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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF LEADINGAGE NEW YORK, INC.,

Appellant,

-against-

No. 93

SHAH,

Respondent.

MATTER OF COALITION OF NEW YORK STATE
PUBLIC HEALTH PLANS,

Appellant,

-against-

No. 93

NEW YORK STATE DEPARTMENT OF HEALTH,

Respondent.

20 Eagle Street
Albany, New York
September 5, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN



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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 93, Matter of
3 LeadingAge New York v. Shah.

4 Counsel.

5 MR. GREENBERG: Chief Judge DiFiore, members of
6 the court, may it please the court. Judge DiFiore, may I
7 reserve a minute in rebuttal?

8 CHIEF JUDGE DIFIORE: One minute?

9 MR. GREENBERG: One minute.

10 CHIEF JUDGE DIFIORE: You may, sir.

11 MR. GREENBERG: The executive compensation
12 regulations that are before the court this afternoon for
13 review are unlike anything this institution has seen in
14 nearly four decades. Not since the mid-1970s in Rapp v.
15 Carey has the court seen so aggressive an expanse of
16 assertion of claimed rule-making authority. This is not a
17 case - - - this is not a case where an agency on its own
18 initiative drawing on its special technical competence
19 expertise in a particular field fills a gap in a statutory
20 scheme pursuant to an explicit statutory delegation.

21 CHIEF JUDGE DIFIORE: Counsel, do you restrict
22 your argument to executive compensation, not to the
23 administrative expenses?

24 MR. GREENBERG: My clients do, Your Honor.

25 CHIEF JUDGE DIFIORE: Yes.



1 MR. GREENBERG: We challenge only the hard cap
2 and the soft cap. We don't challenge the administrative
3 cap.

4 CHIEF JUDGE DIFIORE: Is executive compensation
5 part of administrative expenses?

6 MR. GREENBERG: They are - - - well, the
7 administrative expenses cap carves out of it certain forms
8 of compensation that aren't directly attributable to
9 program services. So for example, a CEO, an HR director,
10 public relations director, your traditional senior
11 executives in a corporation, private or public, not for
12 profit, publicly traded, you name it, are subject to these
13 limits. And what makes these executive compensation limits
14 unlike anything this court has ever seen is that they were
15 promulgated not as an organic rule-making process but
16 pursuant to an explicit directive and an executive order
17 that - - -

18 JUDGE WILSON: So let me ask you about a
19 different use of the word executive. The state
20 constitution vests the executive power of the State and the
21 Governor. What is the executive power of the State?

22 MR. GREENBERG: The executive power of the State
23 is to implement the policy that is established by the
24 legislative branch.

25 JUDGE WILSON: So how about issues like choosing



1 vendors?

2 MR. GREENBERG: There's no question that an
3 agency like the health department can pick what vendors it
4 wishes to choose. There's no question that an agency can
5 determine how many goods and services, what the price of
6 the goods services are. What makes this case unlike
7 anything is that the limits on executive compensation
8 arrogate onto the authority of the health commissioner and
9 the department the power of an executive compensation czar.
10 There's no - - -

11 JUDGE STEIN: Well, let's leave - - - let's leave
12 the soft cap out of this for a second. Obviously, the
13 legislature has given the Department of Health pretty
14 expansive power to regulate public health and Medicaid
15 funds and all of that. And it seems to me would you agree
16 that this is a little bit different from our usual Boreali
17 analysis because it's not a matter of private rights. It's
18 a matter of the Department of Health has the right to
19 contract with various entities and to give them money, and
20 this is sort of - - - these are conditions on the money
21 that they are willing to give them. Do you - - - do you
22 agree with that analysis?

23 MR. GREENBERG: I strongly disagree with it, Your
24 Honor.

25 JUDGE STEIN: Why?



1 MR. GREENBERG: That is not the regulations that
2 are before this court if you look at them, all 7,000 words
3 of it, utterly prescriptive in every way imaginable. Not a
4 word of those regulations are about who the Department
5 picks and chooses. What the regulations are about are
6 limiting compensation on pain of sanctions, including the
7 regulations - - -

8 JUDGE FAHEY: Well, what they're saying is - - -
9 is we're entering into a contract with you. And under this
10 contract, this is our money, and we're giving it to you to
11 do certain things and - - - or for certain services that
12 you've rendered. And we will - - - we limit how you can
13 use it in this particular area. It seems that you've got
14 two veins of thought here. One is the this is an
15 outrageous intrusion on private corporate government - - -
16 governance. That's one theory that you could follow. And
17 the other theory you could follow is the State saying this
18 is our money - - - I'm talking about the hard cap now, just
19 the hard cap - - - the State saying this is our money and
20 we're saying you can only use our money in a certain way.
21 You have two lines of thought here. Go ahead.

22 MR. GREENBERG: There is no statutory authority.
23 There is no case law authority for the State to dictate to
24 a private company what it does with money it earned after
25 it receives it. That is quintessentially a legislative



1 judgment.

2 Judge Stein, your point is right. There are
3 statutes. There are fifteen statutes that they cite. If
4 you look at those statutes, these are decades-old statutes
5 put - - - they are providing general authority. What's so
6 critical is that this court's cases, starting with Rapp
7 through Campagna v. Shaffer through Owner Occupied Housing
8 v. Abrams, has said over and over - - - long before the
9 Supreme Court knew there was a major questions doctrine
10 this court said if you're going to regulate in a highly
11 controversial politically charged economic area - - -

12 JUDGE STEIN: What's politically charged and
13 highly controversial about this issue, again, in the
14 context of entities that are receiving State money and how
15 - - - and how that money is spent?

16 MR. GREENBERG: The question of how much an
17 executive makes, whether it's excessive or not, is fiercely
18 debated.

19 JUDGE STEIN: Well, it's - - - but is it debated
20 in this context? I mean there have been bills proposed and
21 so on and so forth but they - - - but - - - and we have
22 lots of other statutes, as the plaintiffs have - - - have
23 pointed out. But they - - - they don't deal with the
24 context of receiving State money.

