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COURT OF APPEALS

STATE OF NEW YORK

CUOMO,

Respondent,

-against-

NO. 1

NEW YORK STATE COMMISSION ON ETHICS
AND LOBBYING IN GOVERNMENT,

Appellant.

20 Eagle Street
Albany, New York
January 7, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN
ASSOCIATE JUSTICE SALIANN SCARPULLA

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Good afternoon and belated
2 Happy New Year. The first case on the calendar is number
3 1, Cuomo v. New York State Commission on Ethics and
4 Lobbying in Government.

5 Counsel?

6 MR. BROCKNER: May it please the court. Dustin
7 Brockner on behalf of the Commission. Can I have three
8 minutes for rebuttal?

9 CHIEF JUDGE WILSON: Yes.

10 MR. BROCKNER: The Third Department held that
11 because the commission enforces ethics laws, the governor
12 must be able to control the commission through appointment
13 and removal. That categorical rule suffers two fundamental
14 defects.

15 JUDGE SINGAS: Isn't it more than the third
16 department? Isn't it the Constitution that holds that we
17 have separate branches of government who each have their
18 own independent function and that an encroachment by one
19 against another is a violation of our constitutional law?

20 MR. BROCKNER: That's correct. At that level of
21 generality, that our Constitution - - - has that separation
22 of powers. But the premise in there is whether that
23 separation requires that the governor be able to control
24 the executive branch through appointment and removal. And
25 from - - -

1 JUDGE SINGAS: Well, do you think that the
2 executive has to control, oversee, dictate in any manner?

3 MR. BROCKNER: There has to be - - - yes. Under
4 separation of powers, one branch cannot steal for itself
5 the power of another branch. And the commission has a
6 carefully structured - - - excuse me, carefully structured
7 appointment and removal process to ensure that sufficiently
8 independent, so it could do its vital job, and also at the
9 same time prevent any one branch from usurping for itself
10 the functions of another.

11 JUDGE GARCIA: So no one controls the commission?
12 It's extra government?

13 MR. BROCKNER: Not - - - not at all, Your Honor.
14 There are ways in which the governor and legislature - - -
15 there's political accountability through the commission
16 structure. The governor - - -

17 JUDGE GARCIA: In what way?

18 MR. BROCKNER: And I'll go through them. First,
19 the governor and the elected officials appoint the
20 commission members through the executive - - - second,
21 through the executive budget. The elected officials decide
22 every year how much funding, if any, to give to the
23 commission.

24 JUDGE SINGAS: But if we - - - can we just follow
25 up on that a little bit? We'll - - - follow up on all of

1 them. But on the budget specifically, doesn't the act
2 itself prevent the governor from reducing the appropriation
3 altogether?

4 MR. BROCKNER: No, no, that's not right, Your
5 Honor. What Your Honor is referring to is something called
6 interchange. That is a provision - - - and in this
7 respect, the commission looks identical to the Board of
8 Parole, a - - - a statute that plaintiff agreed to as
9 governor. And what you're talking about is, after an
10 appropriation is made, after the governor, right, decides
11 how much and the legislature approves, after that, there's
12 a statutory process not required by the Constitution where
13 at times interchange - - - let's - - - I don't know the
14 details. For certain functions, money can be transferred
15 from one appropriation to another.

16 It is not constitutionally required. And
17 instead, the key point here is the governor still has, in
18 her discretion, as author of the executive budget to decide
19 how much money, if any, in the first instance, to give to
20 the commission and what it could be used for. And if you
21 look at the budget bill since then, even as to interchange,
22 the governor has retained the ability to decrease - - -

23 JUDGE HALLIGAN: What if - - -

24 MR. BROCKNER: - - - funding at times.

25 JUDGE HALLIGAN: I didn't mean to cut you off.



1 What about removal authority? Can you point to any other
2 agency where the members are removable only by impeachment,
3 or by a vote of the members themselves, and not by any
4 publicly accountable official?

5 MR. BROCKNER: I'll just give you one example.
6 Most recently, Delgado, the committee there. There was no
7 way to remove the members. It was a statutorily - - -
8 appointments were by statute and there was no mechanism to
9 remove - - -

10 JUDGE HALLIGAN: Although, Delgado is arguably
11 different in that there is. I'm not sure that there's the
12 same type of executive authority that's being exercised.
13 So maybe I should ask a more precise question, which is any
14 other entity that has exercised executive authority, if - -
15 - if we were to agree that what the commission does here is
16 to exercise executive authority where there's no removal
17 power exercised by any publicly accountable official. And-
18 - - and I guess my follow up question is, why shouldn't
19 that trouble us?

20 MR. BROCKNER: Two - - - two responses on that.
21 Well, first, Delgado, it was - - - wasn't a legislative
22 power. It was a committee. It was quasi legislative. It
23 was still an executive function in that regard. And - - -

24 JUDGE HALLIGAN: Well, wait. In what regard
25 exactly was - - - was - - -

1 MR. BROCKNER: It was like - - - it was
2 rulemaking. It was something - - - it was authorized by
3 statute. It was akin to rulemaking, which is something
4 that agencies do. But I want to move on from Delgado. But
5 that is an example where this court looked under separation
6 of powers at a commission structure, and there was no
7 removal. And it was held to comply with separation of
8 powers. Other - - - the Commission on Prosecutorial
9 Conduct, there are no way to remove a majority of the
10 members there. I believe the chief judge and the
11 legislative leaders appoint, and there's no removal
12 mechanism specified for removal of those additions.

13 CHIEF JUDGE WILSON: So let me ask - - - let me
14 ask you this. Suppose we thought that the structure here
15 was constitutionally fine. Is there a limiting principle
16 on what types of executive powers could be delegated to a
17 similar organization?

18 MR. BROCKNER: Yes, there are, Your Honor. And
19 I'd like to go through three factors that a court could
20 consider and mindful just to start, there has never been -
21 - - this court has never said, and it's - - - it would be
22 inconsistent with our history and practice, that the
23 governor must be able to control every executive entity
24 through appointment and removal. That's just not been our
25 - - - our history and practice to date.

1 And the factors that the court could consider to
2 ensure that the legislature hasn't taken for itself
3 executive power are, first, for an agency that's
4 independent, does the agency's - - - agency's mission
5 warrant the degree of independence, such as if it's
6 performing an internal oversight function? Second, does
7 the agency structure provide adequate safeguards to guard
8 against legislative domination? And third, did the
9 governor consent to that structure? And does she retain
10 meaningful influence over the agency's direction? And - -
11 -

12 JUDGE HALLIGAN: But if that - - - if those are
13 the factors, then then it seems to me that you're arguing,
14 but tell me if I'm overreading it that that there is no
15 there are no teeth to appointment or removal power, that if
16 there are other safeguards, as you describe it, or some
17 control, for example, through the budget process or the
18 general supervisory powers, that that's enough. I guess, I
19 thought you were making a narrower argument which had to do
20 with the function of this particular entity.

21 MR. BROCKNER: I will, and I think that's what I
22 started with what is the - - - the mission of the agency
23 and is unique here. I mean, this is not policing the
24 public at large. This is a governor and the legislature
25 deciding for themselves how to best regulate their own

1 affairs.

2 JUDGE HALLIGAN: So but why - - - help me
3 understand why that matters in terms of the parameters of
4 executive authority. I understand your argument, but I
5 don't see, other than you pointing to Cohen and Delgado, a
6 constitutionally grounded reason why that matters.

7 MR. BROCKNER: Well, those are constitutional
8 decisions of this court.

9 JUDGE HALLIGAN: They are. But if we thought
10 they were distinguishable. I'm asking from first
11 principles what - - -

12 MR. BROCKNER: It's a recognition of the
13 political branches, institutional expertise and authority
14 to decide for themselves how to best regulate their own
15 affairs and operations.

16 JUDGE HALLIGAN: So can I tell you what concerns
17 me about that? It seems to me that separation of powers
18 and in particular, you know, some teeth to the authority
19 that each branch has is partly about public accountability.
20 And if I'm trying to understand why the self-regulation
21 argument would allow us to discard what otherwise might be
22 some checks, unless you're arguing that this structure
23 would be permissible across the board with respect to any
24 function whatsoever. So maybe you can help me with that.

25 MR. BROCKNER: Okay. I mean, there's - - -

1 there's several things to unpack from there. We are not
2 arguing that this applies across the board. And I think
3 internal oversight function is a key consideration in this
4 case. And the respect for the governor and legislature's
5 considered judgment that when it comes to how to best
6 regulate themselves, they are - - - they have the expertise
7 and authority to make those decisions, you know, with
8 latitude. This is not the regulation of police functions.

