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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF ACEVEDO,

Appellant,

-against-

NO. 40

NEW YORK STATE DEPARTMENT OF MOTOR
VEHICLES,

Respondent.

MATTER OF CARNEY,

Appellant,

-against-

NO. 41

NEW YORK STATE DEPARTMENT OF MOTOR
VEHICLES,

Respondent.

MATTER OF MATSEN,

Appellant,

-against-

NO. 42

NEW YORK STATE DEPARTMENT OF MOTOR
VEHICLES,

Respondent.

20 Eagle Street
Albany, New York
March 23, 2017

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Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar are appeals number 40, 41, and 42,
3 Matter of Acevedo, Carney, and Matsen v. the New York State
4 Department of Motor Vehicles.

5 Counsel.

6 MR. SILLS: Good afternoon. I repres - - - my
7 name is Eric Sills. I represent the three named
8 petitioners-appellants in these cases. I also currently
9 represent over 350 additional similarly situated
10 individuals.

11 I'd like to, if I could, reserve two minutes for
12 rebuttal, please.

13 CHIEF JUDGE DIFIORE: You may, sir.

14 MR. SILLS: In 2006, the legislature enacted a
15 recidivist DWI offender policy. In 2012, DMV decided that
16 the policy wasn't tough enough, and they overruled it.
17 Every single provision - - -

18 JUDGE RIVERA: But how - - - how is that in
19 conflict with the authority that the Commissioner has
20 simply because the legislature chooses to speak
21 specifically about one matter; how does that foreclose the
22 Commissioner from exercising very broad discretion?

23 MR. SILLS: Because no matter how broad the
24 Commissioner's discretion is, it has to have limits, and it
25 can't be unfettered and unbridled. And because some of the

1 statute cited by respondents would appear to give the
2 Commissioner unlimited discretion, you have to search
3 through the VTL to find some limit somewhere, and I believe
4 that Vehicle and Traffic Law Section 1193(2)(b)(12) defines
5 the upper limit of that discretion.

6 Now, it's well settled that if there's a statute
7 and there's a regulation, and they are in direct conflict
8 with each other, the statute - - -

9 JUDGE RIVERA: But that's what I'm not clear
10 about your argument. Where is the conflict?

11 MR. SILLS: Where's the conflict? There are
12 multiple conflicts between, I'll call it the Statute, in
13 what I'm referring to 1193(2)(b)(12), and I'll call it the
14 Statute to avoid repetition.

15 JUDGE RIVERA: Um-hum.

16 MR. SILLS: Under the Statute, a person doesn't
17 qualify for permanent revocation unless they have either
18 four DWI-related convictions within four years, or five
19 within eight years. And even if they do qualify, it would
20 be an eight-year permanent revocation. Under the
21 regulations, five within your entire lifetime means you're
22 permanently, permanently revoked.

23 So if it's really just five in your whole
24 lifetime for the regulations, then a statute that says you
25 need five within eight years has been rendered ineffective.

1 JUDGE ABDUS-SALAAM: But counsel, doesn't the
2 Commissioner always retain discretion to decide to waive
3 that lifetime revocation?

4 MR. SILLS: I'm glad you asked that question,
5 Your Honor. I have been persistently arguing for four-and-
6 a-half years now that this waiver provision is nothing
7 short of a farce. We have not been granted a fact-finding
8 hearing on this, so we have to rely on anecdotal evidence.
9 But even in this record, we know that according to DMV,
10 four waivers have been granted out of over a thousand
11 waiver applications. And realistically, I can assure you
12 that the only reason a thousand people have even tried for
13 the waiver is because everybody knows it's just a complete
14 waste of time. And so they're not even attempting to get
15 the waiver.

16 Now, if you look at the waiver provision itself,
17 which is Regulation 136.5(d), even in that regulation, it
18 says that the Commissioner can deviate from the general
19 policy. So the waiver regulation actually uses the word
20 policy. I think it's clear here that this is policy
21 making.

22 JUDGE RIVERA: Well - - - well, counsel, could -
23 - - could the Commissioner, just in your - - - this - - -
24 in Acevedo's individual case have done what you're calling
25 a policy, permits her to do? Just done it in this case on

1 the facts.

2 MR. SILLS: Which of the three?

3 JUDGE RIVERA: Acevedo.

4 MR. SILLS: Acevedo. Mr. Acevedo had his three
5 DWI-related convictions within five years, I believe. So
6 he didn't qualify for permanent revocation under the
7 Statute which would require three within four years. If he
8 did qualify for the five-year revocation, the Statute
9 appears to mandate a mandatory waiver after five years,
10 because he only has those three - - -

11 JUDGE RIVERA: But doesn't - - - doesn't it allow
12 the Commissioner to decide otherwise? That's a yes or no.

13 MR. SILLS: I'm not sure I can answer it yes or
14 no, and I can explain.

15 There is a public safety and welfare exception.
16 But because Mr. Acevedo has no other driving-related
17 convictions in his entire life, it would seem that any - -
18 -

19 JUDGE RIVERA: But again, doesn't that fall
20 within the Commissioner's discretion that's provided for in
21 the Statute; is that not - - -

22 MR. SILLS: No - - -

23 JUDGE RIVERA: - - - correct?

24 MR. SILLS: - - - because the Statute has a
25 default to a mandatory waiver subject to a case-by-case - -

1 -

2 JUDGE RIVERA: And that's what I'm asking you - -

3 -

4 MR. SILLS: Right.

5 JUDGE RIVERA: - - - could not the Commissioner,
6 looking at this individual case, have decided that the
7 license is suspended and not going to be reinstated?

