



OFFICE OF THE ATTORNEY GENERAL  
CONNECTICUT

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June 7, 2021

BY EMAIL

The Honorable Vincent J. Candelora  
House Minority Leader  
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Dear Minority Leader Candelora:

Your letter of May 10, 2021 requested a formal opinion on the constitutionality of aspects of §13 of House Bill 6443, presently under consideration by the General Assembly.

Section 13 proposes to channel designated revenue streams to a non-lapsing fund managed and spent by a nine-member investment council. You ask whether the bill's contemplated process for expending public funds would violate Connecticut's Constitution.<sup>1</sup> After careful consideration, I conclude there is a fair likelihood that a court presented with the issue would hold aspects of §13 unconstitutional under the separation of powers doctrine.

**Overview of Section 13 of HB 6443**

Section 13 would establish the Connecticut Equitable Investment Fund (the "Fund"), into which the state would deposit public funds including revenues from wage compensation, consumption, digital advertising, and recreational cannabis

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<sup>1</sup> Your letter articulates a policy objection to new revenue-raising measures under consideration by the legislature, but indicates that your legal question relates only "to the process by which these additional revenues are expended" under §13 of HB 6443, with specific reference to possible infringement on the "budget-making authority reserved to the legislature." This opinion is limited to the constitutional question you raise.

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taxes. §13(b)(1)-(3).<sup>2</sup> The Fund would be “manage[d] and oversee[n]” by a nine-member Connecticut Equitable Investment Council (the “Council”) composed of the Governor, the Treasurer, the OPM Secretary, and “six members of the public,” two of whom would be appointed by each of the Governor, the president pro tempore of the Senate, and the speaker of the House. §13(c)(1).

This Council would be responsible for both growing the Fund and expending its resources “through investments-in-place programs and strategies” aimed at “support[ing] the growth of the state’s economy.” §13(c)(3). Appropriate investments “include, but are not limited to,” four enumerated strategies: Building wealth in traditionally underserved communities; reducing income inequality; retaining and attracting talent to the state; and reducing municipal reliance on property taxes. *Id.*

Special investment funds are not inherently or categorically problematic. The General Assembly has established a number of special investment funds without raising any serious constitutional concerns. *See, e.g.*, Conn. Gen. Stat. § 4-66h (establishing the Main Street Investment Fund); Conn. Gen. Stat. § 16-245n (Clean Energy Fund); Conn. Gen. Stat. § 32-39 (Innovation Investment Fund). But the process and structure envisioned by §13 would be an unusual – and, as best I can determine, unprecedented – delegation of the legislature’s appropriations power.

### **Discussion**

Enacted legislation ordinarily carries a strong presumption of constitutionality and will be struck down only if its unconstitutionality is proved beyond a reasonable doubt. *Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 405 (2015). If enacted into law, §13 would be evaluated under the six *Geisler* factors used by the Connecticut Supreme Court when construing the Connecticut Constitution. They are “(1) the text of the operative constitutional provision; (2) holdings and dicta of [the Supreme] and the Appellate Court; (3) persuasive and relevant federal precedent; (4) persuasive sister state decisions; (5) the history of the operative constitutional provision, including the historical constitutional setting and the debates of the framers; and (6) contemporary economic and sociological considerations, including relevant public policies.” *Kerrigan v. Commissioner of*

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<sup>2</sup> Section 13 also contemplates establishing “a program to solicit private investment from state residents,” §13(c)(5), and depositing those investments into the fund. §13(b)(2).

*Public Health*, 289 Conn. 135, 157 (2008) (citing *State v. Geisler*, 222 Conn. 672, 685 (1992)). These factors may be “inextricably interwoven,” and not every such factor is relevant in all cases. *Bysiewicz v. Dinardo*, 298 Conn. 748, 790 (2010).

The key constitutional provision here expressly mandates separation of powers among the three branches of state government. “The powers of government shall be divided into three distinct departments, and each of them confided to separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.” Conn. Const. art. II.

