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COURT OF APPEALS

STATE OF NEW YORK

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IN RE: WORLD TRADE CENTER LOWER  
MANHATTAN DISASTER SITE LITIGATION,

(FALTYNOWICZ ET AL V. BATTERY PARK  
CITY AUTHORITY AND TWO OTHERS),

No. 119

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20 Eagle Street  
Albany, New York  
October 17, 2017

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: Okay. The next matter on  
2 the calendar is appeal number 119, Matter of World Trade  
3 Center Disaster Litigation.

4 Counsel.

5 MR. AMEND: May it please the court, Andrew Amend  
6 for the State of New York. I'd like to request two minutes  
7 for rebuttal, please.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. AMEND: Thank you, Judge. The Battery Park  
10 City Authority seeks the benefit of a special shortened  
11 time bar given by the legislature only to public entities,  
12 yet BPCA claims the right of a private entity to challenge  
13 legislation temporarily lifting that special public-entity-  
14 only time bar. The legislation in question, commonly known  
15 as Jimmy Nolan's Law, was an eminently reasonable exercise  
16 - - -

17 JUDGE FEINMAN: Let me start with are all public  
18 entities the same in your view? In other words, municipal  
19 corporations, public benefit corporations, political  
20 subdivisions, they're all treated the same?

21 MR. AMEND: They're certainly not all treated the  
22 same for all purposes. But under this court's analysis in  
23 Black River Regulating District and the Third Department's  
24 analysis in Capital Off-Track Betting Corp., there's no  
25 reason to treat public benefit corporations different for



1 purposes of applying the general rule that power conferred  
2 by the legislature confers no vested right as against the  
3 legislature itself. Jimmy Nolan's Law, in any event, also  
4 was reasonable and would satisfy the test of reasonableness  
5 or, indeed, any due process test because the law a narrow,  
6 limited measure to aid recovery against public entities by  
7 a discrete and deserving class - - -

8 JUDGE GARCIA: So which - - - there's been a  
9 discussion, and the Second Circuit I think suggested it,  
10 that we have two tests here, and I think Chief Judge Walker  
11 (phonetic) and Eli Lilly have suggested the same thing.  
12 What's your view on that?

13 MR. AMEND: Whether there are two tests or one  
14 test when there is a private entity against whom claims are  
15 revived is an issue that this court need not resolve to  
16 settle this case because it's only a public corporation.  
17 But in any event - - -

18 JUDGE GARCIA: So this - - - I'm sorry. So the  
19 standard would be different for a public corporation  
20 assuming they get through capacity? The standard you would  
21 apply in testing whether or not this extension of Jimmy  
22 Nolan's Law passes muster would depend on the party?

23 MR. AMEND: Yes. That is something that we think  
24 could be relevant. We also, just to answer your question,  
25 think that the relevant test is reasonableness, no matter



1 even if it is a private defendant.

2 JUDGE GARCIA: Okay.

3 MR. AMEND: I was just putting out that need not  
4 be decided.

5 JUDGE GARCIA: But as I read those cases, a few  
6 things strike me. And the 1924 case, Robinson, sets out  
7 this analysis. Then Gallewski kind of rehashes Robinson  
8 and interprets it and then again in Eli Lilly there's the  
9 suggestion, well, those two tests are different. But it  
10 doesn't seem to me so much that those two tests are really  
11 different. I mean I - - - you could read those two earlier  
12 cases as saying there has to be some type of extraordinary  
13 circumstances. In one case, it's the workers' comp appeal,  
14 in the second it's World War II. And then Eli Lilly  
15 applies that stricter test. But there has to be some  
16 extraordinary circumstances. There has to be a blameless  
17 plaintiff or however they phrase it. And then you look at  
18 that as almost like a Fourth Amendment analysis. You look  
19 at to see if what has the legislature done that's  
20 reasonable. So I have some trouble with saying it's either  
21 this heightened extraordinary circumstances test or this  
22 much lower reasonableness standard when I think you can  
23 harmonize those cases. And I think that's what Gallewski  
24 was - - - was doing.