25 MR. GREENBERG: Correct. These statutes don't



1 come within a million miles of what the regulation does,
2 and that's what this court has required. But let me say
3 this, if you think of their position, there's an unreality
4 to it. They say over and over in their brief that a
5 private corporation that spends more than 199,000, that's a
6 red flag. That is facially - - - facially excessive in a
7 world where there are hundreds if not thousands of
8 employees of the State government, deservedly so, making
9 more than 200,000, when there are first-year associates in
10 large firms in New York City that are making 190- - - -

11 JUDGE RIVERA: But the reg - - - regulations
12 allow, of course, for any particular private actor who is
13 seeking to - - - to enter this particular area and to be
14 paid by New York's taxpayer to explain why 199,000 isn't
15 enough, not to satisfy the executive, but isn't it enough
16 to ensure that there are adequate services, high-quality
17 services that are indeed being delivered and that's the
18 mandate, right, for the agency to ensure that the money is
19 spent in a way that reduces costs and ensures the quality
20 of services. You may say there's a debate.

21 To me, I find that all a red herring. The issue
22 is they've made - - - they've reached this conclusion.
23 These are the regulations they've come up with, and if a
24 particular for-profit-making venture doesn't want to play
25 by the rules, you don't have to deliver those services in



1 New York. I'm not really clear here where - - - where
2 they've run afoul of any constitutional doctrine.

3 MR. GREENBERG: Three reasons, Your Honor. The
4 waiver proves exactly what's wrong with these regulations.
5 It makes our health commissioner the executive compensation
6 guard of the healthcare industry. The legislature - - - no
7 one could dream that a single member of the legislature
8 ever thought they were giving that extraordinary power.
9 That's number one, Your Honor. With respect - - -

10 JUDGE FEINMAN: Well, so, but in response to
11 that, before you go to make the other two points that you
12 want to say, when - - - when it says in the Public Health
13 Law that the Department of Health shall quote, "Regulate
14 the financial assistance granted by the State in connection
15 with all public health activities and receive and expend
16 funds made available for public health purposes pursuant to
17 law," that's a very broad delegation; is it not? And if
18 they wanted it more restrictive they could have written it
19 in a more restrictive fashion, so I don't - - - I don't see
20 how you can say it's not tied to the legislation.

21 MR. GREENBERG: Your case is an answer to your
22 question. Starting with Rapp through the five, five cases
23 rejecting claims by governors and mayors that they had
24 broad contractual authority just like you suggested. The
25 court has said there's a difference between creating out of



1 whole cloth a detailed and comprehensive mechanism designed
2 to relieve a social problem, however laudable. That's one
3 kind of reg. Then the other kind of reg this court has
4 said - - - and again, Campagna, Rapp - - - over and over,
5 at least nine times this court has said no broad statute
6 can be construed to allow such an extraordinary rule-making
7 mechanism.

8 If - - - if I might, though, Judge Rivera, your
9 point about quality. The critical thing about these
10 regulations when you read them is not a word of it has
11 anything to do with price, with quantity, or with quality.

12 JUDGE GARCIA: And, Counsel, I'm sorry to
13 interrupt you on point two now, but that has been my
14 question here on a point I think you make in your brief
15 which is what is the relationship between the salary caps
16 and let's call it the 85/15, 75/25 admin programmatic
17 dollars, right?

18 MR. GREENBERG: Uh-huh.

19 JUDGE GARCIA: And I think may Chief Judge's
20 question was getting to this. So if I'm making 90/10, if
21 I'm a doing a 90/10 so I'm above and beyond what's
22 necessary here, right? I have 90 percent going to program,
23 10 percent admin. But I have somebody who makes 220,000
24 dollars that's subject to this cap, I could take the 21,000
25 dollars away from that executive and spend it on anything



1 else I wanted, right? I mean absent waste, fraud or abuse.
2 I wouldn't have to put it into the programs, right?

3 MR. GREENBERG: Well, that's exactly right. The
4 - - - it's interesting because the court below thought it
5 was drawing a Solomonic line between a hard cap and a soft
6 cap. If there's a line to be drawn the argument you've
7 just made relates to the administrative cap.

8 JUDGE GARCIA: Right.

9 MR. GREENBERG: Because the administrative cap
10 says that you can spend no more than 15 percent of what you
11 receive on administrative services.

12 JUDGE GARCIA: And if I'm over - - - you know, if
13 I'm over on programmatic it doesn't matter what I take that
14 salary and do with it.

15 MR. GREENBERG: Not a bit. And that gets to your
16 question, Judge Rivera. The regs have no rational
17 relationship to quality, cost, or price. Maybe an argument
18 could be made about the administrative cap but not the hard
19 and soft cap.

20 CHIEF JUDGE DIFIORE: Thank you, Counsel.

21 MR. GREENBERG: Thank you, Your Honor.

22 CHIEF JUDGE DIFIORE: Counsel.

23 MR. LUNTZ: Thank you, Your Honor. I'd like to
24 reserve one minute for rebuttal, please?

25 CHIEF JUDGE DIFIORE: You may.



1 MR. LUNTZ: May it please the court. The issue
2 on this appeal is whether respondent has the authority to
3 regulate private business' fiscal operations just because
4 they happen to be participants in the Medicaid program.

5 JUDGE STEIN: Well, could - - - could they make
6 these conditions part of if you want a - - - if you want a
7 contract with the State and you want these funds, could
8 they make these conditions as part of a - - - such a
9 contract?

10 MR. LUNTZ: I think there's a long line of case
11 law from this court that says that the power to contract
12 does not give an agency the power to regulate without
13 legislative authority. And in this case, the four statutes
14 that were relied upon by the respondents during the rule-
15 making process say nothing about executive compensation let
16 alone corporate governance.

17 JUDGE STEIN: But - - - but it seems to me, and
18 this is sort of to follow up on a question that I asked Mr.
19 Greenberg, that there's a difference between the kinds of
20 social policies that we say are inappropriate for executive
21 agencies to - - - to regulate such as, you know, smoking
22 and soft drinks and things like that. There's a difference
23 between that and saying if you want money from us, the
24 State, we - - - these are certain requirements that you
25 must fulfill because we think this helps us regulate the



1 quality of the services that you are going to provide.