8 MR. SILLS: I would submit that if a person has
9 only three DWI-related convictions ever, and they fall
10 under every other waiver provision, it would be an abuse of
11 discretion to say that on a case-by-case basis this person
12 didn't qualify for reinstatement, because it would mean no
13 one will ever qualify for reinstatement.

14 JUDGE GARCIA: Counsel, there's a little bit of
15 confusion to me in this statute, in 1193, because there is
16 this provision for a case-by-case exercise of discretion.
17 And then there are two later, arguably much broader, grants
18 of discretion and relicensing applications given to the
19 Commissioner. So how do they square up?

20 So if you look at one, for example is,
21 "Notwithstanding the provisions of this clause, nothing
22 contained in this clause shall be deemed to require the
23 commissioner to restore a license to an applicant", and
24 then, "Reissuance of licenses; restrictions. Except as
25 provided in this paragraph, where a license is revoked, no

1 new license shall be issued after the expiration of the
2 minimum period specified in such paragraph, except in the
3 discretion of the commissioner."

4 MR. SILLS: Well, I believe in this court's
5 Swalbach v. State Liquor Authority case, they dealt with a
6 similar situation with that, which is, you can't have a
7 general policy and then just say, because you could have
8 used the case-by-case discretion - - -

9 JUDGE GARCIA: That's - - -

10 MR. SILLS: - - - you never do.

11 JUDGE GARCIA: - - - that's really not my
12 question though. It really is, if you've got three
13 instances of the legislature making very clear that the
14 Commissioner of DMV retains this broad discretion, I think
15 you have a difficult argument that anything that they have
16 done, in terms of using the provisions in here as a floor
17 and putting stricter revision, you know, stricter scrutiny
18 on relicensing applications, conflicts with this Statute.

19 MR. SILLS: If the language that says the
20 permanent revocation shall be waived after five years as
21 long as the conditions are met, it means that you can use
22 the default provision and say, what we mean by shall be
23 waived is never waived, ever, then I think it's misreading
24 the waiver. The waiver is a case-by-case - - -

25 JUDGE FAHEY: Are you saying it means must then,

1 it must be waived?

2 MR. SILLS: I'm saying that I'm sure there are
3 individuals where you could say, this particular person
4 cries out for not getting a waiver.

5 JUDGE FAHEY: Well, that's not "must". Must be
6 waived means that - - - that - - -

7 MR. SILLS: No, that's what I'm saying what the
8 case-by-case review would be.

9 JUDGE FAHEY: Um-hum.

10 MR. SILLS: That there has to - - -

11 JUDGE FAHEY: So you're saying that - - -

12 MR. SILLS: That it's - - -

13 JUDGE FAHEY: - - - that shall - - - let me just
14 finish.

15 MR. SILLS: Sure.

16 JUDGE FAHEY: You're saying that shall - - -
17 answer - - - answer my question.

18 MR. SILLS: Sure.

19 MR. SILLS: That shall doesn't mean must. Are
20 you saying it means must or it doesn't?

21 MR. SILLS: I'm saying it's a - - - provides a
22 general rule of must - - -

23 JUDGE FAHEY: Um-hum.

24 MR. SILLS: - - - but every rule has to have an
25 exception - - -

1 JUDGE FAHEY: I see.

2 MR. SILLS: - - - have a safety valve in it.

3 JUDGE FAHEY: So you're saying there's still room
4 for discretion there.

5 MR. SILLS: On a true case-by-case basis.

6 JUDGE FAHEY: Um-hum. I - - - I - - - I get - -
7 - I get your argument, respectfully. I just - - - I wanted
8 to take a step back and ask you about the underlying
9 philosophy, because it seems what you're arguing to us is
10 that the legislature appeared to intend that it must be
11 waived, which in my mind means shall, shall means must,
12 that - - - so the DMV, in essence, would be granting
13 licenses to the most dangerous drivers. But in all other
14 circumstances, the DMV would then retain almost complete
15 discretion.

16 And - - - it - - - I don't see how that could be
17 what the legislature intended. Because your reading of - -
18 - of the Statute is that. Your reading of the Statute is,
19 really, they must do this. Must means must, and there's no
20 discretion here. Now you're tell me something a little bit
21 different. But in essence, these are the most dangerous
22 drivers on the road, yet that policy doesn't apply to
23 everybody else. It doesn't make sense to me.

