No: CA22-01133

Supreme Court of the State of New York

Appellate Division—Fourth Department

GEORGE BORRELLO, New York State Senator, CHRIS TAGUE, New York State Assemblyman, MICHAEL LAWLER, New York State Assemblyman, and UNITING NYS, LLC, Individually, and on behalf of all those similarly situated,

Petitioners-Respondents,

v.

KATHLEEN C. HOCHUL, New York State Governor, MARY T. BASSETT, New York State Commissioner of Health, NEW YORK STATE HEALTH DEPARTMENT, and PUBLIC HEALTH AND HEALTH PLANNING COUNCIL,

Respondents-Appellants.

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS-RESPONDENTS AND AFFIRMANCE

May 23, 2023

Gregory Dolin, M.D.*
Counsel of Record
John J. Vecchione
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
greg.dolin@ncla.legal

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because legislatures, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern. These problems have manifested themselves at both federal and state levels. Unfortunately, New York is no exception.

[1] No party counsel authored any portion of this brief, and no party, party counsel, or person other than *amicus curiae* paid for this brief's preparation or submission. All parties have consented to filing of this brief.

NCLA strongly supports judicial enforcement of separation-of-powers principles, including the constitutional mandate that "[t]he legislative power of this state shall be vested in the senate and assembly," (N.Y. Const. art. III, § 1), and that "and no law shall be enacted except by bill," (*id.* § 13). By requiring that no one other than the Legislature may exercise legislative powers, the Constitution "ensure[d] that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow." (*Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting)).

During the pandemic, state and federal actors, including Governor Hochul and other Respondents-Appellants have exercised power explicitly denied to them by the Constitution and the laws of the land. Each such exercise of power constricted liberties of the citizens of this State, including by imposition of unlawful and unjustifiable quarantine orders. Even at this late hour, with both the World Health Organization and the federal government declaring that the Covid-19 emergency is over, Respondents-Appellants are refusing to surrender the power to suspend, re-write, and ignore statutory law—a power that Respondents-Appellants unlawfully arrogated to themselves in the first place.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." (The Federalist No.

47, p. 300 (H. Lodge ed. 1888) (Madison) (quoted in *Hebel v. West*, 803 N.Y.S.2d 242, 247 (3d App. Dep't 2005))). It is for this reason that the Constitution of this State envisions division of such powers into three distinct branches. (*See Maron v. Silver*, 14 N.Y.3d 230, 258, 925 N.E.2d 899, 913 (2010) ("The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions.")). "The separation of the three branches is necessary for the preservation of liberty itself, and it is a fundamental principle of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others." (*Id.* (cleaned up)).

Judged against this basic principle, the Executive Branch's promulgation of 10 NYCRR g 2.13, Isolation and Quarantine Procedures ("Rule 2.13"), which directly contravenes a duly-enacted detailed statute, cannot stand. By promulgating Rule 2.13, the Executive Branch arrogated to itself not just the power to order citizens into quarantine, but the power to suspend and amend statutes on its own say-so, which was perhaps the most noxious type of royal prerogative against which the Revolutionary generation rebelled.

This Court must not permit the Executive Branch of this State to claim kingly powers—powers that the framers of the present and all preceding Constitutions of this State have not only rejected, but fought a war over. Accordingly, *amicus curiae* urges this Court to affirm the judgment of the Cattaraugus County Supreme Court.

ARGUMENT

I. LAWMAKING IS EXCLUSIVELY WITHIN THE PROVINCE OF THE LEGISLATURE

The Constitution of this State vests "[t]he legislative power … in the senate and assembly." (N.Y. Const. art. III, § 1). The Constitution further specifies that "no law shall be enacted except by bill," (*id.* § 13), which in turn must receive "assent of a majority of the members elected to each branch of the legislature," (*id.* § 14), as well as gubernatorial approbation, (*id.* art. IV, § 7). Any enactment that has not satisfied the above requirements cannot be "law."

The legislature, however, "is free to announce its policy in general terms and authorize administrators 'to fill in details and interstices and to make subsidiary policy choices consistent with the enabling legislation.'" (*Dorst v. Pataki*, 90 N.Y.2d 696, 699, 687 N.E.2d 1348, 1349 (1997) (quoting *Matter of Citizens for an Orderly Energy Policy v. Cuomo*, 78 N.Y.2d 398, 410, 582 N.E.2d 568, 572 (1991))). At the same time, the ability to delegate the filling in of "details and interstices" is not a license to either abrogate the responsibility to legislate or permission to wholly transfer the legislative power to another branch of government. As the Court of Appeals explained, "the Legislature is powerless to delegate the legislative function unless it provides adequate standards. Without such standards there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities." (*Rapp v. Carey*, 44 N.Y.2d 157, 162, 375 N.E.2d 745, 748 (1978) (internal citations omitted)). And

while the delegations of powers under New York Constitution may be broad, it is well settled that the Governor cannot act absent a statutory authorization.

