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COURT OF APPEALS

STATE OF NEW YORK

ROXANNE DELGADO,

Appellant,

-against-

NO. 83

STATE OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York
October 18, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Karen Schiffmiller
Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: The first case on
2 today's calendar is number 83, Delgado v. State of New
3 York.

4 Counsel?

5 MR. MACDONALD: Your Honor, if I could reserve
6 two minutes for rebuttal?

7 ACTING CHIEF JUDGE CANNATARO: Two minutes.

8 MR. MACDONALD: May it please the court, I'm
9 going to get right to the point of this matter, with the
10 unconstitutionality of the 2018 law that created the
11 committee on legislative and executive compensation and a
12 matter that I believe is first - - - a matter of first
13 impression for this court, which was the enabling language
14 of that law that permitted an unelected committee to make,
15 what was called, recommendations.

16 ACTING CHIEF JUDGE CANNATARO: What do you mean
17 when you say, it's a matter of first impression, given we
18 have the judicial accountability litigation?

19 MR. MACDONALD: For this - - -

20 ACTING CHIEF JUDGE CANNATARO: For this court.

21 MR. MACDONALD: This court, the Court of Appeals.
22 So what the - - - functionally, what the law did was it
23 took some recommendations by an unelected committee that
24 became law, as of January 1st, 2019, without any further
25 action of the legislature, and - - -



1 JUDGE RIVERA: But why do you need that action?
2 I mean, you've got the original statute. The legislature
3 has already made a determination, has provided these
4 factors, has given guidance, and then the legislature does
5 have an opportunity to reject those recommendations. So
6 you've got legislative action on the front end, legislative
7 action on the back end. It sounds like more legislative
8 action than you would have had if you were just passing a
9 statute.

10 MR. MACDONALD: Except that's not true, because
11 whatever the committee did, these recommendations they did,
12 in addition to having what's called the force of law, also
13 superseded inconsistent provisions of the Legislative Law,
14 Section 5, 5-A, and 169.

15 JUDGE RIVERA: Yeah, but my point is that the
16 legislature, because they get an opportunity to reject it,
17 right, the - - - why - - - why isn't that - - - if not - -
18 - if not the spirit within the language of the
19 Constitution?

20 MR. MACDONALD: Sure, because - - -

21 JUDGE RIVERA: Why isn't that good enough?

22 MR. MACDONALD: Yeah, because the Constitution
23 has language and specific stuff for how a bill becomes a
24 law, and within the spirit of the Constitution, isn't
25 enough. So what you're talking about, Your Honor, I



1 believe, is, if anything what happened was the 2018 Act was
2 a bill that had future action to be done, at what I, in our
3 - - - what we in our brief call a nonfinal bill, which is
4 not something that the legislature is allowed to pass under
5 the State Constitution.

6 JUDGE WILSON: So can I probe - - - over here,
7 sorry. Can I probe the contours of your argument a little
8 bit? So supposed that things were set up the same way that
9 it's set up, but what happens is the legislature says, for
10 2019, the compensation will be 110,000 dollars, and the
11 committee for the successive three - - - each of the
12 successive three years will adjust it based on inflation,
13 let's say. Is that constitutional or not constitutional?

14 MR. MACDONALD: Not constitutional because - - -

15 JUDGE WILSON: Okay. And what if it says, based
16 upon the consumer price index? Still now constitutional?

17 MR. MACDONALD: That's a good question.

18 JUDGE WILSON: I try to ask them.

19 MR. MACDONALD: Fortunately - - - fortunately,
20 for me, that's not the case here.

21 JUDGE WILSON: Yeah, but I'd like to know - - -
22 I'm trying to see where the delegation comes from. Is it a
23 lack of specificity and if you get to some point where it's
24 specific enough, there's not a problem? Or is it from
25 something else?



1 MR. MACDONALD: So, it's all of the above. First
2 of all, it's the mechanism. The mechanism was one by which
3 the - - - the committee did - - - made its recommendations
4 - - -

5 JUDGE WILSON: Let's stick with - - - let's stick
6 with my good question.

7 MR. MACDONALD: Okay. I'm getting to your good
8 question.

9 JUDGE WILSON: Okay.

10 MR. MACDONALD: It was self-executing. So let's
11 say there was a cost-of-living allowance built in there.
12 Maybe that's self-executing enough that it passes
13 constitutional muster, that there can be increases to pay
14 during the legislative term. That's a possibility.

15 JUDGE WILSON: Well, you don't say it said the
16 CPI, right? Is that sufficient enough?

17 MR. MACDONALD: Yeah, and that would be great if
18 it was our facts.

19 JUDGE WILSON: Okay, but there are - - - there
20 are several different CPIs, right? There's for urban - - -
21 there's - - - there's a whole bunch of them. And beyond
22 that, the CPI is created by a federal government
23 organization, right, the Bureau of Labor Statistics, which
24 sometimes changes the inputs to the CPI and sometimes
25 changes the weights to the CPI, so ultimately, you're



1 having a delegation to some nonelected group - - -

2 MR. MACDONALD: So assuming that all - - -
3 assuming that all works, I think that would be a situation
4 where we're skipping a step to what was actually the
5 assignment of this committee. But if that were the - - -
6 if those were the guidelines, then you're getting into the
7 kind of what's - - - worth - - - what's not really being
8 questioned here, the cases that establish - - - Levine v.
9 Whalen and so on that establish. Okay, you set up the
10 guiderails - - -

11 JUDGE WILSON: So it's not the nonelected so
12 much; it's the specificity is not tight enough. Is that
13 the problem?