24 MR. SILLS: I have two responses.

25 JUDGE FAHEY: Go ahead.

1 MR. SILLS: The first would be that this court
2 has repeatedly made clear that there have to be some
3 guidelines, principles, rules that limit discretion. And -
4 - - and if - - - what I'm getting the sense here is that
5 you're saying they've been delegated unlimited discretion,
6 and there doesn't have to be a single limit on it, just be
7 - - -

8 JUDGE FAHEY: It's always a mistake to - - - to
9 try and anticipate what we're thinking.

10 MR. SILLS: I - - -

11 JUDGE FAHEY: I can't do it, so don't - - - don't
12 bother; don't try.

13 MR. SILLS: Okay. I apologize for that. But - -
14 -

15 JUDGE FAHEY: It's all right.

16 MR. SILLS: - - - there has to be some limit on
17 the discretion. I've been trying to find limits on the
18 discretion. The respondents have, to this day, not
19 provided a single limit on the discretion. So - - - so
20 that - - - you know, that's been an issue - - -

21 JUDGE GARCIA: So then would the point be that
22 the other provisions are invalid if they were ever to come
23 into play because they give unlimited discretion? Because
24 there is unlimited discretion and relicensing.

25 MR. SILLS: In Boreali, the court said that even

1 under the broadest allegation of author - - - of
2 discretion, the court, in effect, has to go fishing through
3 and find - - -

4 JUDGE GARCIA: That's a different analysis that
5 we're talking about that there. That's a separation of
6 powers analysis.

7 MR. SILLS: Right.

8 JUDGE GARCIA: So just on a conflict analysis - -
9 -

10 MR. SILLS: Yes.

11 JUDGE GARCIA: - - - or a preemption, whatever
12 you want call it, to get back, which is where I'm stuck
13 where Judge Fahey is, you seem to be saying that with
14 respect to what the Vehicle and Traffic Law identifies as
15 the worst offenders for relicensing, the discretion is
16 (indiscernible) on a case-by-case basis, and it's not - - -
17 for anything else where you have your license revoked,
18 which would be much less in terms of what this
19 contemplates, you have unlimited discretion, DMV.

20 MR. SILLS: Well, my response would be that if
21 you - - - if you look at the Statute progressively, and the
22 VTL has been repeatedly amended and updated over the years,
23 the reason that VTL Section 1193(2)(b)(12) was enacted was
24 because the legislature thought DMV was giving licenses
25 back too soon, okay, for these recidivists.

1 And so they said, you know, they shouldn't be
2 getting, at three offenses, their licenses back in eighteen
3 months, which is the - - - was the policy, and twenty-four
4 months for four within ten years. And as a result, what
5 they did was create, what they thought, was a very, very
6 tough Statute.

7 JUDGE GARCIA: Or a floor. Or a floor. That
8 they thought they weren't being tough enough, so it's
9 almost like a mandatory minimum.

10 MR. SILLS: But then they wouldn't have said,
11 shall be waived after five years, and they wouldn't have
12 said after three years, DMV can give out conditional
13 licenses. And I know my time is up, but if I - - -

14 JUDGE RIVERA: But then why are they saying that
15 the Commissioner may, on a case-by-case basis, refuse to
16 restore?

17 MR. SILLS: Because on a case-by-case basis - - -

18 JUDGE RIVERA: Isn't that again recognizing the
19 Commissioner's discretion?

20 MR. SILLS: It's the discretion that even amongst
21 these people, there have to be some who should be singled
22 out for individualized treatment, but not as a group of
23 thousands of them. And a point I would like to make is,
24 what are these people - - -

25 JUDGE RIVERA: But isn't the broad discretion of

1 the Commissioner to also decide the best way to implement
2 this authority, and that if the Commissioner has already
3 decided a certain type of repeat - - - repeat action within
4 a period of time, would always justify the suspension and
5 need not say that repeatedly in every single case. He can
6 decide that at the beginning, and issue that kind of
7 directive to everyone?

8 MR. SILLS: But that would be making value
9 judgments, that would be setting social policy, that would
10 be acting under - - -

11 JUDGE RIVERA: No. If they - - - if - - - if she
12 could do it on a case-by-case basis, why can't she just do
13 it as the rule?

14 MR. SILLS: Because that's exact opposite of on a
15 case-by-case basis according to Swalbach.

16 JUDGE RIVERA: Um-hum.

17 MR. SILLS: I mean, I think that is literally the
18 opposite of - - - a general rule is the opposite of case-
19 by-case review.

20 And an issue that I would like to bring to your
21 attention is, the legislature does have a policy throughout
22 the VTL - - -

23 JUDGE RIVERA: But are - - - but are you saying
24 in a case-by-case basis she can't rely on a rule, a rule
25 that she is otherwise author - - - authorized to pass?