As the Connecticut Supreme Court recently reminded us, the state separation of powers doctrine has always allowed more structural flexibility than its federal equivalent. *See Casey v. Lamont*, SC 20494, 2021 Conn. LEXIS 78, at \*31 (Mar. 29, 2021) (“Unlike the separation of powers doctrine that has developed under the federal constitution, ‘the historical evolution of Connecticut’s governmental system [has] established a “tradition of harmony” among the separate branches of government . . . .’”) (citing *State v. McCleese*, 33 Conn. 378, 419 (2019)); *Bartholomew v. Schweizer*, 217 Conn. 671, 676 (1991) (“Recognizing that executive, legislative and judicial powers frequently overlap, we have consistently held that the doctrine of the separation of powers cannot be applied rigidly.”). That flexibility can leave room for significant interbranch collaboration. For example, the Connecticut Supreme Court has upheld legislative appointments to executive branch boards or commissions. *Compare Seymour v. Elections Enforcement Comm’n*, 255 Conn. 78 (2000) (allowing legislative appointment under the state separation of powers doctrine); *with Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that legislative appointment to the Federal Elections Commission violated the federal doctrine).

Perhaps self-evidently, the General Assembly does not impermissibly confer its exclusive powers on the executive branch every time it authorizes an administrative agency to make granular decisions about spending money. Instead, the Connecticut Supreme Court has long recognized that the General Assembly can constitutionally grant “an administrative agency the power to ‘fill in the details’” of a legislatively-determined policy. *New Milford v. SCA Services of Connecticut, Inc.*, 174 Conn. 146, 149 (1977). For an assignment of authority to be appropriate and lawful, rather than an unconstitutional delegation of exclusive powers, the legislature must build a sufficiently strong policy armature: “[I]t is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an

intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits . . . .” *Hogan v. Dep’t. of Children & Families*, 290 Conn. 545, 572 (2009).

Section 13 implicates two quintessential legislative powers – law-making and appropriations. *See Casey*, 2021 Conn. LEXIS 78 at \*30 (“[S]ince the law-making function is vested exclusively in the legislative department... the [l]egislature cannot delegate the law-making power to any other department or agency.”); *Eielson v. Parker*, 179 Conn. 552, 560 (1980) (“Legislative power necessarily encompasses the power to appropriate funds to finance the operation of the state and its programs.” Internal quotation omitted). So the question here is whether the bill would impermissibly confer those powers on the Council – effectively setting up the Council as an unelected legislature – or whether instead the bill merely and permissibly authorizes the Council to execute the General Assembly’s will by filling in the details. Answering that question requires determining whether §13, as drafted, sufficiently “declare[s] a legislative policy,” “establish[es] primary standards for carrying it out,” or “lay[s] down an intelligible principle” for the Council to follow. *Hogan*, 290 Conn. at 572.

It probably does not. Section 13 requires only that the Council expend funds in the form of “investments-in-place” to promote economic growth. It neither defines “investments-in-place” nor limits their scale or scope, and so its strategies and programs could extend far beyond the four kinds of explicitly nonexclusive programs enumerated in the bill. Even though its name references equity, the Council would not be bound to expend funds to promote equity at all, much less any specific legislative equitable vision. The bill contains no legislatively provided metrics or definitions for either “equity” or “growth” to limit the Council’s unreviewable authority to effectively set economic growth policy and appropriate indefinite amounts of public funds in service of that administratively defined policy.

That extraordinarily broad legislative grant of authority would be a significant departure from Connecticut Supreme Court precedent, to which we now turn. As a rule, the Court has not allowed the legislature to delegate the kind of primary, permanent, nearly limitless, and broadly discretionary policymaking and appropriation authority that is proposed by §13.

In *University of Connecticut Chapter AAUP v. Governor*, 200 Conn. 386 (1986), the Court upheld the constitutionality of a statute empowering the governor to “reduce budgetary allotments by up to 5 percent” under clearly delineated circumstances, including where revised estimates show there is not enough money left in the state budget to meet obligations. *Id.* at 387. Clear standards limited when the Governor could step in and what the Governor could do. The delegated executive authority was both limited in scale and contingent on the occurrence of specific legislatively determined circumstances. By contrast, §13 permanently delegates appropriation authority over an indefinite amount of public funds for broadly unlimited purposes.

In March of this year the Supreme Court handed down its decision in *Casey v. Lamont*, affirming the constitutionality of the Governor’s power to temporarily modify or suspend statutes in light of the COVID-19 public health emergency. As in the *University of Connecticut* case, the statutes upheld in *Casey* did not confer permanent and primary policymaking authority on the Governor. Instead, the statutes defined the circumstances under which the Governor could act; set time limits for the duration of the emergency powers; and confined the Governor to modifying or suspending existing law rather than making new law. In other words: the statutes upheld in *Casey* dealt with assignments of authority that were temporary, contingent, definite, and guided by legislative standards – all the things that §13 is not.