25 MR. AMEND: Gallewski certainly said that it was



1 deciding the case within the framework of Robinson.  
2 Gallewski also said, you know, that a claim can be upheld  
3 where there are exceptional circumstances and in a serious  
4 injustice.

5 JUDGE GARCIA: Right.

6 MR. AMEND: Our point is that the injustice need  
7 not be as extreme as the particular one in Gallewski to  
8 satisfy the statute - - -

9 JUDGE FEINMAN: Those - - - those are semantic  
10 losses, in essence, on the original test that was in  
11 Robinson.

12 MR. AMEND: Correct. And the original test that  
13 is in Robinson is also satisfied here.

14 JUDGE STEIN: Well, that would be consistent,  
15 wouldn't it, with McCann and - - - and Hymowitz, right?

16 MR. AMEND: Yes. Absolutely. You have here, as  
17 in McCann, a group of plaintiffs. So even the - - - who  
18 even though they had the benefit of a symptom discovery  
19 rule had to act within ninety days of discovering symptoms.  
20 And the type of symptoms that they, you know, first noticed  
21 would - - - could easily be mistaken for a cold or sinus  
22 infection. If they don't - - -

23 JUDGE GARCIA: But that really goes to satisfying  
24 the test, right? So what I think the Circuit's just asking  
25 us for is - - - are there two tests and which one should we



1 apply, right. So your facts in this case may fit one or  
2 the other or maybe the same test for both. But really, the  
3 issue for us is what's the test, and that should - - -

4 MR. AMEND: No. I - - -

5 JUDGE GARCIA: - - - apply for everyone. Or  
6 maybe not for public benefit corporations, I guess.

7 MR. AMEND: No. That's absolutely -- you're - -  
8 - you're correct, Your Honor, in terms of what the Second  
9 Circuit certified this test - - - or certified to this  
10 court. We do, in any event, think that no matter what  
11 standard is applied this statute meets it. The - - - as to  
12 the - - -

13 JUDGE GARCIA: Unfortunately, we can't do that  
14 here, right.

15 MR. AMEND: What's that?

16 JUDGE GARCIA: We can't do the Eli Lilly fix here  
17 because they're not asking us does it pass. They're just  
18 asking us what's the standard. So in effect we have to  
19 either choose or say it's the same standard, right?

20 MR. AMEND: With respect, the Circuit did say  
21 that the court could expand the questions. But assuming  
22 that the court choose - - -

23 JUDGE FEINMAN: No. I thought they only said  
24 that on the first question. I don't think they said that  
25 on the second question.



1 MR. AMEND: No. They - - - I believe the  
2 language did - - -

3 JUDGE RIVERA: Well, the rule let's us modify or  
4 not answer, do whatever we want with the questions.

5 MR. AMEND: Yes.

6 JUDGE RIVERA: But - - - but we - - - our role  
7 here is not to decide the ultimate question that is  
8 presented in a federal lawsuit that has exclusive  
9 jurisdiction over these kinds of cases.

10 MR. AMEND: Under - - -

11 JUDGE RIVERA: It's just to tell them what our  
12 state rule is.

13 MR. AMEND: Understood. And the state rule, the  
14 reason that these circumstances are relevant that make this  
15 a compelling case to revive claim statute also speak to why  
16 the standard is reasonableness and not some - - - that you  
17 have to have something that was as extreme as in - - -

18 JUDGE WILSON: So is there any circumstance - - -  
19 switching subjects back to the - - - where you started. Is  
20 there any circumstance where a public benefit corporation  
21 can sue the state challenging a legislative act as  
22 unconstitutional?

23 MR. AMEND: There are certainly the - - - the  
24 exceptions that have been noticed in - - - noted in the  
25 case law in which a municipality or other political



1 subdivision can challenge the constitutionality of a state  
2 law. And there - - -

3 JUDGE FAHEY: Those are a grant from the state  
4 directly, right? Aren't they usually a grant?

5 MR. AMEND: A grant from the state to directly or  
6 the subdivision claims has a viable claim that by complying  
7 with the statute it will by that very act of compliance be  
8 forced to violate someone else' constitutional rights.