2 MR. LUNTZ: Well, two things, Judge. One is,
3 yes, the Department of Health in this case clearly has the
4 authority to receive and expend Medicaid funds and as part
5 of that to participate in the rate-making process and
6 determine the cost of services. But in this case, once the
7 provider has been paid and received a Medicaid
8 reimbursement those funds are no longer State funds because
9 the services have been adequately rendered.

10 JUDGE FAHEY: But that was - - - that was a
11 question I was asking Mr. Greenberg too. It's still a
12 contractual relationship. You're saying these are the
13 conditions upon which I'm going to turn over these funds to
14 you. And your response is either yes, I'll enter into that
15 contract; no, I won't; or we negotiate as to the dollar
16 amount. What the executive has said this is a condition of
17 the contract. I fail to see how anyone entering into that
18 contract wouldn't have the authority to do that. And it's
19 specifically different from these normal Boreali analysis
20 where you're dealing with, you know, the public's right to
21 smoke in a park or, you know, to buy a soft drink, all
22 those things your argument I think is - - - you're on much
23 stronger ground because the nature of the relationship is
24 more like a tort relationship. You're part of that
25 relationship because you're part of society as opposed to a



1 contractual relationship, we're here, it's an agreement
2 between two respective parties.

3 MR. LUNTZ: Well, the providers in this case and
4 the State have a symbiotic relationship that's gone back
5 for decades.

6 JUDGE FAHEY: That's true. In fairness, you're
7 right about that.

8 MR. LUNTZ: And the providers, the cover
9 providers here have made huge investments to participate in
10 the Medicaid program, and as part of that commitment
11 there's certain expectations, one of which is that they
12 have corporate autonomy to determine what to do with money
13 that it has received for services it has adequately
14 rendered. Now the Department clearly has statutory power
15 to recoup overpayments if there is fraud or if there some
16 other type of misconduct or regulatory violation. But if -
17 - - if the services have been adequately provided the money
18 is no longer the State's money, and the Department does not
19 have the legislative authority or any other authority to
20 dictate to private businesses what they do.

21 JUDGE RIVERA: Well, I under - - - I understand
22 your argument to be you all have invested because you've
23 had this long relationship in doing business a particular
24 way. And the State now says, look, we've had a task force,
25 we've revisited this, we think the way you've been doing



1 business is not good business for the taxpayers of New
2 York. So now we have other criteria. Again, you can
3 either continue to do business based on this new criteria,
4 based on the entity's assessment that - - - that the way
5 you've been doing business is not good for the people of
6 the state of New York, the taxpayers as well as the
7 recipients of the services, or you can adjust and continue
8 to do business on these new terms. Again, I - - - I really
9 don't understand the argument that the - - - that the DOH
10 could not do that.

11 MR. LUNTZ: Well, I think to Judge Garcia's point
12 - - -

13 JUDGE RIVERA: I mean what - - - what if there
14 was some other change beyond - - - put aside the
15 compensation. What if they recognize there was something
16 else that had been done over and over and over again and -
17 - - and they decide, you know, that's - - - that's not good
18 - - - that's not good for public health, it's not good for
19 business, we're going to change things. Your - - - is your
20 argument they can never change anything - - - any of these
21 requirements?

22 MR. LUNTZ: No, the - - - no. Clearly,
23 regulations change, circumstances change. But in this
24 case, the purported rationale for these regulations, which
25 is to control Medicaid costs and improve quality of care,



1 has no nexus whatsoever - - - whatsoever to the executive
2 compensation limits that are part of these regulations.
3 And the statewide pricing methodology - - -

4 JUDGE RIVERA: If we disagreed with you and it
5 did, does your argument fall?

6 MR. LUNTZ: Well, there still has to be a grant
7 of legislative authority to intrude into the fiscal
8 decisions of private businesses that are really at the
9 essence of the business judgment rule. And there's no
10 precedent from this court, and there's certainly no
11 precedent in legislative authority for that proposition.

12 JUDGE RIVERA: Well, they decide how much they're
13 going to reimburse you, correct?

14 MR. LUNTZ: Yes, clearly the Department has - - -
15 has - - -

16 JUDGE RIVERA: I mean there's a whole formula
17 around that - - -

18 MR. LUNTZ: - - - the power to regulate that.

19 JUDGE RIVERA: - - - and - - - and you call could
20 say, well, that's not enough. That won't let us provide
21 quality services. There's nothing you can do about that,
22 correct?

23 MR. LUNTZ: Right, but there's no nexus between
24 executive compensation and the cost of services or the
25 quality of services because - - -



1 JUDGE RIVERA: But how is that different from my
2 example? Let's say they decide we're only going to pay you
3 a dollar for something that you think needs to be
4 reimbursed at 20 dollars. There's nothing you can do about
5 that is there?

6 MR. LUNTZ: There's nothing we can do about
7 reimbursement rates other than through the negotiation
8 process that would occur.

9 JUDGE RIVERA: Right, so I don't see the
10 difference. I don't - - - I don't see then how your
11 argument stands.

12 MR. LUNTZ: Because in this case under the
13 statewide pricing methodology that was enacted by the
14 legislature and took effect January of 2012, the executive
15 compensation is removed from the formula that determines
16 reimbursement rates for nursing home. So there is no
17 connection whatsoever between compensation above 199,000
18 dollars paid to say an administrative or nursing home and
19 the cost of those Medicaid services.

20 JUDGE RIVERA: That one's more fungible, right?
21 Anyone can negotiate at that high level, right?

22 MR. LUNTZ: Well, you can negotiate about the
23 costs of services, but here the services have already been
24 rendered.

25 JUDGE RIVERA: No, but I'm saying in terms of the



1 compensation of that executive - - - those executives. You
2 can negotiate those things, so the State could decide, you
3 know, you're negotiating too high. We don't - - - the
4 taxpayers are not getting their money's worth for this.