1 MR. SILLS: If you agree that the Commissioner
2 can make these value judgments, and set social policy, and
3 resolve difficult social issues in a way that I believe the
4 Boreali line of cases says that Commissioner cannot do, if
5 you would - - -

6 JUDGE RIVERA: Yeah - - -

7 MR. SILLS: - - - if you agree - - -

8 JUDGE RIVERA: - - - but you're light is on, but
9 I - - - I don't think that's what's going on. Because you
10 - - - you make the presumption that everyone is entitled to
11 get a license, and they're not.

12 MR. SILLS: I - - -

13 JUDGE RIVERA: It's already been revoked. But I
14 - - - I know your time is done.

15 MR. SILLS: I don't believe I - - - I feel that
16 everyone is entitled to a driver's license. Thank you.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.
18 Counsel.

19 MR. HITSOUS: Good afternoon, Your Honors.

20 The legislation to which my adversary referred,
21 the 2006 legislation, is an apt illustration on why it is
22 the DMV wasn't intending to overrule any kind of recidivist
23 policy. In 2006, when the legislature enacted
24 1193(2)(b)(12), it simultaneously revisited 1193(2)(c)(1),
25 which deals with relicensing of drunk drivers who had their

1 licenses revoked, and it made some adjustments, but it left
2 DMV's discretion intact.

3 This is the same as what's happened every time
4 the legislature has looked at VTL 1193.

5 JUDGE ABDUS-SALAAM: Counsel, do you - - - do you
6 see 1193(2)(b)(12) as a floor or a ceiling on the
7 Commissioner's discretion?

8 MR. HITSOUS: I see (2)(b)(12) as largely
9 irrelevant to the issue of relicensing, Your Honor. (2)(b)
10 concerns the revocation of licenses, and (2)(c) is the
11 reissuance of licenses.

12 So the legislature already has determined that
13 there's a difference between revocation and reissuance.
14 And this is consistent with its overall policy to get drunk
15 drivers off the road by revoking their licenses, but then
16 entrust DMV with the discretion to decide when and under
17 what circumstances relicensing would occur.

18 Now, DMV in cla - - - in promulgating these rules
19 is doing nothing more than clarifying to the public how it
20 is that it's going to exercise this discretion over a
21 relatively narrow task that the legislature assigned it.
22 And - - -

23 JUDGE RIVERA: So what does - - - what does it
24 mean to - - - to have authorized on a case-by-case basis to
25 refuse to restore a license?

1 MR. HITSOUS: What that means, Your Honor, is
2 that as subject to the - - - the very narrow field that's -
3 - - that is subject to (2)(b)(12)(b) - - -

4 JUDGE RIVERA: Um-hum.

5 MR. HITSOUS: - - - that DMV must consider them
6 individually. Case-by-case doesn't equate to a presumption
7 of - - - of waiver or reissuance; it simply means DMV
8 should consider each and every application on its own
9 merits, and it can deny as many as is necessary where the
10 public interest in safe roads outweighs the individual
11 interest in relicensing.

12 JUDGE RIVERA: Can it do it pursuant to a rule
13 that it's decided in advance?

14 MR. HITSOUS: Well, Your Honor, this isn't a rule
15 that they've - - - that DMV has decided in advance. What
16 DMV has done is articulated presumptive consequences for a
17 certain subset of drivers that are applying for
18 relicensing. And within these presumptions, DMV has said
19 that if you fall within a certain category after it looks
20 at your application, that you're going to, presumptively,
21 be too dangerous to be fit to come back on the roads.

22 However, DMV always retains the discretion to
23 find that the individual interest does outweigh the public
24 interest through the special circumstances exception.

25 JUDGE WILSON: Are there - - - are there any

1 limits on the DMV's relicensing discretion?

2 MR. HITSOUS: Yes, Your Honor. And those limits
3 can be found throughout the Vehicle and Traffic Law. They
4 come in the form of DMV statutory mission, which is pro - -
5 - to protect the roads. And that's why I refer to this
6 balancing between the public interest in road safety and
7 the individual interest in relicensing.

8 This interest doesn't allow for carve-outs, it
9 doesn't allow for political, economic, or social
10 considerations, such as what we saw in a Boreali or
11 Hispanic Chambers. In fact, this balancing is the same
12 kind of balancing - - -

13 JUDGE RIVERA: What - - - what decision is not
14 about protecting the roads? What could possibly - - - what
15 - - - what - - - I mean, that seems extremely broad. I - -
16 - where is the line?

17 Well, I could give you an example, Your Honor.
18 If DMV, for instance, determined by regulation that an
19 individual with back-child support, for instance, would be
20 ineligible to receive relicensing, that would be something
21 that's going outside its statutory mandate, and would be
22 suspect under Boreali.

23 JUDGE FAHEY: One of the Boreali factors that was
24 cited in the dissent, the third Boreali factor referred to
25 no one successful legislative attempts to resolve the issue

1 that's before us now, in our analysis, we would rely on
2 that factor. The dissent specifically talked about the
3 failure of what was called Charlotte's Law, which would
4 leave - - - which would basically have expanded permanent
5 revocation by Statute.

6 And it was specifically cited in dissent, that
7 failed, and yet, in essence, the regulation implements it.
8 How would you respond to that?