9 JUDGE STEIN: You're talking about the exceptions  
10 to the capacity to sue, right?

11 MR. AMEND: Yes. And - - -

12 JUDGE STEIN: Okay.

13 JUDGE FEINMAN: But isn't there a fifth  
14 exception, if you will, that, you know, comes out of - - -  
15 you know, that we should apply some sort of a  
16 particularized inquiry? I mean you see that being done in  
17 the Community Board Seven case where you look at the - - -  
18 that you're going to look at the enabling statute. You're  
19 going to look at the legislative history. And you're going  
20 to try to determine from that - - - I mean isn't - - -  
21 isn't that really, if you will, a fifth exception?

22 MR. AMEND: If there is such an exception, it  
23 doesn't apply here. The - - - any particularized inquiry  
24 is dictated by the fact that the same circumstances that  
25 dictated the outcome in Black River Regulating District and





1 Capital Regional Off-Track Betting Corp. are satisfied  
2 here. It's also satisfied because even if we were to say  
3 that there needs to be a particularized inquiry, in this  
4 case Battery Park City Authority is claiming the right of a  
5 private party to challenge - - -

6 JUDGE STEIN: Well, getting - - - getting away  
7 from - - - oh, I'm sorry. Go ahead.

8 MR. AMEND: Yes? To challenge against  
9 legislative encroachment the benefit of a notice of claim  
10 requirement that was conferred on it specifically because  
11 it was a public entity.

12 JUDGE STEIN: That's not what I thought you were  
13 going to say. But it's - - - but it's a good point. No.  
14 My - - - my question is in those cases where we've applied  
15 this particularized inquiry test were any of those where  
16 the entity was attempting to sue the state to declare a  
17 state statute unconstitutional, or did they all involve  
18 protecting the - - - the municipal entity from lawsuits by  
19 third parties, essentially?

20 MR. AMEND: The particularized inquiry line of  
21 cases to which Battery Park City Authority refers have not  
22 - - - none of those cases involves the situation you have  
23 here of saying are they a creature of the state with rights  
24 to enforce as against the state itself.

25 JUDGE STEIN: It's sort of like a sword versus a



1 shield kind of analysis, to simplify it in - - - in my  
2 mind. We've applied that particularized inquiry test when  
3 - - - when they were trying to use it as a shield not as a  
4 sword against the state that created them in the first  
5 place.

6 MR. AMEND: Yes. That's correct, Your Honor.

7 JUDGE STEIN: Okay.

8 JUDGE FAHEY: But going back to your other point  
9 that you made before basically that the BPCA's availing  
10 itself of privileges unavailable to non-governmental  
11 entities by using the 58, the General Municipal Law.

12 MR. AMEND: Yes.

13 JUDGE FAHEY: Is that the point you were about to  
14 make?

15 MR. AMEND: Yes.

16 JUDGE FAHEY: Yeah. And that - - - that - - - so  
17 if our ruling was based on that - - - or if our analysis  
18 was based on that particular point does it matter which due  
19 process standard we rely on, the reasonableness or  
20 particularized inquiry?

21 MR. AMEND: That would dispose of their ability  
22 to bring the challenge. But as far as reasonableness goes,  
23 one other - - - a few other things that I'd like to just  
24 point out very briefly. Battery Park City Authority was  
25 created by an affirmative act of the legislature and exists



1 and operates solely under the grant of legislative  
2 authority to serve public purposes that are specified by  
3 the legislature. It doesn't have any private shareholders,  
4 own - - - owners or directors, and therefore - - - and its  
5 bondholders bought their bonds while Jimmy Nolan's Law was  
6 already on the books. So there's no - - -

7 JUDGE RIVERA: Can you - - - can you just tell me  
8 about the debt? So they incurred debt that the state is  
9 not responsible for, correct?