5 MR. LUNTZ: But there's no nexus between the
6 regulations and taxpayer efficiency or quality.

7 JUDGE STEIN: Well, but isn't it all part of this
8 pot of money, and it - - - you know, can't the State just
9 say as a corollary to its - - - its right to regulate how
10 generally what's reasonable and - - - and to make sure that
11 the money is being spent as much as possible on services
12 that, you know, there are these - - - there are all these
13 pieces. One of the pieces is administrative expenses. One
14 of the pieces that may overlap with administrative expenses
15 is executive compensation. There are a lot of pieces to
16 this, so you can't necessarily take one piece out of the
17 whole pot and say there's no relationship. They're all
18 related. There's a - - - there's a whole pot of money, and
19 how that's parceled out will dictate in part the quality of
20 services that are provided, no?

21 CHIEF JUDGE DIFIORE: And isn't there some
22 pragmatic or commonsensical approach that when you reduce
23 the percentage of the funding that's directed and dedicated
24 to administrative compensation costs that a higher
25 percentage goes to improving the quality of direct services



1 to recipients?

2 MR. LUNTZ: I think that was an argument advanced
3 by the respondents, and there is no common-sense connection
4 because, as Judge Garcia pointed out, if you're below the
5 administrative cap and you pay an executive more than
6 199,000 dollars the additional money can be used to pay
7 bonuses to other staff, to make capital improvements.
8 There is no necessary connection between the reduction in
9 administrative costs and the quality of care.

10 JUDGE STEIN: Except that the State is still - -
11 - all of this aside, has the right to say that we don't
12 think you're being fiscally responsible at all.

13 MR. LUNTZ: Under the State Finance Law the
14 Department has a general regulatory authority to review
15 fiscal responsibility.

16 JUDGE STEIN: And obligation.

17 MR. LUNTZ: Yes.

18 JUDGE STEIN: And obligation.

19 MR. LUNTZ: And that's done at the time the
20 provider applies to be a Medicaid provider, and there's
21 defined criteria for that. There are four - - -

22 JUDGE STEIN: And it's - - - isn't it reviewed
23 periodically?

24 MR. LUNTZ: It is reviewed. Yes, it is reviewed
25 periodically, but they're defined criteria relating to the



1 fiscal capability of the provider, the legal capacity, the
 2 character and competence, and the track record of
 3 experience and past performance. That has nothing to do
 4 with how much an administrator of a nursing home or another
 5 executive of a healthcare provider is paid to - - - and
 6 that's what's needed to attract and retain quality
 7 management in a highly regulated complex healthcare entity.
 8 And to your question, Judge, the waiver provision actually
 9 places covered providers at a significant competitive
 10 disadvantage. Because any offer of employment to a covered
 11 provider who - - - by a covered provider seeking to hire an
 12 executive has to be conditioned on a successful waiver
 13 application, and while there is a waiver provision these
 14 regulations have been in effect for over five years. And
 15 there is nothing in the record before the court to indicate
 16 that one waiver application of a covered provider has been
 17 granted or even acted upon. So in - - - under these
 18 circumstances again without the statute - - -

19 JUDGE RIVERA: Is there evidence that you can't
 20 attract good executives with the regulations in place for
 21 five years?

22 MR. LUNTZ: I think - - -

23 JUDGE RIVERA: Half-a-decade?

24 MR. LUNTZ: I think the evidence is that for
 25 private businesses who are participating as healthcare



1 providers, in order to attract and retain the best and
2 brightest talent to run their businesses to advance the
3 mission of the healthcare provider you need to pay whatever
4 the market will bear. In many cases, that's more than
5 199,000 dollars.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 MR. LUNTZ: Thank you.

8 MR. GRIECO: May it please the court, DOH has
9 statutory authority to ensure that public health programs
10 serve the interest of their intended beneficiaries.

11 JUDGE RIVERA: But, Counsel, let me - - - let me
12 ask you does it matter for purposes of the constitutional
13 analysis that you all were responding to an executive order
14 that was not just an executive order saying please look at
15 - - - or I direct you to go look at skyrocketing costs and
16 see where there might be a place to - - - to keep those
17 down, but instead specifically points to 199,000 as the cap
18 on executive compensation, you've got this three-year goal
19 at 5 percent increments getting you to 85 percent for the
20 75 percent rule and also mentions the waivers, these core
21 elements of DOH's eventual regulations is found in that
22 executive order. Is that - - - is that something that
23 matters for our constitutional analysis?

24 MR. GRIECO: It does not, Judge Rivera, for
25 reasons that I thought Judge Fahey very effectively



1 encapsulated earlier that this is fundamentally different
2 than the other kinds of challenges this court has seen in
3 the last half-decade or so invoking the Boreali doctrine.
4 The - - - the State stands in a fundamentally different
5 relationship with a company that is seeking to receive
6 State funds and to provide public services based on those
7 funds than it does with respect to private citizens, with
8 respect to things, just smoking and - - - and soda
9 consumption.

10 JUDGE STEIN: But you agree that there has to be
11 a rational connection between the amount of the cap and the
12 purposes that it's intended to serve, correct? And - - -

13 MR. GRIECO: And the purposes that are intended
14 to - - -

15 JUDGE STEIN: And - - - well, we - - - you know,
16 I think we know what they are, but can you explain to me
17 what the basis - - - how you determine based on what data
18 is that 199,000 was the appropriate amount to serve those
19 purposes?

20 MR. GRIECO: So the - - - the connection between
21 - - - between the rule and the purpose is - - - is that it
22 prioritizes the selection of providers who devote
23 relatively more of their resources - - -

24 JUDGE GARCIA: But where did you get the 199,000-
25 dollar number I think is what Judge Stein is asking.



1 MR. GRIECO: So the 199,000-dollar number is - -
2 - is an initially starting number that the - - - that the
3 agency can change over time and is - - -

4 JUDGE GARCIA: Within the executive order.

5 MR. GRIECO: It's in the executive and if - - -

6 JUDGE GARCIA: And where does it come from?

7 MR. GRIECO: It originates from the - - - it is
8 the highest salary paid to employees in the federal
9 government other than the - - - than a couple of
10 constitutional officers - - -

11 JUDGE GARCIA: Not the highest salary paid to
12 State health employee workers, like at State facilities
13 which are exempt under your rule, right?