9 JUDGE GARCIA: But within - - - within
10 constitutional limits, right? I mean - - -

11 MR. BROCKNER: Yes.

12 JUDGE GARCIA: - - - any sitting governor could
13 cede away constitutional authority under that, under that
14 approach and say, look, I agreed to it by not vetoing
15 legislation. So would this legislation be unconstitutional
16 if the governor had vetoed it and they overrode the veto?

17 MR. BROCKNER: I think that would be a closer
18 case. And I'm at the - - - I think ultimately it would
19 still pass muster, but I think it would be a different case
20 for two reasons. First, unlike Delgado, where this court
21 was clear that one consideration - - -

22 JUDGE GARCIA: Delgado is a delegation case,
23 right, which is a separation of powers case. But it's the
24 - - - it's the legislature delegating its own authority.
25 And the question there is, can they do that? This is

1 another branch encroaching on the authority of a separate
2 branch, sometimes I think, referred to as reverse
3 delegation, which the argument is should get heightened
4 scrutiny from a delegation case.

5 MR. BROCKNER: Actually, I'd like to just address
6 why there's no encroachment. So because of that - - - of
7 that factor. So you start with the function and then you
8 look to what is the degree of control. And let me just go
9 back quickly to the veto point. If the governor vetoed,
10 then we wouldn't be able to say the governor had - - - has
11 agreed that this is the best way to self-regulate. So that
12 would be - - - that's one of the reasons, and then - - -

13 JUDGE GARCIA: Can an individual cede
14 institutional authority under the Constitution?

15 MR. BROCKNER: Not at frame that that general - -
16 - not some core power as such, but that's not - - -

17 JUDGE GARCIA: But the problem with your drilling
18 down, to me, seems to be that you focus on each one of
19 these things, appointment, removal, the function, the veto
20 and say not at that level, but it seems there is a very
21 good argument to approach a statute like this from that
22 level, which is how do these pieces work together? So how
23 does the limit on appointments? How does the inability to
24 remove? How does the function of disciplining a branch,
25 which implies certain coercive mechanisms, and the fact

1 that you have just an individual governor not - - -
2 choosing not to exercise a negative here, don't we look at
3 all of that and say, given the function, given the
4 parameters that have been placed on it, given appointment,
5 removal restrictions, does this somehow offend what this
6 court has described as bedrock principles of separation of
7 power?

8 MR. BROCKNER: I agree with that it is a context
9 specific approach that looks to all those factors.
10 However, this is - - - this body strikes a careful balance.
11 If we just take a step back, we know what happens with an
12 ethics commission when it is not sufficiently independent.
13 It is unable to do its job. It cannot help protect the
14 public's trust in government. In fact, if it's thought
15 that it's under the thumb of the political branches, it
16 erodes the public's trust in government. So - - -

17 JUDGE GARCIA: And is there a political price
18 that would be paid for that?

19 MR. BROCKNER: Yes, but also the governor and
20 legislature can address the problem and decide based on
21 hard earned experience, unfortunate experience - - -

22 JUDGE GARCIA: But you would say, though, that
23 that power to discipline within the branch is - - - is a
24 formidable one, right? Power to discipline members of a
25 branch. Which I would think would have led in some way to

1 the legislature deciding they would not be bound by this
2 commission's decisions, that their recommendations that
3 then go to the legislators own internal mechanism rather
4 than what's been placed on the executive branch here, which
5 is that they have the power to fine, right?

6 MR. BROCKNER: Well, two responses. First, you
7 said it's a formidable power, but there's a formidable
8 state interest in having an ethics monitor that is able to
9 do its job. As - - -

10 JUDGE GARCIA: On all branches or one branch?

11 MR. BROCKNER: Well, taking a step back, on both
12 branches, the commission has jurisdiction over both
13 branches - - -

14 JUDGE HALLIGAN: But can't - - - do - - - you
15 know, powers are very limited with respect to the
16 legislature? I mean, that tied to the to the function
17 argument that you're making, I guess, is a question for me
18 along these lines, which is what do you do about the very
19 broad scope of the statute's coverage, right? You, I
20 think, are making an argument that this is self-regulation,
21 internal management, right? But the breadth of individuals
22 and officials who are covered is pretty substantial,
23 including even lobbyists and clients of lobbyists. So how
24 is it that the need for some independence on the theory
25 that the executive cannot reasonably police oneself, how is

1 that - - - that make sense in terms of the much broader
2 coverage in the statute?

3 MR. BROCKNER: Well, I think one point is the
4 alternative is - - - this is plaintiff's theory, despite
5 that broad coverage, I mean, this is a facial challenge,
6 despite it goes over lobbyists, legislative officials.
7 Only one person, the governor, has to be able to control
8 through appointment and removal.

9 JUDGE HALLIGAN: Yeah, but I'm asking you,
10 though, if you're making an argument which - - - you said
11 you're not arguing that this would be tenable, I'm sorry,
12 Chief, I know his light is on, but. But you're saying
13 you're not making the argument that this would be
14 permissible across any function, and you're focused on the
15 ethics function? And I took you from your briefs, although
16 tell me if I misunderstood, to be focusing specifically on
17 the executive and the governor's challenges, any governor,
18 in self-policing oneself. But the coverage of the statute
19 goes far beyond that. So how do we sustain it on the basis
20 that you're proposing, given that it covers a much wider
21 range of individuals or officials?

22 MR. BROCKNER: Well, it's independent of those -
23 - - it's sufficiently independent of those officials.
24 Well, I mean, the AG has an appointee but is not - - -
25 doesn't control it. The point is that for the executive

1 branch, a lot of those people are, you know, the governor
2 would want to protect as well. I mean, if there's - - - in
3 addition, there's the AG and the Comptroller. So I think
4 it matches that when we're coming - - - when internal
5 oversight there's concerns - - -

6 JUDGE HALLIGAN: I mean, if the statute were to -
7 - - were to be more closely tied to the problem that you're
8 identifying, that that might make for a stronger argument,
9 I would think, that it was, you know, necessary and
10 therefore within the play in the joints that are - - -
11 separation of powers cases allow.

12 MR. BROCKNER: It has oversight over both
13 branches and it is independent, sufficiently independent of
14 both branches, and that neither can dominate it. And the
15 governor, I mean, I thought we started this conversation
16 talking about the governor's influence, and she has
17 powerful ways to influence but not unduly control the
18 commission. And that's through the executive budget, which
19 has been called one of the most powerful managerial tools
20 that the Constitution assigns the governor.

21 CHIEF JUDGE WILSON: I think that what Judge
22 Halligan is trying to ask, although I may be
23 misunderstanding it, is how does your self-regulation
24 argument fit with the reach of the statute to lobbyists?

25 MR. BROCKNER: Just two responses, which is

1 preliminarily, this is a facial challenge. So it doesn't
2 matter the claim. It doesn't matter if it's the lobbyist
3 or the governor or the legislature, the commission has no
4 investigative power. That's the first claim. But to the
5 point of lobbyists, they have a special relationship to the
6 political branches, the governor in particular. They are
7 trying to directly and expressly influence the behavior of
8 the political branches, so it is necessary to regulate them
9 if you're going to ensure ethical decisions are being made
10 that we are also - - - there's coverage for the lobbyists
11 who are trying their level best to influence those
12 decisions.

13 JUDGE SCARPULLA: May I ask one quick question?

14 CHIEF JUDGE WILSON: Yes, both.

15 JUDGE SCARPULLA: I just - - - the statute says
16 it's, "Exercise powers and duties with respect to statewide
17 elected officials", right? That could also include elected
18 Supreme Court judges, the way that it is written now,
19 because I, for one, am an elected statewide official. So
20 what is - - - how is this narrowly - - - this language
21 tailored only to people in the executive who - - - the
22 executive branch when it says statewide elected officials?

23 MR. BROCKNER: Because, Your Honor, I've never -
24 - - this is sort of a new - - - a new consideration.

25 JUDGE SCARPULLA: Right. Exactly.

1 MR. BROCKNER: Can I - - - can I just point out
2 article 6, which deals with judiciary? This court has said
3 that is the exclusive mechanism for disciplining judges.
4 So that is the bulwark. And this court could - - -

5 JUDGE SCARPULLA: Except now the legislature has
6 said something else, right? So - - -

7 MR. BROCKNER: Well, no. So sorry - - - you have
8 to - - - you have to read a statute in context and
9 understanding that when it says statewide elected
10 officials, it's referring to the governor, the Comptroller,
11 executive officials.

12 JUDGE SINGAS: Well, usually the statutes spell
13 that out. But I have a different question for you. Can
14 you point us to any authority that says that salutary
15 purpose of legislation overrides separation of powers?

