, which grant courts the authority to review grand jury reports (*see* Def MOL 55 n 34). But that statute requires a justice to review the report to "ensure that [it] is based on the credible admissible evidence presented to the Grand Jury and that it provides statutory procedural protections to identified and identifiable persons" – matters entailing legal determinations within the classic functions of the judiciary (*see Matter of*

Green v Giuliani, 187 Misc 2d 138, 144 [Sup Ct, NY Cty 2000]).

Defendant's reliance on *Matter of Green* as permitting the sort of judicial recommendation provided for by the statute here is also misplaced. In that case, the trial court upheld the constitutionality of NYC City Charter § 1109, which allowed a judge to preside over a summary judicial inquiry into the alleged violation or neglect of duty by a New York City official, involving the taking of transcribed testimony. The Court found this to be a lawful exercise of the judicial function because the Court's role entails such standard judicial functions as presiding over an adversary proceeding, taking testimony and "ruling as to relevancy and reliability under customary rules of evidence" (*id.* at 145).

That is not what is involved here. Under Article 15-a, the presiding justices (or the Appellate Division under plaintiffs' proposed reconfiguration of the language described below) issues an advisory determination on removal, which has no binding effect, and as to which the law provides no standards or rules on which such a determination is to be based. This falls outside the kind of judicial role upheld in *Matter of Green*, and falls squarely in the realm of an advisory opinion of the sort banned in *Matter of Richardson.*

Further, plaintiffs are also correct that giving the Appellate Division judges the power to suspend prosecutors "while there is pending a determination by the commission for his or her removal or retirement" and in certain other circumstances, is outside their constitutional role within the separation of powers framework.

The statute would allow these judges to determine, on a temporary basis, whether elected District Attorneys can be temporarily removed from elective office[37] (*see* Jud Law § 499-f[9][a])

[37] The Commission may recommend that a "prosecutor" should be removed, and the Governor may make a de novo determination to this effect, the removal process applies to ADAs, as well as DAs. As a result, under the statute the Appellate Division may suspend an ADA "pending a determination by the commission for his or her removal or retirement." At oral argument, counsel for defendant took the position that the Governor cannot actually

The Speaker argues that this responsibility is no different from that assigned to the Appellate Division in regard to attorney discipline generally, under which it can suspend a District Attorney *from the practice of law*. This would compel the DA's resignation as an ancillary consequence, triggering the constitutional and statutory provisions for replacement (*see* Def MOL 24; *Matter of Curry*, *supra* [DA must be licensed to practice law]). But here, the presiding justices would not be making a determination well within the courts' purview regarding an individual's law license; rather, they could – without the application of any apparent standards – rule that an elected official can no longer act in the capacity to which he or she was chosen by the voters. The temporary nature of the suspension (*see* Tr 86) would create a circumstance unknown to New York law: an elected official who cannot function in his or her official capacity, but remains in office, without any provision made for how he or she might return, and what would happen in the interim.[38] Indeed, since there is no time frame on when the Governor would need to decide on any recommendation for removal (and the Constitution does not provide one), the Appellate Division's suspension ruling would be indefinite.

The Constitution specifically delineates the process for removal of elected officials, and vests the authority to remove a DA in the Governor (NY Const art XIII, § 13). Granting authority to do so temporarily to the judiciary appears to directly conflict with the Governor's

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remove an ADA, but merely determine that he or she "should" be removed, which the Governor may enforce through his constitutional power to remove the DA (Tr 19-20). It is unclear under that construction what would happen to an ADA suspended under these provisions, since the Governor himself would only be issuing a recommendation as to the outcome. Since the parties' briefs do not address the process by which the Governor may determine that an ADA should be removed – and the concomitant ability of the presiding justices to suspend an ADA – I will not consider it here.