14 MR. MACDONALD: Yes - - -

15 JUDGE WILSON: Okay.

16 MR. MACDONALD: - - - if you can get past the
17 fact that this committee is doing - - - is - - - is making
18 recommendations that supersede existing law - - -

19 ACTING CHIEF JUDGE CANNATARO: So is - - -

20 MR. MACDONALD: - - - without the legislature
21 taking any further steps.

22 ACTING CHIEF JUDGE CANNATARO: - - - your
23 argument that the "reasonable safeguards and standards"
24 that were included in the 2018 legislation were not
25 specific or comprehensive enough?



1 MR. MACDONALD: My argument is that there were
2 essentially none. There was a nonexistent, nonexhaustive
3 list of factors that the committee could decide to use as
4 appropriate to think about the prevailing adequacy of
5 compensation of executive officers and legislators and
6 statewide elected officials and then determine whether they
7 warranted - - - there was an increase in those salaries
8 that was warranted. That's the whole policy question.
9 That's the - - -

10 JUDGE GARCIA: But Counsel - - -

11 MR. MACDONALD: - - - whole ball of wax.

12 JUDGE GARCIA: Counsel, it seems to - - - what
13 I'm struggling with a bit is this case doesn't really fit
14 within our separation of powers jurisprudence, right, which
15 is legislature delegates an overbroad policy decision to an
16 executive branch, official, or agency. That's not what
17 happened here, right. So who's on this committee?

18 MR. MACDONALD: It was supposed to be the Chief
19 Judge, who declined to serve. I'm not sure why. I don't
20 know if I - - - I know why. The 52nd State Controller and
21 maybe the 24th City Controller - - -

22 JUDGE GARCIA: So it was specific individuals - -
23 -

24 MR. MACDONALD: - - - and then the sitting city
25 and state controllers.



1 JUDGE GARCIA: Right. But in their individual
2 capacities, right? The 52nd controller is not a - - - is
3 not a controller; it's a specific person, right?

4 MR. MACDONALD: Yes. Yeah.

5 JUDGE GARCIA: So my issue seems - - - it seems
6 to me the issue that jumps out to me is can the legislature
7 delegate to this type of committee, which is not an
8 executive branch committee or agency, this type of
9 authority?

10 MR. MACDONALD: I say no. I think - - -

11 JUDGE GARCIA: Yeah.

12 MR. MACDONALD: - - - they can create legislation
13 that has commissions that do certain things that fit into
14 the body of administrative law that - - - that sits out
15 there. My point - - - the point of this case is, this
16 isn't within that body of law.

17 ACTING CHIEF JUDGE CANNATARO: So what is the
18 rule? Since you acknowledge that commissions can be
19 delegated with authority, we have case law that sort of
20 defines the standards for how you delegate authority to
21 commission, what is the rule to be applied in this case
22 that shows us that this was an overstep?

23 MR. MACDONALD: So under the existent body of
24 law, administrative agencies or commissions can develop
25 rules and regulations that have the force of law. That



1 force of law is under the law. There's an existing
2 statute. They're within the scope of that statute.

3 ACTING CHIEF JUDGE CANNATARO: But we have that
4 here. There's an existing 2018 enactment that creates - -
5 -

6 MR. MACDONALD: Right.

7 ACTING CHIEF JUDGE CANNATARO: - - - the
8 commission and gives it its marching orders.

9 MR. MACDONALD: Sure. But then those rules and
10 regulations don't supersede any other laws. They're - - -
11 they stay within the bounds of that law.

12 JUDGE TROUTMAN: But here, there was a statute in
13 effect for them to be paid - - - for these particular
14 officers to be paid. The only thing that the committee was
15 to consider was the amount.

16 MR. MACDONALD: That's correct.

17 JUDGE TROUTMAN: So how is that doing something
18 impermissible?

19 MR. MACDONALD: Because what they did in that
20 instance - - - let's go with the executive - - - the
21 commissioners. They took six tiers, made them four; gave
22 the governor a discretion in one or two of the tiers that
23 didn't exist before. What they did, though, was that - - -
24 what they did then supersedes existing law. So this
25 committee went and did these recommendations, that you



1 actually can't find anywhere very easily, and they are now
2 the law.

3 So on the books, anywhere you look, Westlaw, the
4 Legislative Information Service, the Senate website,
5 Casetext, anywhere online, Executive Law 169-E has - - -
6 169 - - - has six tiers of commissioners still. That's not
7 been changed, even though this purports to have changed the
8 law, superseded the law. They're outside of the bounds of
9 what is typical - - -

10 JUDGE RIVERA: Well - - -

11 MR. MACDONALD: - - - administrative law.

12 JUDGE RIVERA: - - - Counsel, you would, I think,
13 even with your analysis, agree, that if what the
14 legislature had done was adopt a statute that set up this
15 committee and required that it provide recommendations,
16 both to salary and - - - and actually these other choices
17 that the - - - that the committee made - - - and then the
18 legislature adopted them, you would not object to that
19 process, right? Or rejected them? You would not object to
20 that process, correct?

21 MR. MACDONALD: I wouldn't - - - no, I mean, they
22 - - - they've had four years to do it. They could - - -
23 they could moot this lawsuit today, and I'd be happy.

24 JUDGE RIVERA: Yeah.

25 MR. MACDONALD: And my clients would be happy



1 with that.

2 JUDGE RIVERA: So your point is that instead of
3 having a system by which, if they don't act, the
4 legislature doesn't act, the recommendation has the force
5 and effect of law. But what you want is for them to
6 affirmatively vote up or down, whichever way they're going
7 to vote on it. Or well, vote up, right? They could just
8 not vote on it, and that means it's not in effect.