16 MR. BROCKNER: That - - - no. But the premise of
17 that question is I'm arguing - - - we're arguing policy,
18 and we're not. We're arguing respect for the institutional
19 authority of the political branches to say when it comes to
20 ensuring our own internal practices are ethical and we have
21 a - - - a functioning ethics monitor, the political
22 branches have the latitude to design the monitor as they
23 think will work. So that's - - - that's one thing. But
24 then the second purpose or the reason for a law is
25 certainly relevant under this court's separation of powers

1 doctrine. In Cohen, this court found relevant the - - -
2 the law was designed to attain a paramount state interest.

3 JUDGE SINGAS: Not at the expense of another
4 branch of government, though. That's my point.

5 MR. BROCKNER: But this is not at the expense of
6 another branch of government.

7 JUDGE SINGAS: This is an encroachment, arguably,
8 one branch encroaching on the quintessential function of
9 another branch to execute the laws. I mean, these are
10 bedrock principles that we teach our middle schoolers from
11 6th grade through high school, through our law school
12 classes and state government.

13 MR. BROCKNER: So I actually think - - - what and
14 you are referring to bedrock principles for sure. The
15 question, though, is, is appointment and removal an
16 essential part of that? And in New York, it's never been
17 vested exclusively in the governor. She has other
18 managerial tools like the executive budget, like her
19 investigative power. And here she also has - - -

20 JUDGE SINGAS: Okay. Let's talk about the
21 investigative power. We talked about the budget, and I
22 think it's toothless. Right, I know you tried to defend
23 that, but ultimately, the governor - - - the - - - the act
24 itself says the governor in the interim, between
25 appropriation, cannot reduce the amount of money that the

1 commission gets. But let's talk about investigation.
2 Let's say there is an investigation. What happens next?

3 MR. BROCKNER: The governor can investigate, make
4 clear, I mean, sunlight is a powerful antiseptic. The
5 governor - - - this is all in the context of all her powers
6 combined. She investigates the commission, makes
7 subpoenas, witnesses, takes testimony, makes clear the
8 affairs and - - - of the commission then uses the bully
9 pulpit to make clear what her findings are, the budget - -
10 -

11 JUDGE SINGAS: Okay. And then the commission
12 rejects that. Then, the commission rejects it.

13 MR. BROCKNER: I'm sorry, the - - - who's the
14 commission in that question? I'm sorry.

15 JUDGE SINGAS: The commission rejects the
16 investigation done by the governor?

17 MR. BROCKNER: So COELIG, the ethics commission?

18 JUDGE SINGAS: Yes.

19 MR. BROCKNER: Well, that's not the commission.
20 The ethics - - - COELIG doesn't have any ability to reject
21 a Moreland Act commission findings.

22 JUDGE SINGAS: So you're saying that the governor
23 has retained her power to investigate, correct?

24 MR. BROCKNER: Yes. And including investigating
25 COELIG. I'll call it COELIG for purposes of this question.

1 JUDGE SINGAS: And I'm asking what happens after
2 that investigation?

3 MR. BROCKNER: The governor makes clear - - - can
4 make clear what her findings were about, how COELIG is
5 expending its funds, making its decisions. Then, she can,
6 through the bully pulpit, go to the legislature, explain if
7 what changes need to be made. And also through the budget,
8 she could say this commission is not using its - - - its
9 resources in an appropriate way and use that as the author
10 of the budget. It's a powerful, powerful tool that's been
11 recognized - - -

12 JUDGE SINGAS: Okay. and - - -

13 MR. BROCKNER: - - - to influence it but not
14 control. Because if - - - may I finish this?

15 JUDGE SINGAS: Yes, of course.

16 MR. BROCKNER: Because we saw when the governor
17 or the elected officials - - - this is through JCOPE. If
18 they could if you give them too much power, if you give
19 them removal, there will be a perception that the
20 commission is - - - that the elected officials are using
21 the commission to protect themselves and that, in this
22 context, based on unfortunate experience, the political
23 branches said we need it to - - - the political branches
24 have oversight over the commission, but not undue influence
25 that would prevent them - - - that would impair the

1 commission from doing its job.

2 JUDGE SINGAS: Just one more. That antiseptic
3 quality, that could be true for the Commission as well,
4 right? They don't need the power to punish and the power
5 to enforce fines because they also have this antiseptic - -
6 - they could have that antiseptic effect. They have a
7 bully pulpit. They could just say, you know what, we found
8 X findings. We're going to air those out. Sunlight is
9 good. Without encroaching upon a quintessential executive
10 power of punishment.

11 JUDGE GARCIA: Or in another way, that same
12 question, what's the justification for the difference in
13 enforcement mechanism between the legislature and the
14 executive? Even your theory?

15 MR. BROCKNER: If I can, I guess, let me - - -
16 let me see if I can take this in turn. What's been struck
17 down by the lower courts is the entire investigative power.
18 So it's not just the civil penalty provision. If there's
19 the flaws of civil penalty provision, that's - - - that - -
20 - the court should focus on that. But as to the
21 difference, and I'm going to talk about the difference in
22 the Legislative Ethics Commission. And I hope to explain
23 why the penalty power is also constitutional - - -

24 JUDGE GARCIA: But if the theory of this
25 commission is, as you described, what could be the

1 justification for different enforcement mechanism? Because
2 then to Judge Singas' point, isn't the fact that the
3 commission can do part A without having the enforcement
4 power of part B enough? If it's enough for the
5 legislature, why is it not enough for the executive?

6 MR. BROCKNER: Taking a step back because under
7 JCOPE, that was - - - that's when the scheme was created -
8 - -

9 JUDGE GARCIA: It's not about - - - forget about
10 JCOPE. I just want to know here in what you've just said,
11 because we never considered JCOPE. This statute, what's
12 the justification for the divergent enforcement mechanisms?

13 MR. BROCKNER: Because experience with JCOPE
14 showed that when the investigative step is constrained,
15 when it's the JCOPE when the elected officials - - -

16 JUDGE GARCIA: Only for the executive, though?

17 MR. BROCKNER: No, for - - - for both. So the
18 elected officials have too much control over JCOPE, then
19 that's where the - - - the problem was. So they tailored -
20 - - they fixed JCOPE with the commission. If problems
21 arise, if there's similar concerns about the legislative
22 ethics commission - - -

23 JUDGE GARCIA: Could you answer - - - I just - -
24 - my question is what under that scheme then - - - had bad
25 JCOPE experience, which I accept - - - justifies a

1 different enforcement mechanism for the legislature than
2 for the executive. If part A is the antiseptic and the,
3 you know, the investigation and the referral, why do you
4 need part B for the executive and not the legislature?

5 MR. BROCKNER: Why? Because at this point,
6 experience had shown that if the investigation is
7 controlled by any of the elected officials, that will be
8 quashed. And the point is, there is no - - - there's - - -

9 JUDGE GARCIA: The legislators aren't elected?

10 MR. BROCKNER: We're not - - - I - - - I think
11 it's - - - this is, again, internal control. And the - - -
12 if there's problems with the Legislative Ethics Commission
13 that are akin to the problem with JCOPE, if experience
14 shows this model isn't working, the political branches can
15 do what they did here and tailor the response to fix it.

16 JUDGE RIVERA: So I'm a - - - I'm a little
17 unclear. Is your point that the experience with JCOPE was
18 that the legislators could police themselves, put aside the
19 investigation, but punish and police themselves but the
20 executive branch could not?

21 MR. BROCKNER: No.

22 JUDGE RIVERA: Okay.

23 MR. BROCKNER: The point is two - - - just two
24 points. Just because the Legislative Ethics Commission has
25 a certain structure - - -

1 JUDGE RIVERA: Yes.

2 MR. BROCKNER: - - - doesn't require that the
3 commission have a similar structure. That's just the
4 fundamental point why - - -

5 JUDGE RIVERA: Well, if the governor - - - will
6 the former governor even have standing to complain about
7 that here?

8 MR. BROCKNER: For - - -

9 JUDGE RIVERA: To complain that, well, they get
10 to police themselves but I don't get to police myself?

11 MR. BROCKNER: No, I don't - - - I'm not sure I
12 understand. The point, though, is that the problem at hand
13 was because JCOPE could - - - there's this two-step process
14 where there's an ethics monitor that investigates, and then
15 it goes to Legislative Ethics Commission; that was under
16 JCOPE, and that was the scheme. And after a decade of
17 experience, it was - - - this scheme is not working. But
18 the - - - the problem was not the Legislative Ethics
19 Commission is shirking its duty. There's no evidence that
20 the Commission - - - JCOPE found a violation, and then the
21 Legislative Ethics Commission decided not to impose a fine.
22 There's no evidence like that. Rather, the concern was at
23 step one of the process, which is with JCOPE. So they
24 tailored - - -

25 JUDGE GARCIA: But there was that concern with

1 the executive branch? That JCOPE was finding these
2 violations and referring them to the executive branch, and
3 the executive branch was taking no action?