[38] The Legislature has in the past enacted statutes to deal with temporary absences of DAs in emergent circumstances, through the temporary designation of an ADA to act in the DA's stead (*see People v Lester*, 267 AD 537 [1944] [upholding constitutionality of law allowing ADA to act in DA's stead while he is serving in military during Second World War]). In contrast, I can find no circumstance where the Legislature provided for the temporary removal of a duly elected officer for an indeterminate period – by someone other than the constitutional official who has the authority to remove that individual from office permanently.

jurisdiction in this regard (*see Matter of Schumer*, 60 NY2d at 54 ["a District Attorney . . . is a constitutional officer chosen by the electorate . . . whose removal by a court [from a particular case] implicates separation of powers considerations"]). Granting the presiding justices the authority to take such a step with no end date and no provision for how the DA's responsibilities will be carried out in the meantime is at odds with the Constitution's provision for elected county prosecutors. As a result, the suspension provisions of the statute are not consistent with the constitutional roles of the judiciary or with Article XIII, Section 13 of the State Constitution.

IX. Severability

As set forth at length above, I find that granting authority to the CPC to issue final determinations (albeit subject to possible appeal) to impose discipline on attorneys for violations of the Rules of Professional Conduct, as provided for under Jud Law § 499-a and 499-f(1) violates Article VI, section 4(k) of the New York State Constitution in that it limits the exclusive jurisdiction granted the Appellate Division over such matters. I further find that Jud Law § 499(f)(7) - (9) of Article 15-a violates Articles VI and XIII of the New York State Constitution in that it vests in the presiding justices of the Appellate Division with authority nowhere set forth in the Constitution to review CPC determinations, suspend prosecutors, and recommend removal of prosecutors to the Governor.

In light of these rulings, I must consider whether the statute may be saved by severing the offending provisions, as defendant has suggested (*see* Tr 68). The statute contains a severability provision, stating that if "any part or provision of this act is adjudged by a court of competent jurisdiction to be unconstitutional or otherwise invalid, such judgment shall not affect or impair any other part or provision of this act, but shall be confined in its operation to such part or provision" (Ch 202 of the Laws of 2018, § 2).

The test for severability of portions of a statute is "whether the Legislature would have wished the statute to be enforced with the invalid part rescinded, or rejected altogether" (*People v On Sight Mobile Opticians*, 24 NY3d 1107, 1109 [2014] [internal quotation and citation omitted]). I therefore must determine if the above provisions found unconstitutional are "at the 'core' of the statute and interwoven inextricably through the entire regulatory scheme" (*id.* [internal quotation omitted]).

There is no doubt that the Legislature intended for the judiciary branch to play a significant role in evaluating whether a prosecutor's alleged misconduct impinges on the integrity of a district attorney's office. Indeed, the Legislature determined that use of the judiciary branch was so integral to the review of alleged prosecutorial misconduct, that when an appeal was taken, it withheld the power to admonish or censure a prosecutor from the CPC and placed it solely in the control of the presiding justices under de novo review, unless an appeal was not sought by the prosecutor (*see* Jud Law § 499-f[7]-[8]). Without the use of the presiding justices for the planned appeal process, prosecutors would be left with no mechanism to challenge the findings of the CPC, except in the context of removal and retirement, which would be presented to the Governor (*id.* § 499-f[8]). Indeed, the sponsors' memorandum in support of the Chapter Amendment noted that one purpose thereof was to "delegate more authority to the presiding justices of the Appellate Divisions" (Mem in Supp, Ch 23 of the Laws of 2019, Justification Section).

Based on the plain intent of the Legislature, I find that the attempt to use the Judiciary branch, through reference to the presiding justices of the Appellate Divisions, to be at the core of the statute and so interwoven that my ruling herein essentially removes provisions at the heart of the legislation. For these reasons, I find that these provisions of Article 15-a cannot be severed.

In a post-argument letter, defendant proposes an alternative outcome: for the Court to "sever" the offending language by striking the first four words each time the phrase "the presiding justices of the appellate division" appears in the statute, cleverly leaving behind the term "the appellate division" so as to make the avenue of appeal from CPC decisions the Appellate Division itself[39] (*see* Def Post-Arg Ltr 2). This I cannot do. The Court of Appeals has made clear that "[t]he doctrine of separation of governmental powers prevents a court from rewriting a legislative enactment through the creative use of a severability clause when the result is incompatible with the language of the statute" (*People v Marquan*, 24 NY3d 1, 10 [2014]; *see also Free Enterprise Fund*, 561 US at 510 [while the Court might "blue pencil" enough of the statute to render it constitutional, "such editorial freedom . . . belongs to the Legislature, not the Judiciary"]). The Court's language precisely characterizes what defendant is asking for here, and it is therefore impermissible.