14 MR. GRIECO: It - - - it may not be. However,
15 this court made clear in the New York State Health
16 Facilities Association v. Axelrod case that one of the ways
17 that an administrative agency can implement a policy is to
18 - - - to pick a threshold which can an actual number even
19 if the enabling statute is set to general policy and then
20 makes that number adjustable based on logically relevant
21 factors which is what DOH has done here.

22 JUDGE GARCIA: So DOH adopted the number in the
23 executive order?

24 MR. GRIECO: Well, the executive order - - - yes,
25 the DOH adopted as the initial - - - as the initial number



1 and it says that it - - - it - - - that it can be adjusted
2 over time.

3 JUDGE RIVERA: Could you have passed regs that
4 didn't start with that number at all?

5 MR. GRIECO: The - - - yes, and the entire point
6 of the Health Facilities Association case is that the
7 agency - - - there are - - - there's a menu of options that
8 an agency can choose from when deciding how to address a
9 policy. And this court - - - this - - -

10 JUDGE RIVERA: No, but the - - - the regs here,
11 they're not organic. I mean it's not like the agency said,
12 okay, we're going to go past these regs. You have an
13 executive order that directs it and sets out these core - -
14 - three core requirements that need to be set out in the
15 regs, and the Commissioner of the DOH went about the
16 business to try and respond to that executive order and
17 adopted those three - - - three cores - - -

18 MR. GRIECO: Which is - - - which is - - -

19 JUDGE RIVERA: Excuse me.

20 MR. GRIECO: Sorry.

21 JUDGE RIVERA: Requirements rather than visiting
22 each and deciding specifically that the 199,000 made sense?
23 Am I wrong about that?

24 MR. GRIECO: Two - - - you are correct about
25 that. And it's appropriate for two reasons. One of them



1 is that in the area of State contracting and expending of
2 State resources this is a core responsibility of the
3 executive branch of government in a way that the kinds of
4 regulations this court has questioned under the Boreali
5 doctrine are not. And secondly - - -

6 JUDGE RIVERA: So let me - - - let me ask you two
7 questions then. On - - - on the first point, should we
8 reconsider whether or not Boreali, that analysis, applies
9 to this kind of a case? Is Boreali inappropriate to this
10 kind of a case?

11 MR. GRIECO: So the court does not need to do
12 that to resolve this case. I do think it would be an
13 accurate statement that this court has never relied on the
14 Boreali doctrine when confronting a regulation of this
15 type. It has - - -

16 JUDGE WILSON: But isn't the - - - isn't the
17 necessary implication of your statement that you just made
18 that if this lies within the executive power we're not
19 looking at Boreali or cases like that that deal with
20 whether the legislature has properly delegated a
21 legislative function to somebody but rather whether this
22 wasn't an executive function to begin with.

23 MR. GRIECO: That is correct, and all - - - and
24 to it I would add that this court has several times that
25 the separation of powers doctrine has to be applied



1 contextually. And when the context is State spending and
2 State contracting, this court made clear in a number of
3 cases from the 1970s onward that there is overlapping
4 executive and legislative authority in certain areas.
5 There are some things that are - - - that are reserved
6 solely to the legislature. For example, actually
7 appropriating funds and saying this is the amount of
8 funding for a program would be a legislative function, but
9 ensuring that the funds are spent on that program would be
10 an overlapping legislative executive function.

11 JUDGE RIVERA: So can you point to - - - to
12 another scenario where something like this has happened
13 where you have an executive order with this kind of
14 granular detail that then directs particular regulatory
15 response and the agency or department responds in that way?

16 MR. GRIECO: Yes, there are - - - there are a
17 number of cases in the - - - in the '80s and '90s upholding
18 executive specific policies and some of them went even
19 farther. There was one, for example, in one of the cases
20 where - - - under the previous Governor Cuomo in which he
21 actually created new agencies, for example to enforce
22 voting rights which did something this - - - this
23 regulation did not do which is actually - - -

24 JUDGE RIVERA: No, but my question is does the
25 executive order, let's take that particular example, say



1 explicitly and these are the three, four things that have
2 to be done, go past regulations that - - - that say that?

3 MR. GRIECO: Yes, the - - - the Governor does
4 have within - - - within a certain range of authority the
5 ability to - - - to make specific requirements. The
6 Governor has broad authority to - - - to execute the law
7 which includes ensuring that money is spent as intended.

8 JUDGE RIVERA: Like I said, can you just point to
9 one other executive order that does that? Any one, you
10 choose.

11 MR. GRIECO: Well, for - - - for example, in the
12 case of the - - - of the Voting Rights Commission it
13 actually said that there - - - that there have to be
14 specific commissions and it - - - it created them to work
15 side-by-side with - - - with local commissions. And - - -

16 JUDGE RIVERA: Did it then tell them what they
17 had to pass as their regulations as opposed to that general
18 framework? I get what you're saying there.

19 MR. GRIECO: Right, and the - - - and the other
20 part of my answer to your question, Judge Rivera, is that
21 in addition to all of that DOH did a substantial amount of
22 work on this regulation. It is a - - - a perfectly
23 appropriate way for an executive agency to implement
24 policy, for the legislature to adopt a policy the Governor
25 to set - - - to set a certain baseline for a regulation,



1 and then agency to apply its expertise in adding content to
2 that regulation which they did - - - they did here.

3 JUDGE RIVERA: So let me ask here - - - so now
4 you've gone where - - - where I was hoping you would go.
5 As I understand it, the soft cap, it's not really something
6 you can find in the executive order; is that correct?