9 MR. MACDONALD: Yeah.

10 JUDGE RIVERA: That is where the rubber meets the
11 road, right - - -

12 MR. MACDONALD: Yeah, but - - -

13 JUDGE RIVERA: - - - is your argument?

14 MR. MACDONALD: I guess I'm going to go out on a
15 limb a little bit here and correct you when you say "force
16 and effect of law" because - - -

17 JUDGE RIVERA: Go ahead.

18 MR. MACDONALD: - - - my friend here is going to
19 cop - - - keep talking about force of law. What they did
20 was law. According to the law, it supersedes conflicting
21 provisions of laws.

22 JUDGE RIVERA: No, no, what I'm asking you - - -
23 along the lines of - - - some members of the court have
24 given hypotheticals. I say, you wouldn't - - - would you
25 agree that if the statute simply set up the committee,



1 authorized it to provide the legislature with these
2 recommendations, and then the legislature had, at that
3 point, to act, you would say that's fine, correct? They
4 can pass enabling statutes to design - - -

5 MR. MACDONALD: Yes, Your Honor.

6 JUDGE RIVERA: - - - whatever body to give them
7 recommendations and do what they want.

8 MR. MACDONALD: That's correct, Your Honor.

9 JUDGE RIVERA: So your issue is not setting up
10 the committee. Your issue is that they don't then take
11 some affirmative act - - -

12 MR. MACDONALD: Correct.

13 JUDGE RIVERA: - - - in response to the
14 recommendation.

15 MR. MACDONALD: It's the executing mechanisms.

16 JUDGE RIVERA: Right.

17 MR. MACDONALD: So - - -

18 JUDGE RIVERA: So then the case boils down to
19 whether or not the legislature can set up a mechanism
20 where, if they don't act, it has the force of law.

21 MR. MACDONALD: And I say they can't, and the
22 Constitution says they can't.

23 JUDGE RIVERA: Because they always must act;
24 that's your view?

25 MR. MACDONALD: That's - - - yes. And don't



1 forget, I don't really think the governor should be able to
2 prospectively surrender the governor's veto power, which is
3 also an important part of our - - -

4 ACTING CHIEF JUDGE CANNATARO: Counsel - - -

5 MR. MACDONALD: - - - Constitutional process.

6 ACTING CHIEF JUDGE CANNATARO: - - - with respect
7 to both supersession and the veto, the original 2018 bill,
8 legislation, contained the supersession language right in
9 it. They - - - it was certainly contemplated in the minds
10 of the people who passed the bill that these numbers would
11 supersede the numbers in the old statute. And one would
12 presume, when the governor signed the bill, he noticed at
13 the time that there was no veto provision in there. So how
14 is this not all precleared under the statute?

15 MR. MACDONALD: Because it can't be. Because the
16 way the statute is designed, that makes it a nonfinal bill.
17 And the legislature can't pass nonfinal bills. They
18 essentially left blanks to be filled in. We want - - - we
19 want you to decide - - - and they de - - - they gave an
20 entire policy decision to this committee - - - decide
21 whether or not everybody should get raises or not. Make
22 that decision for us, and then fill in the blanks, and
23 whatever blanks you fill in are going to supersede the
24 existing law, where the numbers are already written down.

25 JUDGE RIVERA: No, it's actually - - - then we're



1 going to look at it. You're going to give us the
2 recommendation, we're going to look at it, and we're going
3 to decide whether or not we disagree, and if we do, we're
4 going to reject it.

5 MR. MACDONALD: Yeah, so or we're going to do
6 nothing, and it's - - -

7 JUDGE RIVERA: That's actually what - - - the way
8 the law is written.

9 MR. MACDONALD: Right, or we're going to do
10 nothing, and it's going to self-execute and become - - -

11 JUDGE RIVERA: Yeah, yes.

12 MR. MACDONALD: - - - become law. So to - - -
13 back to, Judge Rivera, your - - - back to your original
14 question, this happened subsequently.

15 JUDGE RIVERA: Um-hum.

16 MR. MACDONALD: I've participated in the campaign
17 - - - a public campaign finance case, Hurley, in Niagara
18 County. That judge said, no, correctly, there's not - - -
19 there needs to be legislative equivalency for you to change
20 the election law. There wasn't. He struck down the
21 statute. And weeks later, the legislature took basically
22 everything that the - - - that committee had done - - -

23 JUDGE TROUTMAN: But in the Niagara County case -
24 - -

25 MR. MACDONALD: - - - and passed it into law.



1 JUDGE TROUTMAN: - - - that the committee was
2 given the authority to commit - - - to create new law at -
3 - - fully create new law, and it didn't have the parameters
4 that were set forth here.

5 MR. MACDONALD: They had quite a few rules that
6 they were supposed to follow in what they were doing, I
7 believe, in that.

8 JUDGE TROUTMAN: So you're saying this case is
9 identical to Niagara County case?

10 MR. MACDONALD: I'm not saying it's identical,
11 because there was - - - because there was an extra
12 component. They were tasked with drafting new legislation
13 and - - - and were given the power for anything that they
14 did that conflicted with existing election law, it would
15 supersede. I do believe that language was basically the
16 same in both.

17 JUDGE TROUTMAN: And still, because of the
18 distinction between the two, it doesn't make a difference
19 here. This - - - what this committee did, you say, still
20 caused the legislature to improperly give up their powers.