10 MR. AMEND: Yes. As do all - - -

11 JUDGE RIVERA: But what difference - - -

12 MR. AMEND: Sorry.

13 JUDGE RIVERA: What difference, if any, does that  
14 make, then, in the analysis?

15 MR. AMEND: It doesn't make a difference because  
16 all public corporations, including municipalities, incur  
17 debt that are not guaranteed by the state. Also, the  
18 rights of the bondholders are not asserted here, nor could  
19 they be, by BPCA alone. Nor are they infringed because,  
20 again, the bondholders bought their bonds when this law was  
21 in effect.

22 JUDGE RIVERA: Well, we don't really have to  
23 decide this question, right? This is again the - - - the  
24 question for us is how to - - - how the Second Circuit can  
25 figure out whether or not BPCA has capacity to sue. The



1 question for us is not whether, indeed, they have capacity  
2 to sue, correct?

3 MR. AMEND: It is not, but I was actually making  
4 these points in - - - in reference to get back to the  
5 question of what standard should apply.

6 JUDGE RIVERA: Yeah. You're - - - you're making  
7 the point as to how the Second Circuit would make that  
8 determination.

9 MR. AMEND: Well, and to how this court might  
10 answer the question of what standard applies substantively  
11 to the due process challenge if BPCA has the right to bring  
12 it, and that point is simply that under these circumstances  
13 there are no private interests to balance against the  
14 public interests that the legislature - - -

15 JUDGE RIVERA: Well, if - - - if indeed the suits  
16 are allowed to go forward and BPCA loses, who loses money  
17 in that?

18 MR. AMEND: The Battery Park City Authority  
19 potentially would have to pay but the Battery Park City  
20 Authority, by definition, everything it has is held in  
21 trust for the common good. Its profits inure to the State  
22 of New York - - - the benefit of the State of New York and  
23 the people thereof. There are no private holders, no  
24 owners.

25 JUDGE RIVERA: What do the bondholders get out of



1 that then? Anything? Or why - - - why purchase the bonds?

2 JUDGE GARCIA: Do they get tax-free bonds?

3 JUDGE RIVERA: What do they get?

4 MR. AMEND: They get a debt - - - well, they get  
5 the right to be paid by Battery Park City Authority, but  
6 that is the same for any city, any contractor, and there's  
7 no infringement here of any right. They bought these bonds  
8 knowing that this law was on the book and that - - - books  
9 and that Battery Park City Authority could pay claims if  
10 they were found to be liable.

11 CHIEF JUDGE DIFIORE: Thank you, Mr. Amend.

12 Counsel.

13 MR. CONNOLLY: May it please the court. My name  
14 is Daniel Connolly from Bracewell, and I represent the  
15 respondent, Battery Park City Authority. I think I would  
16 start with just by saying Judge Garcia's question is the -  
17 - - is the exact right question, and is there one standard,  
18 is there two standard. And the jurisprudence of the State  
19 it's really quite clear that there is one standard. Claims  
20 or viable statutes are - - - are extremely rare in this  
21 state. They are - - - and as the court told us - - - as  
22 this court told us in 1922, "an extreme use of legislative  
23 power." Ever case that has followed in the almost 100  
24 years since then has followed a similar fact pattern that a  
25 serious injustice had to be addressed. So I agree to a



1 certain degree that the question was open - - - was asked  
2 in an open way in the Hymowitz or the Eli Lilly case, as  
3 Judge Garcia refers to it. It was - - - it was asked in an  
4 open way is there two standards and then they say, well,  
5 there's serious injury here so we're not going to go and  
6 make a decision. But the truth of the matter is the case  
7 that is - - -

8 JUDGE RIVERA: Doesn't that suggest that maybe  
9 there is because otherwise wouldn't you just say there's  
10 only one standard?