4 MR. BROCKNER: There was - - - no, the - - - the
5 concern was that the investigative stage, that - - - that
6 the control was more insidious - - -

7 JUDGE RIVERA: Okay, but then - - -

8 MR. BROCKNER: - - - than that and prevented the
9 investigation in the first place.

10 JUDGE RIVERA: But - - - but - - - but you're
11 missing the call of this question. The question is, okay,
12 maybe you've made a good argument about investigation, but
13 why is it then you can't have the independent investigation
14 with the recommendation, as is the case with the
15 legislative branch, for the executive branch to then clean
16 house? I think that's - - - I think that's the nature of
17 these questions.

18 MR. BROCKNER: I - - - I understand, and that's
19 because the separation of powers is not a mechanism for the
20 court to tell the political branches how to fine tune their
21 internal control mechanism. It's to ensure that the
22 legislature - - -

23 JUDGE GARCIA: No, but you said the purpose of
24 this is important to the constitutionality. And if the
25 purpose isn't consistent, wouldn't that affect our analysis

1 of the common good argument that you're making? Because,
2 as Judge Rivera articulated it better than I had been
3 doing, there didn't seem to be a problem with that part of
4 the enforcement. It was with the investigation. So why do
5 you split part B this way? Because certainly the power to
6 impose these penalties is significant.

7 MR. BROCKNER: And the power is significant, that
8 that is true. And because the political branches said - -
9 - took this an incremental step, I mean, JCOPE itself was
10 in a change from the prior regime because we were unable as
11 a state to have an effective ethics monitor. So the - - -
12 the new - - - the way to fix it was through JCOPE. And
13 when the - - - the problem with the new scheme, which is
14 JCOPE and the Legislative Ethics Commission was - - - the
15 problem was with JCOPE. So then the - - - the targeted
16 solution was with JCOPE and creating the commission itself,
17 and they - - - and the governor made the decision that she
18 doesn't want - - - and partnered with the legislature, she
19 doesn't want to be able to unduly influence the commission
20 - - -

21 JUDGE GARCIA: We've said it in another case, and
22 I can't think of it. You can't cede your constitutional
23 authority because you don't want to be accountable, right?
24 I mean, that's political accountability issue.

25 MR. BROCKNER: Right.

1 JUDGE GARCIA: And you can't say, I don't want to
2 make that decision because, you know.

3 MR. BROCKNER: And there's - - - there's as much,
4 if not more political accountability than the commission
5 found accountable in Delgado. And that is through - - -

6 JUDGE RIVERA: Can I - - - can I just clarify one
7 - - - and I know we've gone way over on your light. I just
8 want to clarify one thing. Is there anything in this
9 legislation that prevents the executive from doing their
10 own investigation and, let's say, terminating an at-will
11 employee in the executive branch? Is there anything here
12 that prevents them from doing that?

13 MR. BROCKNER: No.

14 JUDGE HALLIGAN: Can I - - - can I ask, in the
15 briefs, my understanding was that a severability question
16 was raised and it was briefed, but decision on it was
17 reserved; is that right?

18 MR. BROCKNER: That - - - that's correct, Your
19 Honor.

20 JUDGE HALLIGAN: Can you tell me what your view
21 on severability was before supreme court? Was there any
22 provision that you thought might, you know, make - - - make
23 the statute as - - - I understand you're telling us it's
24 constitutional in its entirety, but - - - but under the
25 supreme court's ruling constitutional?



1 MR. BROCKNER: There - - - there are two
2 responses. One, that if the issue is with the enforcement,
3 the finding, then that's the part that's - - - that's
4 actually 94(10) (p). That can be severed and the remainder
5 of the statute could be upheld. Or alternatively, that the
6 commission exercises lots of powers besides investigating
7 enforcement, collection of financial disclosure statements,
8 training. Those are powers outside 94(10) - - - Executive
9 Law 94(10) and those powers, the commission can continue to
10 provide training and continue to collect financial
11 disclosure statements and lobbyist registration statements.
12 And it can continue to do that.

13 And I think with respect to severability, and
14 assuming this court did find a flaw, which we submit there
15 is - - - is not, that it would be very precise to guide the
16 court's analysis, and also because this would be the first
17 time in New York's constitutional history that this court
18 has had separation of powers, prohibits an agency structure
19 from being done in a certain way.

20 JUDGE HALLIGAN: Thank you.

21 MR. BROCKNER: And I will reserve the remainder
22 for rebuttal.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. DUBINSKY: Good afternoon. May it please the
25 court, Gregory Dubinsky, on behalf of the respondent,



1 former Governor Andrew Cuomo. Over two centuries ago,
2 James Madison said, I conceive that if any power whatsoever
3 is in its nature executive, it is the power of appointing,
4 overseeing, and controlling those who execute the laws.
5 This court has enunciated a similar principle. In this
6 state, the court has said - - -

7 JUDGE RIVERA: So if the executive still gets to
8 do that, which was my question to him, what - - - where is
9 the, as he called it, stealing the authority of the
10 executive branch to also provide an independent entity who
11 would investigate and perhaps impose civil penalties?

12 MR. DUBINSKY: If - - - I'm sorry, I'm not sure I
13 understood the question.

14 JUDGE RIVERA: Well, the executive still gets to
15 do that, right? That was my question to him. Or do you
16 disagree? Do you believe that the executive could not,
17 regardless of what this agency does and chooses not to
18 investigate, perhaps something that an executive, right now
19 Governor Hochul, could decide, I'm dissatisfied or I think
20 there's corrupt conduct, I'm going to terminate the
21 employment of this particular individual in this branch?

22 MR. DUBINSKY: So what the act at issue does is
23 it creates an entirely unaccountable law enforcement - - -

24 JUDGE RIVERA: Well, just to be clear, do you
25 agree, as he answered me, that - - - that the governor

1 still has that authority?

2 MR. DUBINSKY: What I'm - - - what I'm trying to
3 say to Your Honor's question is - - -

4 JUDGE RIVERA: Well, it's a yes or no.

5 MR. DUBINSKY: Well, no, because COELIG gets to
6 decide in its unilateral discretion who to enforce the law
7 against and what penalties to impose. And the governor
8 does not get a say in those enforcement decisions.

9 JUDGE RIVERA: No. And what - - - I understand
10 your point about that, but independently of that, doesn't
11 the executive still have authority to otherwise clean
12 house?

13 MR. DUBINSKY: I think it's conceivable, but I
14 think that's completely irrelevant to the constitutional
15 question before us.

16 JUDGE RIVERA: Well, let's say - - - I don't know
17 if that's true, but okay, that's a fair response. So let
18 me ask you this - - - let's say this particular entity did
19 an investigation and cleared someone. Could the governor
20 still decide I'm not going to continue with that employee?

21 MR. DUBINSKY: It's conceivable. But again - - -
22 but to take the inverse of Your Honor's question.

23 JUDGE RIVERA: Yes.

24 MR. DUBINSKY: If COELIG decides to enforce the
25 laws against a particular individual - - -

1 JUDGE RIVERA: And Hochul would not. Right.

2 MR. DUBINSKY: Right. And again, this reaches
3 not just executive branch and legislative branch officials
4 who cannot be punished, but also private individuals,
5 right? So if COELIG decides I'm going to enforce these - -
6 - these sweeping powers, you know, use my sweeping powers
7 as an agency to punish individuals for violating the ethics
8 laws, the governor does not have any say whatsoever in
9 that, cannot oversee those individuals, cannot remove - - -
10 remove the members. So for example, if COELIG just decides
11 to treat - - -

12 JUDGE RIVERA: And that's because of the
13 enforcement authority over the law, not because these are
14 employees within the executive branch, correct?

15 MR. DUBINSKY: Correct. Because the act imbues
16 this commission with sweeping, mighty law enforcement
17 powers that are quintessential executive powers to decide -
18 - -

19 JUDGE HALLIGAN: I want to - - -

20 MR. DUBINSKY: Yes, Your Honor?

21 JUDGE HALLIGAN: Go ahead. Finish.

22 MR. DUBINSKY: - - - to decide who to punish for
23 what conduct and what penalties to impose with no oversight
24 whatsoever by any official. This is a quintessential case
25 - - -

1 JUDGE RIVERA: Would it be constitutional if all
2 they did was recommend to the governor? We've done our
3 investigation. We recommend - - - we - - - we think it's
4 substantiated. We recommend the following. You decide
5 what you're going to do with it. But this is our
6 recommendation.