For example, in *Rapp*, then-Governor Carey issued an executive order requiring "State employees, many [who were] not subject to removal by the Governor, t[o] fi[le] … financial disclosure statements, and t[o] abst[ain] from activities not prohibited by statute." (*Id.* at 160, 375 N.E.2d at 746). He did so following a prior decision of the Court of Appeals which held that as a general matter, financial disclosure requirements directed at government employees did "not infringe upon individual employees' constitutional rights." (*Evans v. Carey*, 40 N.Y.2d 1008, 1009, 359 N.E.2d 983, 983 (1976)). In *Rapp*, however, the Court concluded that *even if* imposing such requirements were permissible, the authority to create the reporting obligation rested with the Legislature and not the Governor. As a result, the Court held that in issuing the executive order, the Governor "did not implement existing legislation regulating conflicts of interest, but reached far beyond such legislation and thus assumed the power of the Legislature to set State policy." (*Clark v. Cuomo*, 66 N.Y.2d 185, 189, 486 N.E.2d 794, 797 (1985) (referring to *Rapp*)).

The rule emerging from *Rapp* then is that "in this State the executive has the power to enforce legislation and is accorded great flexibility in determining the methods of enforcement. But he may not … 'go beyond stated legislative policy and prescribe a remedial device not embraced by the policy.'" (*Rapp*, 44 N.Y.2d at 163, 359 N.E.2d at 748 (quoting *Matter of Broidrick v. Lindsay*, 39 N.Y.2d 641, 643–64, 350 N.E.2d 595, 597

(1976) (internal citations omitted)). In short, "[w]here it [is] practicable for the Legislature itself to set precise standards, the executive's flexibility is and should be quite limited." (*Id.*)

An even starker case of usurpation of powers presents itself where the Governor not only regulates on an essentially "blank slate," (which she is not permitted to do), but where she regulates directly contrary to the will of the Legislature. (*See Clark*, 66 N.Y.2d at 189, 486 N.E.2d at 797 ("[W]hen the Executive acts inconsistently with the Legislature, or usurps its prerogatives, … the doctrine of separation is violated.")). Thus, to answer the question of whether the Governor's claim to authority in any given area is legitimate, courts must ask two related questions, *viz.*, (a) has the Legislature spoken on the issue in question?, and; (b) if so, do the Governor's actions contradict the Legislative policy? When either the first question is answered in the negative, or the second question in the affirmative, the Governor's unilateral actions violate the Constitution.

In the case before this Court the Legislature has clearly spoken on the issue of quarantine, yet Rule 2.13 directly contradicts the scheme enacted by the Legislature. Given the conflict between an administrative rule and duly-enacted legislation, it is clear what must prevail—that which meets the constitutional requirement of "law." (*See* N.Y. Const. art. III, §§ 13-14).

II. RULE 2.13 PLAINLY CONTRADICTS LEGISLATIVELY ENACTED LAW

"Because of the constitutional provision that '[t]he legislative power of this State shall be vested in the Senate and the Assembly,' the Legislature cannot pass on its law-making functions to other bodies …" (*Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976) (quoting N.Y. Const, art III, § 1, internal citations omitted)). At the same time, "there is no constitutional prohibition against the delegation of power, *with reasonable safeguards and standards*, to an agency or commission to administer the law *as enacted by the Legislature*." (*Id.* (emphasis added)).

The Court of Appeals has set forth a four-part test to determine whether an executive action transgressed "the scope of the authority properly delegated to it by the Legislature." (*Boreali v. Axelrod*, 71 N.Y.2d 1, 13 (1987)). These factors are whether:

> (1) the agency did more than balance costs and benefits according to preexisting guidelines, but instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems;
> (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance;
> (3) the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and
> (4) the agency used special expertise or competence in the field to develop the challenged regulation.

(*NYC C.L.A.S.H., Inc. v. New York State Off. Of Parks, Recreation & Historic Pres.*, 27 N.Y.3d 174, 179-80 (2016) (cleaned up)).