7 MR. GRIECO: The - - -

8 JUDGE RIVERA: Call the soft cap, we'll just use
9 that.

10 MR. GRIECO: It is not - - - it - - - that part
11 is not specifically spelled out in the executive order.
12 The reason that it - - - that it was added to the rule is a
13 couple of things. The - - - the premise of the rule is to
14 select providers who develop - - - devote relatively more
15 of their resources to program services including patient
16 care as opposed to other expenses. And in - - - and a
17 company that is going to spend more on patient services
18 with respect to its - - - to private paid patients is also
19 - - - it's going to be reasonable to infer that it is going
20 to do the same with respect to patients with - - - with a
21 public payer. And there are regulations, federal and state
22 regulations, that require State and - - - that require
23 public and private paid patients to be treated the same.

24 JUDGE FAHEY: But - - - but the - - - you're
25 cross-appeal is basically the Second Department's wrong and



1 the Third Department - - - or the Third Department's wrong
2 and the Second Department's right, right?

3 MR. GRIECO: Correct.

4 JUDGE FAHEY: That's - - - that's the core of
5 your cross-appeal. All right. So the logic in my mind and
6 my questions to you before were that the contractual
7 relationship is different than the other relations were - -
8 - that were regulated under Boreali - - - if Boreali
9 analysis even applies here, let's assume that it does. And
10 that that contractual relationship means that the State can
11 - - - can as part of a contract require something that it
12 may not be able to require as - - - as to results of its
13 general - - - generally by being an actor in society. All
14 right. But how does that apply to the soft cap because the
15 State is saying to you, plaintiffs - - - appellants in this
16 case, you can't use our money to pay more than 199,000
17 dollars. But where does the State get the power to say how
18 they use other money? It seems to me that if the basis of
19 the State's authority is its contractual relationship and
20 saying we won't give you this money, you won't go into a
21 contract unless you do this, then I'm having a hard time
22 seeing how you could tell them what - - - what to do with
23 money that isn't covered by that contract, that's not part
24 of that contract.

25 MR. GRIECO: So DOH has always had the authority



1 to and always been required to consider a provider's entire
2 business and sources of - - -

3 JUDGE FAHEY: Sure, the authority is - - - I
4 don't think we can argue that the authority is really broad
5 and expressed but it's implied - - - excuse me, it's not
6 expressed. It's all implied authority. And so that causes
7 us to really drill down, as Judge Rivera said here before,
8 and get into this granular kind of detail.

9 MR. GRIECO: Well, the - - - the error that the
10 Third Department made - - -

11 JUDGE RIVERA: Well, if I can put it in another
12 way, the ability to consider all sources doesn't mean the
13 ability to direct how sources are used.

14 MR. GRIECO: So the rule on its face appreciates
15 the distinctions between State funds and non-state funds.
16 State funds are subject to the - - - the 199,000-dollar
17 threshold subject to the waiver provision whereas with
18 respect to non-state funds the rule appreciates that the
19 way that the State is going to examine those funds is
20 different and it examines them by allowing the use of a
21 independent board and a salary survey to assess whether the
22 salary was set in an appropriately independent way. And if
23 it satisfies those criteria, then the rest of the rule need
24 not apply.

25 JUDGE RIVERA: Let me ask this, with respect to



1 the goals that you seek to achieve with the hard cap, can
2 you achieve those goals without the soft cap?

3 MR. GRIECO: So the - - - the portion of - - -
4 the portion of the rule that looks at State funds and
5 State-authorized payments provides the - - - the State with
6 a valuable tool for ensuring that - - - that DOH can
7 prioritize the selection of providers who devote more
8 resources to - - - to patient services such as direct
9 patient care. The other portion of the rule, the portion
10 that the Third Department struck down, that portion of the
11 rule, what the court below failed - - - failed to
12 appreciate is it is based on a similar - - - a similar
13 premise that if an - - - if an organization operates
14 efficiently in the private market with respect to private
15 patients and privately - - - privately received funds it is
16 likely to operate more efficiently when it - - - when it
17 chooses to then apply voluntarily to become a direct - - -
18 a provider of State-funded services. And if it doesn't - -
19 -

20 JUDGE GARCIA: Chief Judge - - -

21 MR. GRIECO: - - - then the opposite is true.

22 JUDGE GARCIA: May I ask a question? I know your
23 time is up. But it seems to me in looking at let's call it
24 the 85/15 complimenting these caps, it seems to me the
25 85/15 goes to what a lot of the - - - my colleagues have



1 been talking about it which is where does the State money
2 go to ensure that you're using it for program purposes?
3 The caps seem to me, both of them, to go to what you can't
4 do with State money. And that seems - - - because once you
5 have the 85/15 you've locked in the amount you need to
6 spend on the programs. And that seems to me implementing a
7 policy, and in this governor's case, this governor and the
8 executive branch have decided that it's good policy to have
9 executive compensation capped.

10 But if we do this here we're going to be saying
11 that in any case where there's contracting authority, where
12 we're responsible for the State, the executive branch, how
13 this money is spent, the next executive may have very
14 different policy objectives. That executive may say, you
15 know, consumption of soft drinks and junk food is terrible,
16 and it really affects the workforce, and that workforce is
17 providing services. And that's degrading the services
18 because of the health of the workforce. So, you know what?
19 You can't spend our money on junk food. You can't spend it
20 on soft drinks. You - - - could they do that?

21 MR. GRIECO: The - - - the limiting principle for
22 the - - - for the sources of statutory authority that DOH
23 has relied upon for this rule is whether the rule is
24 directed to ensuring that money is directed to patient
25 services. If - - -



1 JUDGE GARCIA: But you've got that with your
2 85/15. What they do with the rest of the money, all you're
3 saying is you can't do this. You're not saying it has to
4 go to patient services. They've made the 85/15. All
5 you're saying is you can't spend it on this, and that's
6 where I have a problem with this rule.

7 MR. GRIECO: Because an agency is allowed to
8 target the - - - one problem in multiple ways, and they are
9 complementary portions of the regulation. The 85/15 does
10 set a certain floor, but the executive compensation rules
11 and the administrative compensation - - - and the
12 administrative expenses rules which have largely gone
13 unchallenged in this case and - - - are based on the same
14 premises.