By contrast to *Casey* and *University of Connecticut*, in *State v. Stoddard*, 126 Conn. 623 (1940), the Court struck down a law resembling §13 in important respects. *Stoddard* examined a statute empowering an administrator to set the minimum price for milk without providing any policy direction beyond a general directive to “take into consideration the type of container used and other cost factors [that] should influence the determination of such prices.” *Id.* at 625. We can recognize elements of §13 in *Stoddard*, including the permanence of the delegation, the exclusion of the legislature entirely from the equation, and the lack of any standard other than the invocation of an economic truism. In *Stoddard*, the truism was that the price of a good should reflect something about the cost of production; here, it is that a state’s economic policies ought to promote economic growth. But that impermissibly leaves policymaking – and, in §13, appropriations – to the virtually unfettered discretion of an administrative body.

Connecticut precedent provides a strong basis for concluding that §13 would contravene the separation of powers. But to the extent that the Connecticut Supreme Court would look to other jurisdictions for guidance, I find nothing to suggest that either the federal courts or our sister states would resolve this issue any differently.

As noted above, federal courts are broadly less flexible than Connecticut courts when examining separations of powers issues generally. But the two systems apply approximately the same test when evaluating the constitutionality of legislative delegations as a subset of the larger realm of separation of powers problems. Federal courts ask whether Congress articulated “an intelligible principle” to which the delegee “is directed to conform.” *Mistretta v. United States*, 488 U.S. 361, 372 (1989). *And see, e.g., Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (“[T]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion.”). For the U.S. Supreme Court, the search for an “intelligible principle” has meant ensuring that Congress “delineates the general policy,” identifies “the public agency which is to apply it,” and sets “the boundaries of this delegated authority.” *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

Since the federal and Connecticut courts apply substantially similar tests to resolve these delegation questions, it is instructive to compare the legislative delegation that the U.S. Supreme Court upheld in *Mistretta* to the delegation contemplated by §13. *Mistretta* asked whether Congress violated the separation of powers when it charged the Sentencing Commission with crafting the Federal Sentencing Guidelines. *Mistretta*, 488 U.S. at 368-69. To answer its question, the Court looked to the detailed direction provided by Congress, which articulated goals and purposes, *id.* at 374; mandated a specific strategy for meeting those goals – the Guidelines, *id.* at 374-75; enumerated at length the seven factors that inform the Guidelines’ offense categories, *id.* at 375-76; and set clear standards by mandating aggravating and mitigating circumstances and even specific sentencing outcomes. *Id.* at 376-77. In sum: The *Mistretta* Court had recourse to an extraordinary level of legislative detail that guided, directed, and constrained the Commission’s administrative discretion. That is a far cry from what we see here in §13, which offers a single overarching legislative purpose, at an extraordinarily high level of

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abstraction, past which there are no mandatory directions or limits.<sup>3</sup>

### Conclusion

In part because § 13 would work such an unprecedentedly broad delegation of the legislature's law making and appropriation powers, there is no clear black letter caselaw directly on point. But I have closely examined the language of the Connecticut Constitution, the holdings of our Supreme Court in other delegation cases, and the persuasive precedent of other jurisdictions. All of those sources of authority strongly suggest my conclusion: It is likely that a Connecticut court would rule that §13 lacks the requisite standards and limits to survive a separation of powers challenge.<sup>4</sup>

Very truly yours,



WILLIAM TONG  
ATTORNEY GENERAL

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<sup>3</sup> With respect to the fourth *Geisler* factor, it does not appear that any other state has addressed the constitutionality of a delegation identical to the proposed §13, either in terms of the broad scope of the delegated authority or the limited legislative direction that §13 would provide. So it is unlikely that the Connecticut Supreme Court would rely upon cases from other states in its analysis of §13, though the requirements for clear legislative policies and guidance are equally applicable in other states' considerations of delegation challenges. *See, e.g., Vermont Educ. Bldgs. Financing Agency v. Mann*, 127 Vt. 262, 268 (1968) (the delegated authority was "confined within ascertainable and reasonable boundaries" leaving "sufficient and adequate standards to guide and direct the action of the board within the dimensions of constitutional requirements.")

<sup>4</sup> Because of the limited scope of your question, and because I determine that the bill would likely violate the separation of powers, this opinion does not consider the potential implications for the bill of Article III, §18 of the State Constitution, relating to the spending cap.