21 MR. MACDONALD: That's correct. I would say that
22 maybe the Public Campaign Finance Law was this one on
23 steroids, because they got to, you know, draft new laws, as
24 opposed to just supersede. But nevertheless, what happened
25 was exactly what should have happened. A committee made



1 some recommendations. The legislature actually enacted the
2 law. Regardless of anybody's position on the merits of
3 that, that's the way it should be done, and that's the way
4 this should have been done - - -

5 ACTING CHIEF JUDGE CANNATARO: Counsel - - -

6 MR. MACDONALD: - - - all the way through. Thank
7 you.

8 MR. PALADINO: Good afternoon, Your Honors. My
9 opposing counsel's major point seems to be that the
10 committee is somehow superseding preexisting statutes. But
11 as the Chief Judge pointed out, it was not the committee
12 that did the superseding; it was Section 4(2) of the
13 Enabling Act that superseded the preexisting statutes.

14 JUDGE WILSON: Let me ask you a different - - -
15 sorry.

16 JUDGE SINGAS: Mr. Paladino, why not just apply
17 the definition for a law that's in the Constitution? A
18 bill passed by both houses and signed by the governor.

19 MR. PALADINO: That precisely describes the
20 Enabling Act. It was the Enabling Act that was passed by
21 both houses of the legislature and signed - - -

22 JUDGE SINGAS: So then they have free reign? So
23 as long as you comply with Boreali on any topic, if there's
24 an Enabling Act that allows it, anything is a go?

25 MR. PALADINO: No, Your Honor. You have to



1 satisfy the requirements in Levine v. Whalen, all of which
2 are satisfied here. We have the articulation of the basic
3 policy, namely that salaries for public officials should be
4 adequate.

5 JUDGE GARCIA: But that's a different issue.
6 That's - - - you're giving it to an executive branch
7 agency. I mean, you have to retain the big policy picture
8 in the legislature. But let me give you a hypothetical.
9 There's a legislature they wanted to do tort reform. It's
10 getting to the end of an election year. They can't get
11 around to it. There's a gubernatorial election; all the
12 seats are up. They lose the gubernatorial election. The
13 parties are going to change. Different parties coming in.
14 Different governor. Not going to do tort reform.

15 They do this. They pass a law in the interim,
16 and they offboard the process; they give it to a committee.
17 The com - - - and say, same thing, you can overturn rules
18 of common law, whatever you want, and if we don't act, we
19 the legislature don't act, then that's going to become law
20 and supersede statute.

21 So they do that. They come up with this thing.
22 It comes back. Bam, it's the law. There's a new governor
23 sitting there powerless. Right?

24 MR. PALADINO: Well, I assume that this law that
25 you're hypothesizing does set forth adequate policy - - -



1 JUDGE GARCIA: Sure.

2 MR. PALADINO: - - - all of adequate standards -
3 - -

4 JUDGE GARCIA: That - - - that offboarded - - -
5 that offshore legislative machine there, that has the same
6 authority you have here. Different topic.

7 MR. PALADINO: I think that would be a lawful
8 delegation. If the governor - - - if the governor who
9 signed the law remained - - - was politically accountable
10 for signing that law. The new - - -

11 JUDGE GARCIA: He's gone. He or she is gone.

12 MR. PALADINO: The new governor - - -

13 JUDGE GARCIA: New governor. New governor says,
14 where - - - you know, you're overturning statutes that are
15 passed on the books. Where's my veto? One house below.
16 You can say, no, no, this is going to have the force of law
17 now, and there's no process that that - - - there's no
18 process for reviewing that by the executive branch.

19 MR. PALADINO: Governors get overridden all the
20 time. Bills become law over their veto.

21 JUDGE GARCIA: But that's the process that we
22 have in the Constitution. This is not.

23 MR. PALADINO: Yes, it is, Your Honor, because if
24 this new governor doesn't like the new state of affairs,
25 that governor can - - - can propose legislation to overturn



1 what this committee in your hypothetical did.

2 JUDGE GARCIA: But - - - but that's maybe a fix
3 to a problem, but my concern is the problem that's been
4 created by having a process for changing the law that
5 doesn't have to go through the Constitutional bill passing.
6 You know, and we talk about commissions and other things,
7 but those have to - - - as I think your adversary was
8 saying, one, they don't have the - - - they have the force
9 of law, but they were overwritten by statute, and two, I
10 think even the commissions have to comply with the
11 Administrative Procedures Act, which I don't think this
12 committee did.

13 MR. PALADINO: Well, my opponent did raise this
14 SAPA claim. He lost in that claim, and he abandoned it, so
15 that issue is not - - -

16 JUDGE GARCIA: I'm not saying that's the claim
17 you're going to win or lose on, but it just shows you how
18 different this is from the ordinary process. I mean, they
19 don't have to comply with SAPA, right?

20 MR. PALADINO: Well, Your Honor, they do have to
21 follow the guidelines that were laid down for them. They
22 have to act consistently with their enabling legislation.
23 This is not unprecedented. This is just like Center for
24 Judicial Accountability. It's just like the Berger
25 Commission statute.



1 JUDGE WILSON: Well - - - well, it's a little
2 different from Berger, isn't it? Because in Berger, the
3 governor had the ability to disapprove it, no?

4 MR. PALADINO: No, Your Honor. The - - - there
5 was a legislative veto, a very questionable legislative
6 veto process, by which the legislature could have
7 disapproved the recommendations of the Berger Commission.
8 That was doubtful in light of Chadha, assuming this court
9 would follow the federal model in that respect.

10 What is similar is that there was enabling
11 legislation that established the policy, established the
12 guidelines, and reserved the right for the legislature to
13 review the report of the committee before it became law,
14 and pass a new law to modify or abrogate. But in other - -
15 - all other respects, it's essentially identical.

16 JUDGE RIVERA: Yeah, it's not an administrative
17 rule. I mean, there is - - - there are several
18 differences. Not an administrative rule, right, in the
19 truest sense of an administrative rule. This committee
20 comes up with recommendations that will become law, unless
21 the legislature rejects it, right?