11 MR. CONNOLLY: Well, I think what it - - - what  
12 it suggests, Your Honor, is a careful - - - if there were  
13 to be a second standard, the so-called reasonable standard,  
14 it would have come, if it came from anywhere, from Robinson  
15 v. Robins Dry Dock. And when you read Robinson v. Dry  
16 Dock, which I know we all have very carefully, you can see  
17 that it's - - - it's addressing a serious injustice. Every  
18 piece of the language of the factual and in the legal  
19 support of it hews to the notion that this is an extreme  
20 use of legislative power and subsequently - - -

21 JUDGE RIVERA: I don't know that that goes to the  
22 question whether or not that forecloses something that  
23 falls short of a serious injustice nevertheless being  
24 upheld as an appropriate revival statute.

25 MR. CONNOLLY: Well, I think that - - - I agree



1 that that sort of begs the question that the Second Circuit  
2 is asking. They find themselves in a circumstance - - -  
3 you know, in truth this - - - this court has never held a  
4 revival statute to be unconstitutional, so it's hard to - -  
5 - it's hard to see what would - - - what would miss the  
6 test. Having said that I submit to you this court has  
7 never seen a revival statute quite like this on a basis as  
8 articulated by the state legislature as thin as this. And  
9 so - - -

10 JUDGE WILSON: Well, what about the argument that  
11 the test ought to be lax or ought to be towards  
12 reasonableness at least because the statute is being - - -  
13 claims are being revived against a public entity?

14 MR. CONNOLLY: I don't think there's any support  
15 for that notion. And I think - - - and this - - - this  
16 goes to another critical question and it - - - it blurs the  
17 two questions, but that Judge Feinman raised in the very  
18 beginning which is are there differences between municipal  
19 corporations, political subdivisions, and public benefit  
20 corporations? And the answer to that is yes. And  
21 furthermore, there are differences between public benefit  
22 corporations. And so, you know, the - - - the notion that  
23 there is a one-size-fits-all test or that all public  
24 benefit corporations can be treated one way that fails - -  
25 -



1           JUDGE STEIN: Well, let's assume that that's not  
2 the case, that they can be treated differently for  
3 different purposes. I think isn't the question before us  
4 for purposes of this particular capacity to sue rule, what  
5 should be - - - what should be the rule? We have certainly  
6 found in other cases or - - - whether explicitly or  
7 implicitly this particularized test was - - - was  
8 applicable but they've never, as far as I'm aware, apply to  
9 the capacity to sue rule. And - - - and particularly in a  
10 case where the entity that we're talking about has asserted  
11 a time limitation that only government entities can assert.  
12 So - - - so why isn't it appropriate for us to - - - to  
13 take that into account?

14           MR. CONNOLLY: So the - - - just if I can back up  
15 one quick second. The - - - the notion, it's been asked  
16 that a lot, how Battery Park City asserts the notice of  
17 claim protection. But to be clear that is a power that is  
18 given to it not because of general municipal law which all  
19 municipal corporations have that benefit under 50(e). Not  
20 because of that but because of a particular section of  
21 enabling legislation. So the State can give that power,  
22 and so it does not have that power inherently. It's - - -  
23 going back to what Judge Feinman said, it's not like a  
24 fifth category. It's a separate category.

25           JUDGE FAHEY: Yeah. I don't know, you know. I





1 was on the Council in Buffalo for a long time, and every  
2 public benefit corporation I thought had that power given  
3 its enabling legislation. I - - - I never saw one that  
4 didn't, that didn't have the - - - that standard, the one,  
5 your ninety-day standard. I thought that was the standard  
6 part of the package. The differences are usually the  
7 powers they have, the projects they're going to work on,  
8 whether they're doing real estate. Anyway, the differences  
9 are - - - are set out for policy reasons but not for  
10 procedural reasons primarily.

11 MR. CONNOLLY: No. I - - - I think that's right.  
12 There - - - there have been some in the history of - - - of  
13 the state that don't have notice of claim.