7 MR. DUBINSKY: Obviously, that would be a
8 different statute but I think - - -

9 JUDGE RIVERA: Yes, I understand. I'm asking you
10 - - -

11 MR. DUBINSKY: I know.

12 JUDGE RIVERA: - - - would you say that's
13 constitutional?

14 MR. DUBINSKY: I would still say that that
15 intrudes upon the governor's prerogative to decide who to
16 investigate and - - - and - - - and to determine how
17 enforcement is conducted, as I was going to say earlier.
18 And then I would like to be heard - - -

19 CHIEF JUDGE WILSON: Well, why does it - - - why
20 does it do that?

21 MR. DUBINSKY: Why - - - I'm sorry?

22 CHIEF JUDGE WILSON: Why would Judge Rivera's
23 hypothetical do that? I mean, the newspapers are
24 recommending things to the governor all the time.

25 MR. DUBINSKY: Well, the newspapers are, of

1 course, not state agencies.

2 CHIEF JUDGE WILSON: No, they're not. But if
3 it's simply a recommendation by a state agency, the
4 government is free to disregard that, no?

5 MR. DUBINSKY: I - - - I agree that it would
6 present a different question than the - - -

7 CHIEF JUDGE WILSON: Well, an unconstitutional
8 problem, or one that - - -

9 MR. DUBINSKY: I - - - I still think that it
10 would intrude upon the governor's - - -

11 JUDGE RIVERA: Well, how - - - how would the
12 legislature be taking for itself the enforcement authority
13 by merely having an entity that is recommending the
14 governor's action, but the governor makes the final
15 decision?

16 MR. DUBINSKY: Right. But what - - - in the
17 hypothetical we're discussing, the agency would still be
18 empowered to make determinations about whether a particular
19 individual has violated the law, and the - - - if - - - if
20 - - -

21 JUDGE RIVERA: And the governor can conclude
22 otherwise.

23 MR. DUBINSKY: Well - - - well - - - well, not
24 exactly, because - - -

25 JUDGE RIVERA: The governor is not - - - in my

1 hypothetical, the governor was not bound by any of that.

2 MR. DUBINSKY: Right. But you're still having an
3 unaccountable commission saying Ms. Jane Smith has violated
4 the law, right? That itself is a mighty power.

5 JUDGE HALLIGAN: I want to make sure I understand
6 your view on removal. So is it that the governor has to
7 have sole and exclusive removal authority, or can the
8 authority be concurrent with the legislature? What's your
9 position?

10 MR. DUBINSKY: So I think the question of removal
11 power, as it pertains to executive branch officials - - -
12 so as it pertains to executive branch officials who are
13 exercising quintessential law enforcement functions - - -

14 JUDGE HALLIGAN: Well, I take it you're arguing
15 here that one of the flaws in the statute is that the
16 governor does not have removal authority.

17 MR. DUBINSKY: Correct.

18 JUDGE HALLIGAN: Right? Okay. So my question is
19 what is the nature of the removal authority that you
20 believe the Constitution confers? Is it exclusive, or can
21 it be concurrent?

22 MR. DUBINSKY: Right. And with respect to
23 quintessential law enforcement executive officials, it is -
24 - -

25 JUDGE HALLIGAN: Officials or authority?



1 Quintessential - - - what do you mean by quintessential law
2 enforcement officials?

3 MR. DUBINSKY: With respect to executive
4 officials who exercise quintessential executive functions -
5 - -

6 JUDGE HALLIGAN: Are you - - - I'm just asking
7 about the commission. I take it that you mean you're
8 characterizing them that way?

9 MR. DUBINSKY: Correct.

10 JUDGE HALLIGAN: Okay.

11 MR. DUBINSKY: Yes, Your Honor. So with respect
12 to those sorts of officials, I would say it is an exclusive
13 authority, except I would say, and just to be clear because
14 I think our position has not been totally correctly
15 represented by my friend, we are - - - we are not
16 contending that the governor has an indefeasible power of
17 removal and appointment over every single executive
18 official - - -

19 JUDGE HALLIGAN: That's what I'm trying to probe.

20 MR. DUBINSKY: And I - - -

21 JUDGE HALLIGAN: So on removal, what are the
22 parameters you would say?

23 MR. DUBINSKY: So the legislature can say, for
24 example, that certain officials can be removed only for
25 cause. So - - -

1 JUDGE HALLIGAN: Presumably or to require an
2 explanation, something like that?

3 MR. DUBINSKY: To require an explanation. Of
4 course, the Constitution - - -

5 JUDGE HALLIGAN: But your view is that the
6 removal power itself, even if it can be conditioned, can't
7 be shared and it can't be concurrent.

8 MR. DUBINSKY: That's - - -

9 JUDGE HALLIGAN: So - - - so if we set aside if
10 you would the federal cases, I know you rely on those, but
11 if you would set those to the side, what's your best
12 support based on the constitutional history and our case
13 law? I know you rely on Guden, but I believe that's a case
14 in which there was an express authority that was given to
15 the governor, and I don't think we have that here. So
16 what's your support?

17 MR. DUBINSKY: So actually if you read Guden
18 carefully, the - - - the description of the governor's
19 power and saying that in this country, the power of removal
20 is an executive power, and it has been vested by the people
21 exclusively in the governor, that cites article 4, section
22 1, which is the vesting clause, of course - - -

23 JUDGE HALLIGAN: Yes.

24 MR. DUBINSKY: - - - which is not, you know, a
25 reference to the specific provision - - -

1 JUDGE HALLIGAN: Okay. Fair enough. But in
2 addition to Guden, what would you point us to?

3 MR. DUBINSKY: In addition to Guden, I would say
4 as Chief Judge Cardozo has explained in Richardson, which
5 we also cite, the removal of - - - of an executive officer
6 or a public officer is an executive act. And so I would
7 say that also is an explanation - - -

8 JUDGE HALLIGAN: But can you - - - so I guess two
9 related follow up questions. The first is, other than
10 Guden, and I take your point about Cardozo's comment, but
11 I'm not sure Richardson directly presents the question we
12 have before us now despite that comment. But are there
13 cases in which we have - - - we have said that the governor
14 must retain removal authority?

15 MR. DUBINSKY: I think I've, you know, I pointed
16 to what, in our view, are two - - -

17 JUDGE HALLIGAN: Got it.

18 MR. DUBINSKY: - - - Court of Appeals cases that
19 present that point quite in our - - - you know, strongly.

20 JUDGE HALLIGAN: Can - - -

21 MR. DUBINSKY: And I would just say, you know,
22 again, on Guden, it really does, I think, stand for the
23 broad proposition because it cites expressly to the - - -
24 to the vesting clause.

25 JUDGE HALLIGAN: Understood. And in terms of the

1 constitutional history, right, I do think that there are
2 distinctions between the way in which appointment and
3 removal were treated under our constitution and various
4 proposals for change, as opposed to the federal
5 Constitution. So in terms of the back and forth over the
6 last 200, whatever it is now almost fifty years, what are
7 the historical points - - - data points that you would ask
8 us to look at in support of your view of removal authority?

9 MR. DUBINSKY: I'm glad Your Honor asked that
10 question because I think it's a key point. So my friend
11 argues that - - - and this is on page 20 of the reply
12 brief, that the vesting clause in article IV, section 1 and
13 the Take Care Clause in article IV, section 3, imbues the
14 governor with no authority over appointment or removal,
15 which is an extreme argument because in the very beginning
16 of - - - of our constitutional history in this state, the
17 counsel of appointment existed alongside those clauses.
18 Now, it's a bit ironic in our view, and I'll get to the
19 larger exposition of the history, because even in the
20 counsel of appointment, the governor had a say, among
21 others, in terms of appointment and removal. My friend's
22 position is that - - -

23 JUDGE HALLIGAN: But I believe if, correct me if
24 I'm wrong, that - - - that then Governor Jay actually put
25 the question of whether or not the governor had exclusive

1 removal authority, and the answer was no. So I'm not sure
2 how the Counsel of Appointments stretch is helpful to your
3 view, at least on appointment. But maybe I'm missing
4 something.

5 MR. DUBINSKY: Yeah. What I'm - - - what I'm
6 saying is that the governor had a seat on the Counsel of
7 Appointment.

8 JUDGE HALLIGAN: Yeah.

9 MR. DUBINSKY: And so had a voice, a vote among
10 others, on the Counsel of Appointment. But the implication
11 of my friend's position is that the governor has even less
12 power now than - - - than he or she did under the Counsel
13 of Appointment, which is not, in our view, nonsensical.
14 But just to explain the history a little bit. Obviously,
15 the Counsel of Appointment was abolished, and although the
16 State constitution did imbue the Counsel of Appointment
17 with some executive power, for a time, it was abolished.