22 MR. PALADINO: Well, I don't see much of a
23 functional difference between this and a rule of an
24 administrative agency, other than the fact that rather than
25 having an ongoing administration - - -



1 JUDGE RIVERA: Well, the legislature - - - well,
2 you're right. If a statute says that any administrative
3 rule or particular administrative rule is going to go
4 through this same kind of legislative thumbs up or thumbs
5 down, but generally that's not the case, right? You have
6 an enabling statute, authorizes the administrative agency
7 to pass appropriate rules with appropriate guidance given
8 to them, and they do, right?

9 MR. PALADINO: Exactly, and rules do not have to
10 be submitted - - -

11 JUDGE RIVERA: Without come - - - but I'm saying,
12 but usually without coming back to the legislature. That's
13 - - - that's what's happened here.

14 MR. PALADINO: That's true, but - - -

15 JUDGE RIVERA: Or a misunderstanding. And - - -
16 and although I think the hypothetical Judge Garcia has
17 posed presents a tremendous obstacle to you, I guess there
18 is a difference between the legislature delegating an
19 entire subject area of law versus something discrete like
20 the amount of the pay. Because the pay, they're entitled
21 to a salary; that's constitutional. They're - - - they're
22 not deciding whether or not you get paid, right? They're
23 deciding the amount.

24 MR. PALADINO: Well, that's right. I think in -
25 - - in Judge Garcia's hypothetical, the scrutiny might be



1 greater because of this - - - the scope of the delegation
2 is so much greater. The - - -

3 JUDGE RIVERA: Well, it sounds very much like
4 early federal laws that knock down exactly that kind of
5 legislation, where you were delegating an entire area, no
6 matter how much you tried to narrow it, an entire area of
7 law, versus this, which is - - - we're just talking about
8 the amount of money you're paid. You've already made a
9 decision, right? He has the constitutional entitlement to
10 a salary. You've already - - - you're just deciding what's
11 the number. I mean, I think the problem is that you've
12 decided upfront that you're going to let them decide the
13 number, and then once you see the number, you'll decide
14 whether or not to reject it. That's his argument, that no,
15 the only way this works is the legislature has to decide on
16 the number first. It's not that someone can recommend it
17 and then they just reject it. So legislature's got to
18 decide that number.

19 JUDGE GARCIA: But this wasn't just a number,
20 right? It was - - - they changed the tiers, right?

21 MR. PALADINO: Well, that's right, but what - - -
22 think about what the tiers did. The tiers - - -

23 JUDGE GARCIA: No, no, but I'm saying, where
24 would we draw the line? So would we say, you can offboard
25 your legislative authority - - - and this isn't a



1 separation of powers. I think a lot of what we're mixing
2 and matching here is, I'm giving my legislative authority
3 to an executive agency. We have case law on that. Very
4 different. That's not what happened here.

5 You're giving your legislative authority to this
6 group. And they're going to come back, and you're going to
7 pass it through a means that's not the regular bill
8 passing. So if you're saying, okay, you can do a number,
9 what more than the number can you do? You can do a number,
10 plus if you need to change the tiers to get to the number,
11 you can do the tiers. What else could you do?

12 MR. PALADINO: Well, the scope of the delegation
13 is going to be important. And your example with the tort
14 reform, obviously, there's a tremendous number of policies
15 that are implicated there. You would presumably engage in
16 more exacting scrutiny of the adequacy of the - - - of the
17 policy articulation and the standards.

18 JUDGE GARCIA: Policy articulation to me is
19 executive branch. We keep the policy; we give the rule-
20 making authority to the executive branch. We have cases
21 that look at that. Here, to me, is something very
22 different. It's the authority to make law and how that law
23 is going to be - - - have the force of law. So you've
24 delegated that authority to this committee, in a way, with
25 parameters around it, but then within that, this thing



1 comes back, and unless both houses agree that they don't
2 want to do this, it has the effect of law, and it
3 supersedes within the realm of the delegation.

4 Where do we draw the line on when the legislature
5 can offshore that role?

6 MR. PALADINO: Well, there can be constitutional
7 restrictions on delegations. For example, in Article XI of
8 the Constitution, there are express limits on the
9 legislature's authority to delegate the taxing power. It -
10 - -

11 JUDGE GARCIA: So absent that kind of expressive
12 limitation, they can do this, as long as the delegation
13 kind of lists a relatively narrow area.

14 MR. PALADINO: Presumably yes. I mean, this
15 court, at least to date, has not adopted what's, I guess,
16 being worked on at the federal level, this notion of the
17 major questions doctrine, or it's too big a deal doctrine -
18 - -

19 JUDGE WILSON: So - - - so to follow - - -

20 JUDGE GARCIA: Again, that's an executive
21 delegation. That - - - those cases didn't involve congress
22 setting up some type of other authority that then would
23 come back. The only thing I can think of as an analogy is
24 the rule-making authority, like the federal criminal rules,
25 the rules of evidence, which have this type of enabling



1 act, but I believe the Supreme Court has said the
2 legitimacy of that is somehow tied to the - - - the
3 independence of the judiciary, and these are internal,
4 inherent authority rules related to the judiciary. This is
5 very different, right, so. This is - - -

6 MR. PALADINO: The same exact mechanism was
7 approved at the federal level in the Pressler case, where
8 the executive made a recommendation that acquired the force
9 of law unless overruled by congress.

10 JUDGE RIVERA: Does - - - does - - -

11 MR. PALADINO: And I would point out that we
12 don't have a unitary executive. So the fact that - - - I
13 think that this is in the executive branch. It is doing an
14 implementation. And under article - - - Section 18 of
15 Article III, the legislature is expressly allowed to create
16 commissions for special purposes.