In this case, the Legislature enacted a clear policy specifying how quarantine orders are to be entered. Specifically, in Public Health Law § 2120, the Legislature directed that when a "health officer finds after investigation that a person … afflicted [with a communicable disease] is a menace to others, he shall make and file a complaint against such person with a magistrate," and once such complaint is filed, it is *the magistrate* who "after due notice and a hearing" is empowered to "commit the [afflicted] person to any hospital or institution established for the care of persons suffering from any such communicable disease." Furthermore, the Legislature directed *individualized* assessment of threats to public health, based on each person's *affliction* with a contagious disease. The Legislature chose not to permit broad population-wide quarantine orders that may cover people who *might* become afflicted with a disease. Public Health Law § 2120 is thus a detailed compromise between the need for public health measures and liberty interests of individuals. On one hand, the Legislature permitted quarantine and isolation orders—orders that undoubtedly limit an individual's liberty, but on the other hand, to ensure that any individual threatened with liberty deprivation is afforded due process, it required that any confinement be approved by a neutral magistrate who is required to examine each individual case and is authorized to approve isolation only for contagious individuals.[2]

[2] *Amicus curiae* expresses no view on whether or not § 2120 itself presents constitutional problems, and that question is best left for another day.

Rule 2.13 turns the legislative compromise on its head. Gone are the requirements of individualized assessment, of an explicit finding that anyone subject to a quarantine order must himself be *contagious*, and of a neutral judicial determination of a person's danger to public health. In their place is a virtually unlimited grant of power to the State Commissioner of Health. One need not be a great legal scholar to see that Rule 2.13 balances the costs and benefits of protection of public health and individual liberty quite differently from the balance struck by the Legislature. It is irrelevant whether the Legislature or the Governor did a *better* balancing job (though it is noteworthy that Rule 2.13 does not appear to value individualized liberty at all). What matters is that "the [Governor] … creat[ed] [his] own comprehensive set of rules without benefit of legislative guidance," and indeed contrary to such guidance. (*See NYC C.L.A.S.H.*, 27 N.Y.3d at 182) In doing so, the Governor made his[3] own "value judgments entailing difficult and complex choices between broad policy goals to resolve social problems." In essence, the Governor decided that in light of the new problems presented by Covid-19, the best way to resolve "social problems" in the area of public health is to permit the executive authority of the State to subject entire neighborhoods, cities, towns, and maybe even the whole State to enforced quarantine and isolation. Leaving aside the question of the constitutionality of such an intrusion on the liberty of the citizens of this State, unquestionably Rule 2.13 entailed balancing of "difficult and

[3] At the time the rule was promulgated, Andrew M. Cuomo was Governor, so masculine pronouns are being used.

complex choices between broad policy goals to resolve social problems." (*Id.*) That the Governor cannot do. (*See Boreali*, 71 N.Y.2d at 12 ("Striking the proper balance among health concerns, cost and privacy interests … is a *uniquely* legislative function.") (emphasis added)).

Permitting the Governor to waive the execution of certain laws, as he was authorized to do, (*see* N.Y. Exec. L. 29-a), is a far cry from promulgating rules directly contrary to the stated will of the legislature. Moreover, to limit citizens' liberty without any judicial review is to vest the entirety of the State's legislative, executive, and judicial powers in a single branch of government—something that Madison rightly called "the very definition of tyranny." (The Federalist No. 47). "The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement." (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (1952) (Douglas, J., concurring)). This Court must do the same.

CONCLUSION

"The constitutional principle of separation of powers, implied by the separate grants of power to each of the coordinate branches of government, requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." (*Bourquin v. Cuomo*, 85 N.Y.2d 781, 784, 652 N.E.2d 171, 173 (1995) (cleaned up)). While the Constitution of this State "does not 'divide the branches into watertight compartments,' nor 'establish and divide fields of black and white,'" (*id.* (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 245 (1995) (Breyer,

J., concurring in judgment)), it requires the Governor to "take care that the laws are *faithfully* executed," (N.Y. Const. art. IV, § 3 (emphasis added)). Promulgating administrative rules that stand in direct contradiction to policies that were considered by the Legislature, and enacted into law through a constitutional process, violates the Governor's constitutional duties and treads on the prerogatives of the Legislature. Because this Court should not permit either, it must affirm the judgment appealed from.

May 23, 2023

Respectfully submitted,

/s/ Gregory Dolin
Gregory Dolin, M.D.
Counsel of Record
John J. Vecchione
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
greg.dolin@ncla.legal

Counsel for Amicus Curiae

PRINTING SPECIFICATIONS STATEMENT

In accordance with the New York Practice Rules of the Appellate Division Rule 1250.8(j), Proposed Amicus Curiae the New Civil Liberties Alliance provides this Printing Specifications Statement.

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used as follows:

Name of Typeface: Garamond

Point Size: 14 (12 for footnotes)

Line Spacing: Double (single for footnotes and block quotations)

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the Table of Contents and this printing specifications statement, is 2,587.

/s/ Gregory Dolin