9 MR. HITSOUS: I would say that Charlotte's Law -
10 - - well, for one, Charlotte's Law was more narrow than
11 what these regulations do. It only addressed one instance.
12 So this is one bill that didn't make it past committee, and
13 - - -

14 JUDGE FAHEY: Well, I guess - - - I guess what
15 I'm asking you to addresses, is that an unsuccessful
16 legislative attempt to resolve the issue that's before us
17 today that was resolved by the DMV?

18 MR. HITSOUS: No, Your Honor.

19 JUDGE FAHEY: How so?

20 MR. HITSOUS: Because these - - - these bills
21 don't signal - - - or this one bill - - -

22 JUDGE FAHEY: Um-hum.

23 MR. HITSOUS: - - - does not signal the
24 legislature's attem - - - attempts to crowd the field.
25 Now, at no point has - - -

1 JUDGE FAHEY: I can't say that I understand that.
2 They - - - they voted on it. They - - - it didn't pass,
3 and now, you basically did the same thing.

4 MR. HITSOUS: No, Your Honor. What DMV has done
5 is articulate a series of presumptive consequences.
6 Charlotte's Law would not have been presumptive, so this
7 wouldn't have conflicted with Charlotte's Law in any event.
8 And again, Charlotte's Law is extremely isolated. In - - -
9 in the one instance that Charlotte's Law refers to, that
10 doesn't mean the DMV would be constrained to approve
11 relicensing in every other instance.

12 It, in fact, illustrates that the legislature is,
13 when it wants to, capable of curbing DMV's discretion here.
14 I know my adversary referred to DMV's supposedly boundless
15 discretion, but when the legislature has wanted to speak,
16 it has. For instance, in 1193(2)(c)(3), it's articulated a
17 very narrow circumstance where an individual would be
18 ineligible for relicense, permanently. And that is not on
19 a presumptive basis.

20 But that doesn't signal that DMV is constrained
21 to approve relicensing on every other occasion. Not least
22 of which when DMV has allowed - - - or when the legislature
23 has allowed DMV the discretion to decide applications for
24 relicensing without qualification as to who, where, and
25 under what circumstances.

1 And there's a good reason for that, which is that
2 the relicensing equation is inherently complex. When
3 you're relicensing somebody, you're trying to evaluate
4 whether they are fit to be back on the road. That can
5 involve an infinite permutation of factors that is best
6 left to DMV's expertise, as opposed to deciding the
7 relatively simpler question of whether a particularly
8 dangerous act on the road warrants revocation. So - - -

9 JUDGE FAHEY: You know, how about Vince's Law;
10 you're familiar with that? The legislature rejected there
11 a twenty-one-year lookback, and enacted a fifteen-year
12 lookback. And - - - and now, you've enacted, what, a
13 twenty-five-year lookback?

14 MR. HITSOUS: That's correct, Your Honor. But
15 that said, that is simply one attempt that hasn't made it
16 past committee. And this court has been very clear that
17 legislative action is not probative of an intent to crowd
18 the field on a - - -

19 JUDGE FAHEY: Well - - -

20 MR. HITSOUS: - - - particular subject matter.

21 MR. HITSOUS: - - - I think you're right. I
22 think you're right. It's - - - it's an ambiguous path to
23 go on because there's other factors that might come into
24 play; that's certainly correct.

25 MR. HITSOUS: And - - - and I would implore this

1 court, but even if it had found that there were
2 unsuccessful attempts in the legislature that - - - that
3 signaled the legislature - - -

4 JUDGE FAHEY: I guess what it doesn't do is it
5 doesn't answer how you are doing by regulation what the
6 legislature failed to do by law.

7 MR. HITSOUS: What we're doing by regulation,
8 what the legislature has explicitly permitted us to do by
9 regulation, Your Honor. In 1193(2)(c) - - -

10 JUDGE FAHEY: What you're saying then is your - -
11 - your discretion is so broad that if the legislature
12 decides to make a law, it is unable to do so; you still
13 have the - - - right, the discretionary power to implement
14 that policy through the use of your own regulations.

15 MR. HITSOUS: Yes, Your Honor, because they - - -
16 and another thing that this court has decided expressly is
17 that agencies are under no rigid marching orders. In this
18 sense, this case is very similar to the Rent Stabilization
19 case where the legislature - - - where the legis - - -

20 JUDGE FAHEY: Don't worry about those sounds, you
21 know.

22 MR. HITSOUS: Okay. So in cases like Rent
23 Stabilization and General Electric, the legislature had
24 created a concept and then the agency implemented it.

25 Here, the legislature has created the opportunity

1 for relicensing, and expressly, by Statute, said, DMV, this
2 is your responsibility.

3 JUDGE FAHEY: Um-hum.

4 MR. HITSOUS: DMV is discharging its
5 responsibility. Now, I'm not going to say that if the
6 legislature passes a law that conflicts with these
7 regulations, that that wouldn't serve to preempt the
8 regulations, but it hasn't.