17 JUDGE WILSON: Why do you say this is within the
18 executive branch?

19 MR. PALADINO: Because it's implementing rather
20 than creating policy.

21 JUDGE GARCIA: What control of - - -

22 JUDGE RIVERA: I - - - I don't see that. Aren't
23 they just choosing? They're just choosing. Because - - -

24 MR. PALADINO: The - - - the - - -

25 JUDGE RIVERA: Do you agree that the legislature



1 could have made every one of the choices that's in the
2 recommendation itself? Without any recommendations, they
3 could have debated it amongst themselves?

4 MR. PALADINO: Of course, but - - -

5 JUDGE RIVERA: Okay. Do you - - -

6 MR. PALADINO: - - - a valid delegation doesn't
7 depend on a court thinking that the legislature had a good
8 enough reason to do the delegation. It's a question - - -

9 JUDGE RIVERA: Well, let me ask you this. Do - -
10 - is there - - -

11 MR. PALADINO: - - - of authority, not wisdom.

12 JUDGE RIVERA: Is there any - - - is there
13 anything for us to draw from the fact that the language,
14 the constitutional language, is to be fixed by law as
15 opposed to be fixed by statute? Does that matter at all?

16 MR. PALADINO: Well, my opponent thinks it
17 matters - - -

18 JUDGE RIVERA: Help you, hurt you, or doesn't
19 matter.

20 MR. PALADINO: - - - but he's wrong. I mean, it
21 is true - - - I agree with my opponent that 1948 - - -

22 JUDGE RIVERA: Well, I'm just saying. It could
23 have said statute. And the only people who pass a statute
24 are the legislature - - - the elected officials in the
25 legislature.



1 MR. PALADINO: Right. The Constitution could
2 have been worded in a such a manner as to pre - - -
3 preclude a delegation, but it was not. It - - - the intent
4 of it was to transfer authority from the Constitution,
5 where salaries used to be - - - or legislative salaries
6 used to be fixed, and give them to the legislative branch
7 with the consent of the governor. But what's lacking is
8 any evidence that that was intended to preclude the
9 legislature from delegating that authority, just like it
10 can delegate just about any other authority, as long as you
11 have - - -

12 JUDGE SINGAS: Mr. Paladino, I'd like to cite a
13 general term case, so we're going way back to 1871, Healey
14 v. Dudley. That case held that - - - indulge me for a
15 minute - - - that "the Constitution, in providing that the
16 salaries of county judges shall be established by law,
17 confines the power of fixing such salaries to the
18 legislature." The court further reasoned that "When an act
19 is to be done according to law, or a thing is to be
20 established by law, we all understand that the law intended
21 is a law passed by the legislature and not by some inferior
22 body acting under powers conferred by the legislature."

23 I think in your brief, you didn't make a
24 distinction between "fixed by" and "established by". So
25 why not just apply this?



1 MR. PALADINO: Well, I don't agree that the
2 legislature lacks the authority to delegate the authority
3 that's been given to it. It was pursuant to law that these
4 salaries were established.

5 JUDGE SINGAS: But when the amendment was being
6 passed contemporaneously with that, there was some
7 discussion about the legislature's power being checked by
8 public opinion, because if they overcompensated themselves,
9 the argument went, the public would vote them out. So
10 doesn't sort of offloading these decisions to this
11 committee circumvent that entire check on the legislature
12 that was contemplated?

13 MR. PALADINO: No, Your Honor, because anyone
14 who's paying attention realizes that it was the legislature
15 and the governor, through the enactment of the 2018 law,
16 that created this independent body and gave it the power to
17 decide whether public officials should get a pay raise. So
18 if the public doesn't like what the committee did, they
19 realize that ultimate responsibility for those actions lies
20 with the legislature and - - - and the governor. They do
21 not evade responsibility.

22 JUDGE WILSON: Let me see if I can follow up on
23 Judge Garcia's concerns a little bit. In the typical case
24 where we're delegating to an executive branch agency, what
25 we're concerned about is the transfer, improper transfer,



1 of legislative power to the executive branch. With me so
2 far?

3 MR. PALADINO: Um-hum.

4 JUDGE WILSON: Okay. And we don't, in that
5 circumstance, worry that the executive is being cut out of
6 the process. We actually are worried that the executive is
7 having too much power in the process, right? It's a
8 balance that way.

9 If we're transferring to something that's an
10 independent committee, that is not within the control of
11 the executive, we're not worried about the executive having
12 too much power in that balance, we're worried about the
13 legislature abdicating some of its legislative
14 responsibility, for example, my twenty-four-year-old
15 daughter, who could have just as easily been named in the
16 legislation as the people who are named there. She might
17 actually do a good job on it, but that's another matter.

18 In thinking about how much we are willing to
19 allow in the way of delegation, if at all, should we be
20 looking for tighter restraints in the amount that is
21 delegated - - - tighter controls around the delegation, if
22 it is not to the executive branch, but it's rather to some
23 sort of independent committee?

24 MR. PALADINO: That certainly sounds like, in
25 theory, a valid concern. I think that those concerns would

1 be satisfied here by the level of detail in this statute.
2 And in this case, I would also point out that the governor
3 signed onto the process that created this body. It might
4 be more problematic if, let's say, this legislation was
5 created over gubernatorial veto.

6 I would point out that, you know, what happened
7 here at the supreme court is the - - - it was found that
8 this independent body did go too far, and the judiciary
9 stepped in, and that was an additional check by looking at
10 the enabling legislation, looking at the guidelines, and
11 concluding you didn't - - - you were not conferred
12 authority to supersede provisions of the Public Law
13 Officers Law.