In any event, "severing" the role of the presiding justices would not cure the other defects in the statute, and in particular the role assigned the CPC in issuing determinations on the Rules of Professional Conduct. Given my ruling barring the CPC from making such pronouncements under the statute as currently structured, this ruling would fundamentally alter the scope of the Commission's jurisdiction. Thus, this aspect of my decision cannot be severed, as it is addressed to a matter "interwoven inextricably through the entire [statutory] scheme" (*see Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation*, 75 NY2d 88, 94 [1989]). If there are to be adjustments to the legislation to render it constitutional, the appropriate entity to engage in that process is the Legislature, not the courts.

[39] By way of example, defendant would have me "sever" — that is, excise – the words "the presiding justices of" from the phrase "the presiding justices of the appellate division shall review the commission's findings of fact and conclusions of law " in Section 499-f, thereby making the Appellate Division the entity that would perform such review.

* * *

The parties and amici in this case has presented forceful arguments about the important policy concerns underlying the dispute at issue. Plaintiffs' assert that the creation of the CPC will interfere with and chill the independent operation of district attorneys, while defendant and amici believe that the CPC is an essential tool to correct a disciplinary process for prosecutors they view as deficient, and to thereby prevent future prosecutorial abuses of the kind that have led to the conviction of innocent defendants.

As weighty as these concerns are, the question before me at present is simply whether plaintiffs have shown that the legislative enactment of Article 15-a, clothed as it is with the presumption of constitutionality, is on its face is inconsistent with the provisions of the New York State Constitution.

As explained at length above, I find that while plaintiffs have failed to make such a showing as to a number of their arguments, they have demonstrated that the role given by the statute to the presiding justices of the Appellate Division is not permitted under New York's constitutional framework, and that the Commission in its presently defined capacity interferes with and thereby diminishes the Appellate Division's constitutional and exclusive jurisdiction over attorney discipline. Moreover, as these aspects of Article 15-a are central to the operation of the statute, they cannot be fixed through severance of the offending provisions.

Accordingly, for the reasons set forth above, it is hereby

ORDERED that the cross-motion of defendant Speaker Heastie is denied; and it is further

ORDERED that plaintiffs' motion for summary judgment declaring Article 15-a of the Judiciary Law unconstitutional, and permanently enjoining the State from implementing the

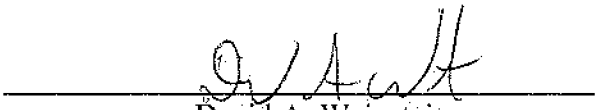
provisions of such statute, including the formation of the State Commission of Prosecutorial Conduct, is granted; and it is further

ORDERED AND DECLARED that certain statutory provisions of Article 15-a of the Judiciary Law violate the New York State Constitution, as set forth above.

This shall constitute the Decision & Order of the Court. This Decision & Order is being electronically filed with the County Clerk, with copies being simultaneously electronically provided to plaintiffs' and defendant's counsel through the New York State Courts Electronic Filing ("NYSCEF") system. The signing of this Decision and Order and electronic filing with the County Clerk shall not constitute notice of entry under CPLR 5513, and the parties are not relieved from the applicable provisions of that Rule respecting to filing and service of Notice of Entry.

ENTER

Dated: January 28, 2020
Albany, New York



David A. Weinstein
Acting Supreme Court Justice

Papers Considered:

1. NYSCEF Document Nos. 73-76 (Plaintiffs' moving papers).
2. NYSCEF Document Nos. 80-98 (Defendants' opposition and cross-moving papers).
3. NYSCEF Document Nos. 104, 110, 119 (Amici Curiae MOLs).
4. NYSCEF Document Nos. 115-116 (Plaintiffs' opposition/reply papers).
5. NYSCEF Document No. 124 (Defendants' reply papers).
6. Oral Argument Transcript.

7. NYSCEF Document Nos. 126-128 (Post-Argument letters).