9 JUDGE FAHEY: Um-hum.

10 MR. HITSOUS: And because it has already given
11 DMV this authority, authority that I'll note has been in
12 existence since 1980, that DMV was perfectly within its
13 rights - - -

14 JUDGE ABDUS-SALAAM: Counsel, in that vein - - -

15 MR. HITSOUS: - - - to amend this - - -

16 JUDGE ABDUS-SALAAM: - - - these - - - these
17 regulations have now been in effect, what, about five
18 years?

19 MR. HITSOUS: Yes, Your Honor. And in those - -
20 -

21 JUDGE ABDUS-SALAAM: Has the legislature - - -

22 MR. HITSOUS: - - - five years - - -

23 JUDGE ABDUS-SALAAM: - - - taken a look at them
24 and decided to do anything about them?

25 MR. HITSOUS: No, Your Honor. In these past five

1 years, that hasn't even been a bill introduced that would
2 purport to rein in DMV's Authority, which signals that the
3 legislature has been looking at what DMV has done, and
4 finds it consistent with its mission.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. HITSOUS: I see that my time is up. Thank
7 you.

8 CHIEF JUDGE DIFIORE: Thank you.

9 Counsel.

10 MR. LANG: Good afternoon. Jeffrey Lang, on
11 behalf of respondent.

12 So I just first want to address the claim by
13 petitioners in this case that the - - - the special
14 exception, 136.5(d) is a farce in two points. One is that
15 that claim isn't properly before the court. I mean, that's
16 really a claim that this regulation which allows DMV to
17 consider exceptional circumstances, isn't properly being
18 implemented by DMV. But in - - - in fact, the regulation
19 is plainly there on its face in what - - - in what
20 petitioners have brought is a facial challenge to the
21 regulations, as opposed to an implementation challenge.

22 And the second point is that there's just no
23 merit to it. In fact, in - - - in the - - - in the last -
24 - - in the last eighteen months, nineteen special
25 exceptions have been granted. So there's simply - - - so I

1 believe there have been eleven that have been granted in
2 last year. So the claim that it's there in name only is
3 simply false.

4 Also, I'd like to address the issue of the - - -
5 what petitioners say is - - - is a conflict between the
6 regulations and what I'll call the permanent revocation
7 scheme in 1193(2)(b)(12). Now, that - - - this is - - -
8 and this is very important. That permanent revocation
9 scheme addresses a very, very narrow set of recidivists.
10 And if the legislature wanted the treatment of those
11 recidivists to somehow affect DMV's expressly granted
12 unqualified broad relicensing authority under
13 1193(2)(c)(1), then it could easily have - - - it would
14 have said so. It would have said so if this permanent
15 revocation scheme were to have such a broad consequence.

16 And - - - but even as to the persons who come
17 within that scheme, which is none of the petitioners here,
18 it doesn't even set any type of ceiling on what DMV can do.
19 Because all it says is that, depending on exactly which
20 provision you fit into, after a limited period of time,
21 either five years or eight years, DMV must waive the
22 permanent revocation if certain statutory factors are met.

23 Now, when DMV waives the permanent revocation,
24 all that means is that DMV can, at that point, has to
25 decide its, you know, applies its relicensing regulations,

1 and still has to make a relicensing decision. And the
2 permanent revocation provisions expressly say that nothing
3 shall require DMV to relicense an applicant if it - - - DMV
4 believes that it's contrary to - - - to public safety.

5 Now, you know, in the issue of deciding these on
6 a case-by-case basis, all DMV has done here with the
7 regulations is adopt a set of presumptive rules that allow
8 for an applicant to put forward special circumstances. DMV
9 does consider relicensing applications on a case-by-case
10 basis. It has just applied essentially a set of - - - of
11 proportional rules where persons who have one or two
12 drunk-driving convictions, they will normally just have to
13 wait their statutory minimum period, and then they can be
14 relicensed.

15 Persons who are more serious, if you have three
16 or four, you have a waiting period. And if - - - if you
17 have, you know, three or four, and serious driving offense,
18 or five, then you are presumptively revoked, that's a
19 presumptive lifetime revocation, but you - - -

20 JUDGE RIVERA: So that's what - - - that's what
21 he's arguing. That you can't make - - - you can't issue
22 these presumptions. You're limited to the case-by-case
23 analysis.

24 MR. LANG: There - - - there's simply no support
25 for an idea that for - - - for this notion that an - - - an

1 agency isn't deciding appli - - - applications on a case-
2 by-case basis when it's using presumptive rules.