14 But I appreciate Your Honor's concern, and I do
15 acknowledge this isn't quite like the typical situation,
16 but if you just substituted this committee for an
17 administrative agency, let's say it was put in the
18 executive branch and these things - - - these
19 recommendations were just called regulations, and putting
20 aside the SAPA process would have kicked in, I think here
21 the statute intended to supersede the SAPA process.
22 Regulations are not submitted to the legislature for
23 approval. They can, at any time, look at them and - - -
24 and over - - - overrule them. So the fact that they're
25 allowed to go into effect, isn't a problem, in that



1 respect.

2 And I think that there are sufficient checks
3 here, because the legislature could have always passed a
4 new law and overridden the recommendations, just like they
5 can, at any time, step in and overrule an administrative
6 agency's rules and regulations.

7 ACTING CHIEF JUDGE CANNATARO: To go back to the
8 overstepping of the delegation, you were asked a little
9 while ago about the tiers. What is it in the enabling
10 legislation that you view as authorizing, you know, this -
11 - - that goes beyond just setting a number. It actually
12 changes the pay structure for those commissioners. Could
13 that potentially have overstepped the delegation?

14 MR. PALADINO: No, Your Honor, because first, ask
15 yourself, what was the purpose of the old tiers. The old
16 tiers were in service of adequate compensation. There was
17 a judgment that at that time, all of the commissioners in
18 the six tiers performed relatively the same scope of duties
19 and responsibilities, and therefore, they should get the
20 same salary.

21 The committee found that that was outdated, that
22 there had been shifts over time in the relative - - -

23 ACTING CHIEF JUDGE CANNATARO: But that sounds
24 like a quintessentially policy determination.

25 MR. PALADINO: I would disagree, Your Honor. I



1 think it's a subsidiary policy choice. The overarching
2 policy is adequate compensation. And the tiers were in
3 service of that. My opponent - - -

4 ACTING CHIEF JUDGE CANNATARO: So how many - - -

5 MR. PALADINO: - - - has it backwards when he
6 says that I have to point to something that specifically
7 authorized the rearrangement of the tiers. The real
8 question is, is it in furtherance of the overarching
9 policy. And if the answer is yes, then the body was
10 allowed to make suc - - -

11 JUDGE RIVERA: Could they eliminate all the tiers
12 and say, you know, get rid of the tiers?

13 MR. PALADINO: Sure. They could have just gone -
14 - -

15 JUDGE RIVERA: Could have done that?

16 MR. PALADINO: - - - commission by commissioner,
17 and set adequate compensation. Imagine - - - like, in this
18 case the only real shift was one commissioner got moved
19 from old tier A to tier C. The - - - I think he was the
20 head of the Gaming Commission. And one commissioner went
21 from B, that was the Department of Financial Services, to
22 tier A. That's because there had been shifts in the
23 responsibilities over time.

24 Under my opponent's view, if we were stuck with
25 the old tiers, we would have had to have overpaid the



1 gaming commissioner and underpaid the Commissioner of the
2 Department of Financial Services.

3 JUDGE GARCIA: Well, you could have changed the -
4 - - you should - - - could have changed the tiers by
5 actually enacting a law and having the governor sign it.

6 MR. PALADINO: Because that - - -

7 JUDGE GARCIA: I mean, that's an option.

8 MR. PALADINO: - - - there was a law that
9 authorized that, because the overarching policy is adequate
10 compensation, and I don't see what the tiers do other than
11 - - -

12 JUDGE GARCIA: But they're changing the - - -

13 MR. PALADINO: - - - achieve adequate
14 compensation.

15 JUDGE GARCIA: - - - they're changing the tiers
16 much more than for those two commissioners. They're
17 changing them into the future, right? I mean, they don't
18 just apply - - - the new tiers don't just apply to those
19 two commissioners. They apply to anyone in the future,
20 right? They've changed the law.

21 MR. PALADINO: Pursuant to authorization from the
22 legislature, furthering the overarching policy of adequate
23 compensation.

24 JUDGE WILSON: I mean, there's two features about
25 the tiers, right. And I took from one of your earlier



1 answers that you were saying, for example, let's take tier
2 C, which is 120,000 - - - no, 140 to 160,000, I think.
3 That if they had simply said, okay, all these people we've
4 put in tier C, we're not going to say tier C; we're just
5 going to list the names of these jobs and say, for each of
6 those, it's 140 to 160,000 dollars. That - - - you're not
7 really - - - the tier is just a shorthand way of
8 identifying commissioner by commissioner what the committee
9 has decided is adequate compensation, right?

10 MR. PALADINO: Precisely.

11 JUDGE WILSON: That's the first part of what you
12 said. There is a second part, though, to Mr. MacDonald's
13 argument, which is that it should have said 140 or 150. It
14 can't say 140 to 160, because that is then delegating the
15 executive the power to pick the - - - fix the compensation.

16 MR. PALADINO: Well, that was what - - -

17 JUDGE WILSON: How do you respond to that piece
18 of it?

19 MR. PALADINO: The committee was allowed to
20 consider the need to attract talent. And I gave the
21 example in my brief of, you want to hire your clerk. If
22 you just have one salary you could pay, that would limit
23 your sources. But if you have a range, you can hire either
24 less experienced or more experienced. And it's similar
25 here. If you give the appointed - - -



1 JUDGE WILSON: But then is that - - - how is that
2 fixed by law, if it's not a number, even - - - if even the
3 committee doesn't come up with a number?