18 And later there was some language which we think
19 has been overread, that allowed for the legislature to
20 create - - - to decide the method of appointment of certain
21 officials. We think those are local officials. And
22 indeed, the constitutional text which my friend relies on
23 has been repealed. That was in 1963. And the only - - -
24 the only provision that my friend relies on in the entire
25 history of our state's constitution are one, the Counsel of

1 Appointment, which we've just discussed. And two language
2 that now reads - - - that as regards local officials, that
3 local government can determine how those officials - - -
4 officials are - - - are appointed.

5 So I think the meaning of executive power, which
6 I refer to, you know, in the beginning of my remarks with
7 respect to James Madison, is a well understood principle,
8 what the executive power entails.

9 JUDGE HALLIGAN: So then does your proposition
10 have to rest on the vesting and take care clause? Is there
11 any other place where there is an affirmative conferral of
12 may be set to the side appointment, but - - - but focus on
13 removal authority on a governor? Or do you have to derive
14 it from the other two clauses?

15 MR. DUBINSKY: I didn't - - - so two things. I
16 didn't get to discuss article V yet, which I think is very
17 important here. But I would also say that it's not just
18 the vesting of the executive power in the executive, it's
19 also the vesting of the legislative power in the
20 legislature, not of the executive power in the legislature.
21 So we actually - - - we obviously have a separation of
22 powers in the state, although it is somewhat modified
23 versus the federal Constitution, the legislature still is
24 not given any power to remove, in our view, state executive
25 officials. But moving forward to Article V, so the

1 constitutional history - - -

2 JUDGE RIVERA: I mean, you can go -- just - - -
3 if I can just go back. Since you can see that the
4 executive's removal power can be cabined by the
5 legislature, for example, you gave one example. There may
6 be others. By having a for-cause requirement. Why isn't
7 this a constitutionally acceptable cabining by saying it's
8 only focused on particular violations, these ethic law
9 violations in the service of this greater good, because
10 that is a way that addresses what didn't work under the
11 prior framework?

12 MR. DUBINSKY: So I would have a few responses to
13 Your Honor's question.

14 JUDGE RIVERA: Sure.

15 MR. DUBINSKY: So first, the Constitution says
16 that the governor shall take care that the laws are
17 faithfully executed. That is a undifferentiated grouping
18 of laws, the laws, not the laws except for the ethics laws,
19 or the laws except for whichever laws that the legislature
20 decides is expedient to allocate enforcement authority to
21 independent commissions. So that's point one.

22 CHIEF JUDGE WILSON: Well, except that the
23 response to point one might be, well, the best way for the
24 governor to take care that the ethics laws are effectively
25 enforced is to turn that enforcement over to somebody who's

1 not self-interested.

2 MR. DUBINSKY: I think that that's a policy
3 choice that the act makes. But - - - and a particular
4 governor might, you know, make that determination. This
5 isn't - - - this case is, of course, not about whether that
6 would be a good idea or not.

7 CHIEF JUDGE WILSON: Well, Cohen does have some
8 concern about what the policy is, no, in its constitutional
9 analysis?

10 MR. DUBINSKY: Cohen has some stray language
11 about - - -

12 CHIEF JUDGE WILSON: Well,

13 MR. DUBINSKY: - - - the fact that the
14 legislature is conditioning its compensation is salutary
15 because it serves the public interest. But I don't think
16 that was key to its decision.

17 CHIEF JUDGE WILSON: It does say that the intent
18 matters, right?

19 MR. DUBINSKY: Well, even if the intent here is
20 high minded, the policy choice that's made by this
21 legislation is different than the policy choice that's made
22 by the Constitution of the state. The Constitution of the
23 state says that accountability is very important. We have
24 a chief law enforcement officer, a chief executive. That's
25 the governor. If the governor does a bad job, and I'm not

1 quibbling with, you know, whatever perception of the prior
2 agency has been argued. There is a democratic check on the
3 governor's take-care authority.

4 JUDGE RIVERA: Yeah, but the question is whether
5 or not there can be any other check. It's not that of
6 course you can, as they say, vote the bums out, right?
7 That's not the issue. Yes, that always exists. But it may
8 very well be that the legislature and the executive decide
9 that that is not good enough to address this particular
10 concern, which is not only about ethics violations, but it
11 is about the loss of public confidence in government.

12 MR. DUBINSKY: So the second point I want to
13 raise in response to your question on this topic is a
14 reference to a point that Your Honor raised in her dissent
15 in People v. Davidson that was taken up by the court in
16 People v. Viviani, which is the principle dating back over
17 a hundred years, that where the Constitution establishes a
18 specified office or recognizes its existence and prescribes
19 the manner in which it shall be filled, the legislature may
20 not transfer any essential function of the office to a
21 different officer chosen in a different manner.

22 So that principle, which this court has recently
23 enunciated in Judge Garcia's opinion for the court in
24 People v. Viviani, applies certainly as strongly here as it
25 does to a county clerk, as in Wogan, which is, as this

1 court has said, a principal function of the executive is to
2 carry out the laws of this state. And as I was going to
3 say at - - - at the beginning of my remarks, this court has
4 also said that the executive is a court of great
5 flexibility in determining the methods of enforcement. So
6 - - -

7 JUDGE RIVERA: But I guess - - - as I was saying
8 before, why - - - let's go with what you said. Why isn't
9 the executive, since they can remove, they can investigate
10 and remove, you agree, on their own enough, given the goal
11 and the concern, so that we don't end up finding that this
12 is unconstitutional because the legislature has taken for
13 itself, which is - - - I understood that to be your
14 argument, legislature has taken for itself, its power?

15 MR. DUBINSKY: Well, it's actually two arguments.
16 One is the point about usurpation.

17 JUDGE RIVERA: Yes.

18 MR. DUBINSKY: Because, as we've argued, these
19 are legislative agents who are empowered to - - -

20 JUDGE RIVERA: Yes.

21 MR. DUBINSKY: - - - enforce the laws. But the
22 second and equally important argument is that this is an
23 executive power. And so it doesn't matter if you
24 transferred it to Joe Schmo, the - - -

25 JUDGE RIVERA: The diminishment of the power.

1 Yeah.

2 MR. DUBINSKY: Right. It's the encroachment upon
3 the governor's take care of duty, which is essential. But
4 the implication of my friend's argument - - -

5 JUDGE RIVERA: Except, it's not wholly - - - it's
6 not all of the power because the governor can still
7 investigate and remove or not remove - - -

8 MR. DUBINSKY: I'm not sure that's right.

9 JUDGE RIVERA: - - - that way.

10 MR. DUBINSKY: I'm not sure that's right, Your
11 Honor. And I think there would be some serious - - -

12 JUDGE RIVERA: If we read the statute that way,
13 what's your response?

14 MR. DUBINSKY: That it's - - -

15 JUDGE RIVERA: Let's assume we read the statute
16 that way.

17 MR. DUBINSKY: That it still - - - I think in the
18 People v. Viviani case, the question was about concurrent
19 authority, prosecutorial authority. So that same principle
20 would apply here. If we're going to have two law
21 enforcement agencies, you know, one is the chief executive
22 officer of the state whose job it is to enforce these laws.
23 And the other is a completely unaccountable commission
24 exercising tremendously powerful authority to punish
25 whomever it decides for whatever reason and impose penalty,

1 that would still be unconstitutional.

2 JUDGE GARCIA: And so I - - - I just have a
3 clarification question on the statute. I'm a little
4 unclear. How does it work when the commission finds that -
5 - - that an employment action should be taken against an
6 executive branch member? So removal, is that mandatory, or
7 is that then a recommendation to the executive to remove?

8 MR. DUBINSKY: So the way the statute functions
9 is it can - - - COELIG, in its unreviewable discretion, can
10 impose a fine. In addition to the fine - - -

11 JUDGE GARCIA: Right, I understand that.

12 MR. DUBINSKY: - - - it can it can order
13 termination or - - - or other discipline. It can refer the
14 matter to - - - for discipline.

15 JUDGE GARCIA: But it can't order that
16 unilaterally?

17 MR. DUBINSKY: I - - - I believe that it - - - it
18 can refer it for discipline, but I'm not certain whether or
19 not that is a mandatory - - - I believe it is. It's an
20 order for - - - it's for - - - it's for referral for
21 discipline. With respect - - - and this is another
22 argument, it can also recommend impeachment for statewide
23 officials.