3 Just to put this in context, DMV has received
4 since September 2012, when these regulations were enacted,
5 has received approximately 13,000 applications. So these
6 regulations just explain to the public out DMV is generally
7 going to exercise its discretion when deciding applications
8 on a - - -

9 CHIEF JUDGE DIFIORE: Do they serve - - -

10 MR. LANG: - - - case-by-case basis.

11 CHIEF JUDGE DIFIORE: - - - to give guidance to
12 the decision maker; is that - - -

13 MR. LANG: Precisely. They - - - they - - - they
14 guide the - - - the person at DMV looking at these
15 applications so that similarly situated persons are treated
16 in - - - in a similar manner. This simply allow for
17 consistent decision making and - - -

18 JUDGE RIVERA: But they can't ignore the
19 presumption, right? They must apply; it's a mandatory
20 presumption.

21 MR. LANG: In the regulations, it's - - - it's
22 not man - - - it's a presumption. But again, and it is
23 generally applied. But if persons have particular
24 circumstances such as a particular hardship that the lack
25 of a license would cause, then they - - - that would cause

1 them - - -

2 JUDGE RIVERA: No, no, I understand your argument
3 that the presumptions include exceptions. But the question
4 is whether or not, other than for purposes - - - other than
5 based on an exception, can the decision maker ignore the
6 presumption?

7 MR. LANG: No.

8 JUDGE RIVERA: No. So the presumption is
9 mandatory; it always applies. So - - -

10 MR. LANG: In - - - in that sense, yes.

11 JUDGE RIVERA: To the extent - - - I just wanted
12 to clarify what your answer was to the Chief Judge was not
13 - - - I - - - I didn't take it to suggest that they could
14 ignore the presumption. The presumption is helpful, but
15 the presumption is mandatory.

16 MR. LANG: Yes. No, it's not that they ignore
17 the - - - the - - -

18 JUDGE RIVERA: Um-hum.

19 MR. LANG: - - - the presumption. They - - -
20 they apply it. It's that an applicant always has the
21 opportunity to put before DMV particular circumstances for
22 - - -

23 JUDGE RIVERA: You're saying it's a rebuttable
24 presumption.

25 MR. LANG: Precisely.

1 JUDGE RIVERA: Although - - - you would agree
2 it's a very high standard.

3 MR. LANG: Yes, I would. Yeah.

4 JUDGE RIVERA: And meant to be so.

5 MR. LANG: Yes. Exactly. But because when
6 you're dealing with such a large number of applicants to
7 ensure that - - - that DMV is applying its regulations
8 consistently, and meeting its statutory mission to promote
9 public safety.

10 A word about the lookback periods, there are
11 certain statutory lookback periods, and Vince's Law would
12 have been a statutory lookback period. Now, those lookback
13 periods are simply for different purposes. They applied
14 to, for example, the elements of - - - of a criminal
15 offense that determine whether or not you're aggravated,
16 DWI, or regular DWI.

17 They apply to set the minimum statutory waiting
18 periods that determine a period during which a person is
19 simply ineligible to apply for a new license. And - - -
20 and those are generally shorter - - - and Vince's Law would
21 have been something along those lines. It would have been
22 a statutory lookback period.

23 Now, nothing in the statutory lookback periods
24 effects DMV's regulatory lookback period. That applies
25 when DMV is applying its - - - its regulations to you.

1 And, you know, again, if the legislature - - - and - - -
2 and I should say, the Fourth Department rejected this - - -
3 this precise argument in - - - in the Dahlgren case, where
4 this court had denied leave.

5 If the legislature wanted the shorter statutory
6 lookback periods, just like if the legislature wanted the
7 permanent revocation scheme in 1193(2)(b) to cabin DMV's
8 relicensing - - - plain relicensing authority under
9 1193(2)(c)(1), then it's easily could have said so. And
10 where the legislature did want to take away DMV's
11 relicensing authority, which is in a couple of - - - one
12 narrow case were under 1193(2)(c)(3), you will never get
13 your license back if you have twice if - - - two - - - if
14 you have two DWIs where there was physical injury in both
15 cases.

16 The legislature knew how to - - - how to do so;
17 it did so in that case. And if it wanted these statutory
18 lookback periods to have that type of implication, it - - -
19 it simply - - - it simply would have said so.

20 I - - - I see my time is up. Unless there's any
21 further questions - - -

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 Counsel.

24 MR. SILLS: In the Vehicle and Traffic Law, to my
25 reading of it, there's an expressed legislative intent

1 geared towards rehabilitation, and geared towards
2 conditional driving privileges.

3 There are plenty of statutes that address those
4 issues, because I think the legislature realizes people do
5 need to drive; they need to get to work, they need to get
6 groceries, they need to go to the doctor. And to the
7 extent that DMV does have discretion, if they were to say,
8 you can only now drive conditionally for work purposes - -
9 -

10 JUDGE RIVERA: Yes, but - - - but the cases
11 you're talking about are individuals who have had several -
12 - -

13 MR. SILLS: But - - -

14 JUDGE RIVERA: - - - several incidences. These
15 are not - - - this is not once. They've had several
16 incidences, they've had the opportunity not to repeat these
17 violations, and they are recidivists.