15 JUDGE GARCIA: But it could actually be
16 counterproductive. A company could be spending 88 or 90
17 percent on program services, part of that money is the over
18 199- amount. You say you can't use it for that. They cut
19 it. They can spend it on something else and still make
20 your 85 cap. Now we're down to 85 percent, but we're not
21 paying anyone over 199,000 dollars now. That's good.

22 MR. GRIECO: So one - - -

23 JUDGE GARCIA: I don't understand that.

24 MR. GRIECO: One of my counterparts referred to
25 services that have been adequately provided and said that



1 once services have been adequately provided DOH's interest
2 is at an end and that is incorrect. Because DOH can always
3 look for additional ways to improve efficiency beyond the
4 bare minimum. Its authority is not limited just to provide
5 an outright - - -

6 JUDGE GARCIA: Your statement in your brief is if
7 a provider spends quote, "Extravagantly, defined as over
8 199,000, on executive compensation even out of private
9 funds, it may be a red flag that the provider will spend
10 State funds irresponsibly as well." That's a justification
11 for a policy implementation that anything over 199-, that's
12 a red flag for you and your agency that they may be
13 spending money extravagantly in other areas as well?

14 MR. GRIECO: It's - - - it's not a policy
15 judgment, Your Honor, because it is keyed to directing
16 State funds to patient services. A - - - there is no - - -
17 everything - - -

18 JUDGE GARCIA: But there is no relation to that.
19 You already have that locked in in your 85/15. They could
20 actually take money that was going to compensate an
21 official, who doesn't spend 100 percent of their time but
22 spends 90 percent of their time on program services but
23 makes over 199,000, and direct it to something outside
24 program services as long as they're still making the 85
25 percent, actually decreasing the amount that's spent on



1 program services.

2 MR. GRIECO: The - - - but the agency has
3 authority to adopt multiple ways of targeting the - - - the
4 same problem.

5 JUDGE GARCIA: But don't they have to actually
6 target the problem? In my hypothetical, it's actually
7 aggravating the problem.

8 MR. GRIECO: The - - - the way that a particular
9 provider may choose to respond to the regulation does not
10 deny DOH the authority to adopt a regulation that will over
11 time result in the direction of more funds towards patient
12 services.

13 JUDGE RIVERA: Is - - - is DOH's experience the
14 hypothetical Judge Garcia presents to you? Is that the way
15 these providers work?

16 MR. GRIECO: It is not. I do want to address the
17 - - - a comment related to that that one of my adversaries
18 made about the waivers not having been granted thus far.
19 The - - - the rule was tied up on litigation early on, and
20 that is - - - that is my understanding the reason for that.

21 JUDGE GARCIA: Why - - -

22 CHIEF JUDGE DIFIORE: Counsel, one last question
23 to you. Could you take a moment and explain how the
24 penalty provisions work if the hard or the soft cap is
25 violated? I think the word - - - the phrase is that one of



1 the sanctions is the redirection of State funds. What does
2 that mean? Where do the State funds go to? Where are they
3 redirected to?

4 MR. GRIECO: It - - - it can mean a couple of
5 different things. The premise of the rule is that if an
6 agreement cannot be worked out between DOH and the provider
7 under - - - under the penalty provisions that the
8 provider's status as a - - - the provider's status as a
9 current - - - a current contractee to provide State
10 services can be reviewed and could if there is no - - -
11 nothing was worked out could be terminated. The
12 redirection, the rule specifically keys to existing State
13 or federal law. So where there is existing federal or
14 State law as to a particular program, for example, that - -
15 - that allows DOH to come in and exercise that kind of
16 oversight to redirect funds it could do so. But the rule
17 itself is not an affirmative source of authority for
18 redirection. It is pegged to other sources of authority.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 Mr. Greenberg.

21 MR. GREENBERG: Candor requires that I say that
22 this case represents an inflection point in the Separation
23 of Powers doctrine in New York State. Nothing is new under
24 the sun. The arguments that have been made today to this
25 court were made in the '70s, in the '80s five times in five



1 different cases where mayors and governors came before the
2 court and said, oh, the contract authority, we can pick and
3 choose, and we can set standards. Five times this court
4 said no. What has changed in society that would make us
5 think the Separation of Powers doctrine today is less
6 valuable, less important than it was in the '80s, in the
7 '90s. This is nothing less than a power grab. They use
8 the phrase - - - it's a cute phrase, oh, the Separation of
9 Powers doctrine is contextual. It's contextual. What it
10 means is it's not real. It's a symbol. It's an
11 aspiration. Their brief uses language that would make you
12 think, oh, we're not doing or saying anything we've never
13 said before.

14 JUDGE RIVERA: But we have said there's some
15 overlap between the executive and the legislative in this
16 particular area; have we not?

17 MR. GREENBERG: Overlap has never gotten to a
18 place in - - - like I said, those five contract cases, you
19 read the briefs on those cases, the same arguments. The
20 court said you need specific authority. I submit to this
21 court - - - I went through Lexis and Westlaw exhaustively.
22 I have not been able to find a single New York case, not
23 one, that has ever held that the authority to contract
24 confers the power to promulgate regulations let alone in a
25 free enterprise economy a regulation that dictates unre - -



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JUDGE RIVERA: But your argument doesn't turn on the power of the contract. It - - - the power of contract has been discussed here by the bench of course, and some of their argument relies on that. But their argument is their authority they say is based on statutes that don't have, yes, of course, an express statement, it's not expressed language. But we've never said you need the expressed language, right? But they point to several statutes that give them this kind of authority.

MR. GREENBERG: Just like governors and mayors did in Campagna, in Rapp, in Owner Occupied Housing. Let me give you an example. Take Campagna v. Shaffer, Secretary of State had statutes, cited statutes that said blockbusting is prohibited, had statutes that said you can promulgate regulations determining the trustworthiness of real estate brokers. She said that gave me the authority to promulgate a regulation prohibiting blockbusting practices in a part of the East Bronx.