4 MR. PALADINO: Well, Your Honor, the
5 commissioners are not subject to a fixed-by-law
6 requirement. The legislative - - - members of the
7 legislature are, and the attorney general and the
8 comptroller are - - -

9 JUDGE WILSON: Okay.

10 MR. PALADINO: - - - one - - - under Article
11 XIII, Section 7, the other under Article III, Section 6,
12 these commissioners, they're - - - are not state officers
13 named in the Constitution. So you don't need to have them
14 precisely fixed. So that's my - - - the short answer to
15 that.

16 JUDGE WILSON: Yup.

17 MR. PALADINO: But again, I would just remind - -
18 - what is the policy that these tiers represent, beyond
19 simply a shorthand way to achieve adequate compensation?
20 It's simply a subsidiary policy choice. And to have
21 required the committee to adhere to the old tiers would
22 have prevented the committee from fully achieving the
23 legislatively declared policy, because they would have had
24 to, you know, assume that these commissioners were doing
25 the same job they did twenty years ago when, in fact, over



1 time, some of their responsibilities have expanded and - -
2 - and some have contracted.

3 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.
4 Paladino.

5 MR. PALADINO: Thank you, Your Honors.

6 JUDGE RIVERA: What, if anything, is your
7 response to his last point, that the commissioners - - -
8 with the respect to the tiers part of it? The
9 commissioners are not even, let's call it this way,
10 protected by the Constitutional provision saying fixed by
11 law.

12 MR. MACDONALD: Certainly, so I agree that the
13 commissioners don't need to be fixed by law. That's the
14 starting point.

15 JUDGE RIVERA: Okay.

16 MR. MACDONALD: But there was a reason that the
17 legislature originally did the six tiers of commissioners
18 that the people supported through their votes for their
19 legislators, and so on, and that meets the same equivalency
20 in legislation passed by the legislature changing those six
21 tiers, and especially because they had never before given
22 the governor discretion to make hires. That's nowhere
23 described in the 2018 law, to give the executive branch
24 even more power and discretion. It may be a good idea. I
25 think it is a good idea. But that's a policy determination

1 that's a good idea.

2 And on top of all that, I think there prob - - -
3 there's - - - there's likely follow-on effects from all
4 this. So you take tier six and move it up, and you move
5 these - - - you make these progressions in the tiers of the
6 pay of these commissioners. There's follow-on effects for
7 the employees below them and the salaries that are expected
8 to be paid to the people who are deputy commissioners and
9 so on.

10 So that's a big question for the legislation to
11 handle, not through some sort of vague thing to say,
12 discover what's adequate and then decide whether or not
13 anybody's warranted an increase based on what is your
14 determination of adequate. And by the way, we're not going
15 to give you any guiderails on this. We're going to list a
16 bunch of factors that are nonexhaustive for you to go about
17 your business.

18 And the committee, you know, sort of proved the
19 point by going on its own merry way with its holistic view
20 of legislature compensation, putting income restrictions on
21 legislator pay, and deciding that legislators - - -
22 legislatures are full-time employees, full-time.

23 JUDGE RIVERA: So let's say we agree with you.
24 Is then the only way the legislature and the governor could
25 pursue this particular route that has interested them in



1 the past, and that they are arguing in support of now, is
2 either to seek a Constitutional amendment or to pass a
3 statute like you regularly pass a statute and allow for a
4 gubernatorial veto, if that's the governor wants to do? Is
5 that the only options or have I missed one?

6 MR. MACDONALD: You know, I don't know. I don't
7 know if there's, like, some mechanism to be done where you
8 pass a law that causes - - - you know, that is effectively
9 a repealer and the replacement of some nature, where they
10 can adequately do things with proper restrictions and turn
11 it into an administrative - - - I don't know. But - - -
12 because that's not the question here. The - - - you know,
13 the easy answer is pass a law. The other easy answer is,
14 this is not the way it's done, this 2018 law. And maybe
15 there's something in the middle.

16 JUDGE RIVERA: When you say, pass a law, as in
17 pass a statute, you mean they could either have made the
18 decisions themselves - - -

19 MR. MACDONALD: Correct.

20 JUDGE RIVERA: - - - or set this framework up,
21 but they're just recommendations, and then they would take
22 those recommendations and do whatever they need to do to
23 have it pass as a statute, allowing for a gubernatorial
24 veto.

25 MR. MACDONALD: Right.



1 JUDGE RIVERA: Am I understanding that?

2 MR. MACDONALD: Yes, that's correct.

3 And so there was not actually a SAPA claim - - -

4 JUDGE RIVERA: The governor vetoing what the
5 legislators get paid.

6 MR. MACDONALD: Right. There was not actually a
7 SAPA claim in this. SAPA a question asked to illustrate
8 that nobody can identify what it was that this group did,
9 because it wasn't rule-making, but it - - - because it was
10 law-making.

11 Just to quickly address a point from earlier, the
12 Berger Commission to clarify. That commission was undoing
13 certificates of need that were already part of the Health
14 Act. So the Health commissioner had - - - health - - -
15 health commission or the public health council, whatever,
16 had issued certificates of need to all these facilities.
17 The Berger Commissioning was looking at reducing the volume
18 of services and so on, within the existing statutory
19 framework. So it was going to eliminate certificates of
20 need.

21 There's no argument here with the current body of
22 law on delegation doctrine and whether it's been too broad
23 in some interest, where it's just the public interest or
24 something like that, because we don't get there with this
25 case. We don't get there with this case because this group



1 made new laws that superseded old laws, and it had no
2 bounds on it anyhow, even if it could be considered part of
3 that delegation. There was nothing constraining it, and it
4 - - - by its own actions, it illustrated how nothing was
5 constraining it.

6 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.
7 MacDonald.

8 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Delgado v. State of New York, No. 83 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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