18 MR. SILLS: Absolutely. But my question - - -

19 JUDGE RIVERA: And the policy in the VTL is that
20 some recidivists do not get a license again.

21 MR. SILLS: But I guess my question would be,
22 have any of them ever driven drunk while going to work, or
23 driven drunk coming from work, or driving drunk to the
24 doctor, and - - -

25 JUDGE RIVERA: Well, you could make that argument

1 to the legislature, but the policy is very clear. A series
2 of incidents, if you're a recidivist, your license - - -
3 you're not getting a license. It's been revoked - - -

4 MR. SILLS: But - - -

5 JUDGE RIVERA: - - - it's not going to be
6 reinstated; you're not going to get another license.

7 MR. SILLS: The policy is clear, and I think the
8 fact that it is a policy in and of itself makes it illegal.
9 But the Statute isn't clear that if you do this you can't
10 get a conditional license; the Statute tends to favor
11 conditional licenses.

12 Now, I would like to close by saying that, you
13 know, current events have led us to see that public
14 statements made in connection with administrative action
15 can affect how it's reviewed. And if you just look at the
16 press release that came out on the day of these
17 regulations, it says, "Under current law, drivers who are
18 convicted of multiple alcohol or drug related driving
19 offenses cannot permanently lose their licenses."

20 Well, current law hasn't changed. So if they
21 agree that the law doesn't allow this, and then as was
22 pointed out, Charlotte's Law didn't pass, I don't see how
23 they can then say, we're just doing it anyway because these
24 people deserve it. I - - - it would be so easy to pass - - -

25 -

1 JUDGE RIVERA: If - - - if the exceptions weren't
2 what you call a farce, do you lose?

3 MR. SILLS: I - - - thank you, Your Honor.
4 Subsequent to the briefing in this case, the Appellate
5 Division decided, the Third Department decided, Merkel v.
6 New York State Department of Motor Vehicles, and Mr. Lang,
7 I believe, was the attorney on the appeal. And the appeal
8 dealt with an extenuating circumstances waiver application.

9 And the Appellate Division unanimously found that
10 DMV did not exercise any discretion whatsoever,
11 misconstrued its authority under the regulation, and that
12 the appeals board used an improper standard of review, and
13 they remanded the case for a proper analysis. But I would
14 say that the Merkel case - - -

15 JUDGE RIVERA: That's an individual case,
16 correct?

17 MR. SILLS: But if you look at Ms. Matsen's
18 extenuating circumstances documents, which are on pages 179
19 and 180 of her record, and you compare that to the language
20 that was referred to in Merkel, and I can tell you, I have
21 personally reviewed dozens and dozens of these denial
22 letters on compelling circumstances claims, they're - - -
23 they're a form letter, the names change, the addresses
24 change, it - - - it's a form; they're all just denied with
25 a form letter. And - - -

1 JUDGE WILSON: Counsel, I would like an answer to
2 Judge Rivera's question.

3 MR. SILLS: Can you please repeat the question?
4 I - - - I thought I was.

5 JUDGE WILSON: I don't think you were.

6 MR. SILLS: I thought - - - I must have
7 misunderstood it. Could - - -

8 JUDGE WILSON: The question is, if this were not
9 a farce, if the waiver were not a force, would you lose?

10 MR. SILLS: I guess it depends on how much of not
11 a farce they are, or were. Because if - - - if nineteen
12 people in four-and-a-half years are getting waivers, and
13 thousands and - - -

14 JUDGE RIVERA: You're - - - you're disagreeing -
15 - -

16 MR. SILLS: - - - thousands of people - - -

17 JUDGE RIVERA: - - - with the numerical outcome.
18 The question is whether or not it provides a genuine
19 opportunity for the individual.

20 MR. SILLS: In - - - in the record or - - -

21 JUDGE RIVERA: And is that a farce?

22 MR. SILLS: DMV counsel had submitted an
23 affidavit which I had enclosed as an addendum in my reply,
24 saying that needing to get back and forth to work is not a
25 hardship, and completing rehabilitation is also something

1 everybody does, and that those - - - you know, being
2 rehabilitated and needing to get to work are not sufficient
3 to get a waiver, then I would say that it's a farce in the
4 sense that what - - - what could be compelling under that
5 circumstance, you know, everybody - - - I'm not saying - -
6 -

7 JUDGE WILSON: You are - - -

8 MR. SILLS: - - - that a waiver should be given -
9 - -

10 JUDGE WILSON: - - - you are answering - - - you
11 are answering that it is a farce; you are not answering,
12 what if it weren't, would you lose.

13 MR. SILLS: If it weren't, we are still dealing
14 with administrative policymaking, regardless. And just
15 because they've left a safety valve, doesn't change what
16 they've done. And they have - - - they have legislated
17 under the guise of administrative rulemaking. And bec - -
18 - just because they have a waiver provision, even if it was
19 legitimate, doesn't change that the general policy is
20 policymaking.

21 Thank you.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 (Court is adjourned)

24

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C E R T I F I C A T I O N

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I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Acevedo v. New York State Department of Motor Vehicles, No. 40, Matter of Carney v. New York State Department of Motor Vehicles, No. 41, and Matter of Matsen v. New York State Department of Motor Vehicles, No. 42 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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