This court said, even though there were statutes, uh-uh, not something that comprehensive and that detailed. Owner Occupied Housing v. Abrams, the Attorney General pointed to statutes that gave him the authority to set regulations regarding co-op conversions, and they said and approving them and approving the reports. This court said



1 not good enough. You need a specific statute. Time and
2 again this court has said that. Nothing has changed in 30
3 years that would lead to think that some - - -

4 JUDGE RIVERA: So what's missing here? A statute
5 that says that they can indeed pass regulations related to
6 executive compensation?

7 MR. GREENBERG: So here's what's missing - - -

8 JUDGE RIVERA: And does the legislation have to
9 say here's the amount of the cap? How far - - - how far
10 are we going to go down this rabbit hole?

11 MR. GREENBERG: It could be, by the way, any one
12 of the dozens of statutes that have been introduced and
13 debated in the legislature, any one of them would have done
14 it. It would have taken a sentence.

15 JUDGE RIVERA: Well, I just want to know the
16 minimum. What's the minimum?

17 MR. GREENBERG: A statute that would say that the
18 Department of Health can promulgate regulations relating to
19 executive compensation or to work - - -

20 JUDGE RIVERA: Yeah, but doesn't that sound
21 counter, or at least it does to me, to what we said in the
22 past that you don't need that kind of detailed expressed
23 language?

24 MR. GREENBERG: Exactly the right question, and I
25 respectfully submit this court has held before Stephen



1 Breyer at Harvard Law School thought of the Majors
2 Questions Doctrine, before the Supreme Court started
3 applying it. If it's comprehensive - - - and Judge Kaye
4 said this in Bourquin v. Cuomo, I urge the court to look at
5 it, when she was - - - similar arguments were made, and she
6 said those cases don't involve detailed and comprehensive
7 regulations.

8 This court has seen in just the last four years -
9 - - take the Garcia case you decided a few months ago.
10 There the New York City Department of Health had a statute
11 that said you can promulgate regulations regarding
12 vaccinations, and of course they can. And that was
13 quintessentially what they should do. But think of what we
14 have here. The Health Commissioner setting compensation
15 limits in New York. Respectfully, nothing in this court's
16 precedence would allow you to use decades-old statutes.
17 This month I think I can say without fear of contradiction,
18 not a single member of the legislature - - -

19 JUDGE RIVERA: Usually, you know, a time-honored
20 statute has - - - has some value to it. You think because
21 they're older statutes they are not - - - they can't rely
22 on them?

23 MR. GREENBERG: Well - - -

24 JUDGE RIVERA: Doesn't that mean the legislature
25 is comfortable with them?



1 MR. GREENBERG: So here's what the court has said
2 over and over as recently I think as in Garcia and in
3 Acevedo and in New York City Clash (phonetic), the court
4 has said there's no inherent rule-making authority. You
5 can adopt a statute with reasonable standards and
6 guidelines. Why? Because you can only promulgate
7 regulations, to your question, Judge Wilson, not that make
8 policy but that implement policy.

9 So the court has said, okay, in order to tether a
10 reg to a statute you either have to have explicit authority
11 or implicit authority, authority that you can necessarily
12 apply from the original grant of statutory authority. You
13 have to make that connection. No one can believe that any
14 member of the legislature, Judge Rivera, decades ago
15 thought, oh, my goodness, when I said they have the
16 authority to spend money that means they can tell
17 executives how much or how much little they could pay. The
18 legislature never thought that. No one could believe that.
19 And more importantly - - -

20 JUDGE RIVERA: And the costs may not have
21 skyrocketed at that point anyway, but I - - - I get your
22 point.

23 MR. GREENBERG: Thank you.

24 CHIEF JUDGE DIFIORE: Thank you, Mr. Greenberg.

25 MR. GREENBERG: Thank you, Your Honor.



1 CHIEF JUDGE DIFIORE: Mr. Luntz.

2 MR. LUNTZ: Thank you, Judge. Judge Rivera, to
3 your question about what the statute would have to say, if
4 the Public Health Law authorized the Governor to impose - -
5 - to issue an executive order for regulations capping
6 executive compensation, why did the Governor ask the
7 legislature for authority via an Article 7 Budget Bill? To
8 ask that question is to answer it. The Governor was aware
9 of the fact that there was no legislative authority for
10 this proposition and that's why he sought legislative
11 authorization in advance. And it was only after criticism
12 from legislators and stakeholders that the executive order
13 which resulted in these regulations was issued.

14 On the question of the soft cap, the soft cap is
15 not just a guidepost that the Department can use with
16 respect to whether or not providers are responsible. The
17 soft cap actually - - - actually changes the law because
18 both the Not-for-Profit Law and the Business Corporations
19 Law make it very clear that a corporate board of directors
20 is the entity that determines executive compensation.

21 JUDGE RIVERA: But without the soft cap isn't it
22 - - - wouldn't it be possible for a provider to avoid the
23 requirements of the hard cap?

24 MR. LUNTZ: No, because the soft cap does not
25 involve the use of State funds. It's - - - it's funds that



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come from other - - -

JUDGE RIVERA: I understand that, but that ultimate goal of the - - - the - - - what they think is the better use, the use that's in line with the legislative intent of State funds.

MR. LUNTZ: Yeah, and that's speculation, I would say, of the highest order. And there's no connection in this record that that relates to the quality of services provided by Medicaid providers.

And lastly, as to the alleged special expertise of the respondents, the 199,000-dollar cap is not based off of any public health studies as to compensation, reasonable compensation for healthcare executives. It's based on the federal employees' salary scales, and the fact that twelve other State agencies promulgated regulations that have the exact same 199,000-dollar cap speaks to that fact and speaks to the fact that these regulations were the result of an order from the executive not because of any public health concern. Thank you.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

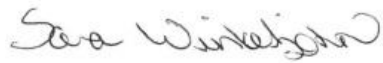
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of LeadingAge New York, Inc. v. Shah, Matter of Coalition of New York State Public Health Plans v. New York State Department of Health, No. 93, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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