24 JUDGE GARCIA: Right.

25 MR. DUBINSKY: But it can still recommend

1 discipline, termination, and it - - -

2 JUDGE RIVERA: And that would go to the executive
3 branch, if it's an executive official?

4 MR. DUBINSKY: It's to the employer of whatever
5 official is - - - is at - - -

6 JUDGE RIVERA: And if they would be in the
7 executive branch - - - so okay, so let's just follow up on
8 that. And then are they - - - is the official who would be
9 the supervisor or the agency or department, are they bound
10 by the recommendation?

11 MR. DUBINSKY: They may not be bound, but - - -
12 but they are - - - but the person is still going to be
13 liable for tens of thousands of dollars in - - - in the
14 fine.

15 JUDGE RIVERA: But in terms of termination - - -
16 so then the executive would retain the authority of
17 removal, and this boils down to the penalty?

18 MR. DUBINSKY: Again, I think that the issue is
19 whether an unaccountable law enforcement agency is
20 permitted to impose penalties and to investigate whomever
21 decides it should investigate or decline to investigate and
22 impose penalty, decide that someone has violated the law -
23 - -

24 JUDGE HALLIGAN: Reviewable by an Article 78,
25 yes? Is everything reviewable by a 78?

1 MR. DUBINSKY: I'm not sure that the - - -

2 JUDGE HALLIGAN: I thought it was, but maybe I'm
3 - - - I'm overreading the provision.

4 MR. DUBINSKY: It is reviewable by an Article 78.
5 I'm not sure about if someone was then disciplined, whether
6 that would be reviewable by Article 78.

7 JUDGE HALLIGAN: I understood. And the
8 penalties, I thought the statute provided that the
9 commission could impose them and that would be a final
10 determination as distinct from some employment action; is
11 that right?

12 MR. DUBINSKY: Yes, that's my understanding.

13 JUDGE SINGAS: And is there any way for the
14 people to ensure that there's an independent ethics
15 commission that wouldn't run afoul of a separation of
16 powers?

17 MR. DUBINSKY: Yes, Your Honor. I appreciate the
18 question. The answer is by constitutional amendment, as
19 was done at the Commission on Judicial Conduct. That shows
20 the right way to go about doing - - - setting up an agency
21 like this that's independent, and that has members of one
22 branch, disciplining members of another branch. If the
23 people decide that it is good policy to have members of the
24 legislative - - - you know, legislative nominees and agents
25 deciding whether or not executive branch officials should

1 be penalized, they're free to do that by constitutional
2 amendment.

3 JUDGE TROUTMAN: But they have no power to police
4 themselves?

5 MR. DUBINSKY: The - - - the people have the
6 power to vote out a governor who doesn't do a good job.

7 JUDGE TROUTMAN: No, what I'm asking you, you're
8 saying, however, neither the governor nor the legislative
9 branches have the ability to police themselves. They have
10 to go through a constitutional amendment and ask the people
11 to - - - to set up a mechanism for saying it.

12 MR. DUBINSKY: I would modify what Your Honor
13 said slightly. I would say that the - - - the legislative
14 ethics branch can enforce the - - - the ethics laws against
15 the legislative members of the legislative branch. That's
16 what currently happens. COELIG cannot discipline or - - -
17 or penalize members of the legislative branch by the
18 statute. With respect to the executive branch, the
19 executive branch can discipline itself. And if they don't
20 do a good job, the, you know, the governor can be voted
21 out. And if they - - -

22 JUDGE RIVERA: So just to be clear, if the
23 legislature, not this model, set up a model that looks
24 exactly like this when it comes to anyone who falls within
25 the legislative branch, but says we're going to let that

1 independent commission determine discipline and determine
2 removal, we're not going to have it just be a referral to
3 us. Would that - - - I assume you think that would be
4 constitutional because that's the legislative branch
5 choosing a mechanism to impeach - - - excuse me, to police
6 itself, even though it's an independent entity?

7 MR. DUBINSKY: If I understand Your Honor's
8 question - - -

9 JUDGE RIVERA: Yeah.

10 MR. DUBINSKY: - - - if the legislative branch
11 created its own mechanism - - -

12 JUDGE RIVERA: Yes.

13 MR. DUBINSKY: - - - but it wasn't legislative
14 appointees who were deciding how to penalize legislative -
15 - -

16 JUDGE RIVERA: Correct.

17 MR. DUBINSKY: - - - they were independent - - -

18 JUDGE RIVERA: Yes.

19 MR. DUBINSKY: - - - you would remove the problem
20 we have here with respect to one branch - - -

21 JUDGE RIVERA: Yes. No, that was my - - -

22 MR. DUBINSKY: - - - disciplining another.

23 JUDGE RIVERA: That was my question. That was my
24 question.

25 MR. DUBINSKY: And I think that, you know, one

1 branch disciplining itself presents very different issues.
2 And that is how, you know, the right way of going about it.
3 Whether or not they can empower - - - the legislative
4 branch can empower private employees, you know, individuals
5 to do that, I think, is a - - - sort of not before the
6 court. And I think it's different when the executive
7 branch does that versus the legislative branch. And let me
8 explain why that I think there would be a distinction.
9 Even if the legislative branch could say we're going to
10 put, you know, private individuals - - -

11 JUDGE RIVERA: So can - - - can the executive
12 branch enforce ethics laws against legislators?

13 MR. DUBINSKY: I would say no for the same reason
14 that the legislative branch as here can't discipline - - -

15 JUDGE HALLIGAN: Well, the attorney general can,
16 surely, pursuant to statute, right?

17 MR. DUBINSKY: Right. We're not talking about
18 criminal - - -

19 JUDGE HALLIGAN: The Tweed Law does that I think.

20 MR. DUBINSKY: Right. And we're not talking
21 about criminal prosecution here. This is just about civil
22 enforcement. So I would put aside the questions of - - -
23 we're not - - - I'm not contending that, for example, the
24 governor is immune from enforcement of the criminal laws or
25 that legislative, you know, members are immune from the

1 criminal laws, either. My point - - -

2 JUDGE HALLIGAN: You've - - - go ahead.

3 MR. DUBINSKY: My point is - - - is a separate
4 one. Just to respond to - - - to the question. With
5 respect to the executive branch, again, the executive
6 branch is responsible for carrying out the laws for
7 determining methods of enforcement. So the governor cannot
8 delegate that authority to private individuals.

9 JUDGE RIVERA: Well, that's what I'm saying. Can
10 then - - -

11 MR. DUBINSKY: That's what I'm saying.

12 JUDGE RIVERA: That's what I'm saying. Can then
13 the executive branch investigate and decide the discipline
14 against a legislative official?

15 MR. DUBINSKY: And my argument would be that no,
16 each branch is in charge of disciplining their own.

17 JUDGE RIVERA: But if it's the general ethics
18 laws, and the legislature writes it that way, what would be
19 the problem?

20 MR. DUBINSKY: Again, the separation of powers
21 prevents the interference by one branch with the peculiar
22 functioning of - - - of each branch - - - each branch's
23 duties. So for the same reason that the legislative branch
24 is not - - -

25 JUDGE RIVERA: So it doesn't matter if the

1 legislature writes the law that way, right, because it
2 always - - - it's the supremacy of the Constitution that
3 matters, correct?

4 MR. DUBINSKY: Correct.

5 JUDGE RIVERA: Okay.

6 JUDGE HALLIGAN: You've focused on the penalties.
7 Does the investigative authority alone pose the same degree
8 of intrusion in your view?

9 MR. DUBINSKY: So as I - - - as I was saying
10 earlier, I don't think you can just sever the penalty - - -

11 JUDGE HALLIGAN: I understand.

12 MR. DUBINSKY: - - - of a provision because what
13 we have here is essentially for - - - for a number of
14 reasons. The legislature wanted a watchdog with teeth. So
15 - - -

16 JUDGE HALLIGAN: I appreciate your view on that.
17 I'm just asking you whether you think as a matter of
18 constitutional intrusion on executive authority, it poses
19 the same kinds of problems, and if so, why?

20 MR. DUBINSKY: So I think it's - - - it's the
21 ability to punish is obviously on a different level than
22 other abilities. But I would still say that the power to
23 investigate or decline to investigate whomever it pleases,
24 and then the power to declare if someone has violated the
25 law, is still a quintessential executive function. So the

1 governor here is deprived of any authority to determine the
2 methods of enforcement, which includes the power to decide
3 who to investigate and who not to investigate, right, which
4 is a quintessential question of prosecutorial discretion.
5 So I think we're still - - -

6 JUDGE HALLIGAN: But in the civil context, is
7 that quite the same? I mean, in the criminal context,
8 obviously it is. But could the legislature set up a
9 commission to investigate some set of problems? Take your
10 pick.

11 MR. DUBINSKY: And these questions came up at the
12 supreme court as well. And there might be a different
13 question about delegation of legislative authority to
14 investigate. But that's not what we're talking about here.

15 JUDGE HALLIGAN: Why - - - but why is that? I
16 think you just said that investigations are, by their
17 nature, quintessential executive authority. So - - -

18 MR. DUBINSKY: Sorry. What I meant by, just to
19 make sure I'm being clear on that.

20 JUDGE HALLIGAN: Thank you.

21 MR. DUBINSKY: When within - - - when they are
22 conducted within the executive branch. When - - -

23 JUDGE HALLIGAN: Isn't that a little
24 tautological? If it's - - -

25 MR. DUBINSKY: Well, it is - - -

1 JUDGE HALLIGAN: - - - an executive branch
2 action, it's executive.

3 MR. DUBINSKY: Well, it's - - - it's just as
4 tautological as is this court's precedent saying that the
5 executive power has been committed to the executive
6 department, right?

7 JUDGE HALLIGAN: Okay. Fair.

8 MR. DUBINSKY: So that's - - - that's - - -

9 JUDGE HALLIGAN: But - - - but you do think that
10 the legislative branch could engage in - - - could set up
11 some commission that would engage in investigations on a
12 particular set of questions or activities?

13 MR. DUBINSKY: Absolutely. Obviously, the
14 legislature has fact finding authority, and I don't quibble
15 with that. But I think that's very different, right?
16 That's - - - I mean, the legislature, for example, can't
17 pass a bill of attainder, right, saying so-and-so has
18 violated the law. We're going to punish this person,
19 right?

20 JUDGE HALLIGAN: But could a legislative
21 commission not issue a report which takes particular
22 individuals to task for their conduct in some, you know,
23 set of issues? I would think that would be hard to exclude
24 if they can do it generally.

25 MR. DUBINSKY: I agree, and that would be

1 something that, for example, legislative subcommittee could
2 do. But again, we're talking about an executive branch
3 agency here. And that does carry different weight. And
4 again, going back to - - - I think Your Honor earlier had
5 mentioned the question of political accountability.
6 Political accountability, ensuring clear lines of political
7 accountability is, after all, at the core of what the
8 separation of powers is set up to do.

9 So the governor is elected as the chief law
10 enforcement officer, which is why, going back to Judge
11 Rivera's questions, it is so important that the governor be
12 politically accountable for her discharge of that duty.
13 Similarly, here when it comes to who to investigate and
14 what - - - what penalties to impose, even before the
15 question of penalties, declaring that someone has violated
16 the law, right, saying this person has committed this
17 misconduct, they've - - - they've violated the law, even if
18 it's then referred to the governor to decide what
19 punishment to impose, you still have a diminishment, in my
20 view, of the political accountability that's at the heart
21 of the committing of the executive power to the executive
22 branch.

23 If the legislature creates a subcommittee that's
24 tasked with investigating the conduct of executive branch
25 officials and lambastes those officials for their poor

1 conduct in office, the lines of political accountability
2 are clear. It's the legislature that's doing that. And -
3 - - and that's - - - that's, you know, I think an important
4 piece of the constitutional separation of powers.

5 CHIEF JUDGE WILSON: Thank you.

6 MR. DUBINSKY: Thank you, Your Honors.

7 MR. BROCKNER: A few quick points.

8 JUDGE RIVERA: Before you get to your points, I
9 just want to clarify, is it this - - - is it your view, for
10 your client, that indeed COELIG can make a recommendation
11 for removal, but the executive branch is not bound by that
12 recommendation?

13 MR. BROCKNER: For the - - - for lower level
14 employees, I believe that's the case. I am not a hundred
15 percent sure. The statute might be ambiguous on that
16 point, and if it matters, the court can construe it
17 accordingly.

18 JUDGE GARCIA: It does seem ambiguous on that
19 point, right?

20 MR. BROCKNER: It doesn't expressly say the
21 removal decisions are binding, and I think the court can -
22 - - again, if there's constitutional concerns, construe it
23 accordingly.

24 JUDGE GARCIA: The report sent to the legislative
25 body when there's a finding of a violation for a

1 legislative employee, are those public?

2 MR. BROCKNER: Unless law enforcement requests
3 otherwise, yes, they are public.

4 JUDGE GARCIA: They are public?

5 MR. BROCKNER: Unless it's for a specific law
6 enforcement reason, they are public.

7 JUDGE GARCIA: So the referral to the legislative
8 branch is public?

9 MR. BROCKNER: That's correct. And there's a
10 cite in our reply brief, I don't have it, it's in the
11 legislative law, I believe. The chief law enforcement
12 officer, my understanding, is the attorney general. But we
13 don't need to quibble about who bears that title. The
14 point is, as this court has recognized in Rapp, there are
15 departments and agencies over which the governor has no
16 general control - - -

17 JUDGE GARCIA: That's an - - - that's an intra-
18 branch separation of powers issue. That's a fractured
19 executive issue. But isn't it very different to have an
20 executive power go outside the executive branch? I mean,
21 if you had given this authority to the attorney general, it
22 would have been a very different story than an independent
23 commission, right?

24 MR. BROCKNER: Several responses. Again, I - - -
25 I do want to set a context here, which is the self-

1 regulation. So we are not talking about vesting the police
2 power to look at the police. The public at large is again
3 within the, you know, discretion of the political branches.
4 But even then, there are still examples of commissions out
5 there, you know, we cite a few board of commissioners of
6 pilots that has this power and isn't controlled by the
7 appointment or removal by anyone in the executive branch.

8 JUDGE GARCIA: But can you control license for
9 the New York Harbor, right, pilots - - -

10 MR. BROCKNER: I'd impose - - - I'd seek
11 penalties as - - - as well. So an executive power that
12 Chief Judge Sanford said, this body doesn't absorb or
13 interfere with the function of any executive officer.

14 JUDGE HALLIGAN: So I looked, and that was really
15 the only example I could find of something that was similar
16 in terms of the, you know, complete curtailment of
17 appointment and removal authority. Maybe, let me ask you,
18 is there anything more, you know, having - - - having heard
19 the discussion on the public accountability question,
20 whether or not the - - - the absence of both of those
21 powers completely provides sufficient accountability. I
22 appreciate your saying there are other mechanisms through
23 which the governor can continue to exercise accountability,
24 but why isn't removal authority necessary for significant
25 enough accountability?

1 MR. BROCKNER: For - - - for several - - - for
2 several reasons. First, this court has never held that.
3 And I think it's reflected in Delgado, again, where there
4 was no removal power. And then also because when the
5 removal in this context is granted to the elected
6 officials, we see what happens, which is the elected
7 officials can - - -

8 JUDGE HALLIGAN: But that's a policy point. I'm
9 - - - I guess what I'm asking is to my mind, separation of
10 powers is a structural doctrine, and so I'm trying to
11 understand why it is that the policy concern can allow us
12 to kind of carve-out an exception in the structural
13 protection?

14 MR. BROCKNER: It's not an exception. Removal is
15 just a tool. It is not an end in itself - - -

16 JUDGE HALLIGAN: Well - - -

17 MR. BROCKNER: - - - and it is just one of the
18 tools that is not granted necessarily to the governor in
19 overseeing in - - - in her role as governor.

20 JUDGE HALLIGAN: Fair enough. But practice would
21 suggest, I think, since we can't really identify examples
22 other than - - - I know you say Delgado and pilots. We
23 can't identify examples over hundreds of years where there
24 is no removal power, even if conditioned, that the governor
25 holds, I think. So - - - so practice maybe suggests that

1 there should be some concern about whether that's
2 necessary.

3 MR. BROCKNER: Well, I think a few things. So
4 you cite some exceptions - - - including exceptions that
5 this court has blessed so - - - so as to whether this is a
6 unyielding categorical rule that applies regardless of
7 function, I think those exceptions strongly suggest it's
8 never been recognized that way. And then in this context,
9 when we were talking about the internal oversight and not
10 necessarily the policing of the public at large, it was
11 found that the political branches made this considered
12 judgment that this is a feature we need to - - - the
13 removal protection is a feature we need to have in order to
14 make this commission independent enough to - - - to do its
15 job.

16 And there are large executive departments and
17 branches out there where - - - excuse me, agencies out
18 there where the governor doesn't control through
19 appointment and removal and instead has her oversight
20 through the executive budget and through her investigative
21 powers, and in this context, the commission strikes - - -
22 according to the political branches, it strikes a careful
23 balance. And that is ensuring the commission is
24 independent enough to do its job, but not allowing any one
25 branch to take for itself the power of another branch. We

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ask the court to reverse and uphold Executive Law 94(10)
and (14).

CHIEF JUDGE WILSON: Thank you.

MR. BROCKNER: Thank you.

(Court is adjourned)



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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Cuomo v. New York State Commission on Ethics and Lobbying in Government, No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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