14 JUDGE FAHEY: Okay.

15 MR. CONNOLLY: But I would agree with - - - I  
16 would agree with Judge Fahey that there - - - there aren't  
17 - - - at least not that I'm aware of off the top of my  
18 head, there aren't too many that don't have that, but  
19 that's not the point. The point is that you look at the -  
20 - - the particularized makeup of - - - in order to answer  
21 the question, you look at the particularized makeup of the  
22 entity you're talking about. It's - - -

23 JUDGE STEIN: That's generally been in the  
24 context of whether other parties, third parties, can sue or  
25 - - - or assert different rights against the public benefit



1 corporation, not the other way around. Not whether the  
2 public benefit corporation can sue the state to declare its  
3 law unconstitutional.

4 MR. CONNOLLY: I think that - - - I think that's  
5 right, Your Honor, except that what the analysis leads you  
6 to is - - - what the particularized inquiry leads you to is  
7 what this court talked about in 2011 in the Bordeleau case.  
8 And in the Bordeleau case it said: "This court has  
9 consistently recognized public authorities as legal  
10 entities separate from the State, enjoying an existence  
11 separate and apart from the state." So what happens, the  
12 result of the particularized inquiry, you're responsible  
13 for your own debts. You're - - - you have all - - - all  
14 your own money. You can do things that the State can't do.  
15 The result of that is it creates you - - - it creates in  
16 the entity, the public benefit corporation entity in this  
17 case, a legal entity separate and apart from the State.  
18 And the question is what does that mean? Well, it means it  
19 has the powers that other legal entities would have,  
20 including the power to challenge the state legislature. So  
21 - - - or legislation from the State.

22 JUDGE STEIN: That's sort of - - - to me that's  
23 sort of a circular - - - circular argument.

24 MR. CONNOLLY: Except - - - and I don't mean - -  
25 - I don't mean it to sound that way because what I'm



1 suggesting is that in evaluating what are we looking at?  
2 We're looking at a public benefit corporation. Not all  
3 public benefit corporations would be - - - would not be  
4 political subdivisions. You can have a public benefit  
5 corporation be a political subdivision. For example, the -  
6 - -

7 JUDGE STEIN: If we decide as a matter of public  
8 policy that we do not think that this particularized  
9 inquiry test should apply to public benefit corporations  
10 suing the State to declare a statute unconstitutional - - -

11 MR. CONNOLLY: I'm sorry. Could - - - the  
12 question was?

13 JUDGE FEINMAN: Could you make a blanket rule, I  
14 think is, - - -

15 JUDGE STEIN: Could -- could we make a blanket  
16 rule. That's right. Yeah.

17 JUDGE FEINMAN: Let's say - - -

18 JUDGE STEIN: As a matter of policy.

19 JUDGE FEINMAN: - - - a public benefit  
20 corporation can't do what - - -

21 JUDGE GARCIA: Constitutional challenges.

22 JUDGE FEINMAN: - - - constitutional.

23 MR. CONNOLLY: Well, if the court - - - if the  
24 court did that it would essentially do violence to the  
25 notion of the public benefit corporation. Keep in mind



1 that public benefit corporation - - -

2 JUDGE STEIN: Well, if we limited it to this  
3 particular context?

4 MR. CONNOLLY: Well, in limit it - - - you would  
5 - - - you would still be, with respect to - - - so, for  
6 example, one of the key elements of public benefit  
7 corporations is their ability to raise money through debt,  
8 through public debt and bondholding. So if - - - if you  
9 were to take away that level of independence - - - I forget  
10 - - - I think Judge Fahey asked or - - - or Judge Wilson  
11 asked does it matter that they collect their own. I'm  
12 sorry, Judge Rivera. Or that their - - - or that they're  
13 responsible for their own debts. Well, it matters  
14 enormously. That's one of the key factors you have to  
15 determine. What does - - -

16 JUDGE STEIN: Well, presumably, if one of the  
17 exceptions to the - - - to the rule apply, it would - - -  
18 it would still apply here.

19 MR. CONNOLLY: Exceptions meaning?

20 JUDGE GARCIA: Capacity.

21 JUDGE STEIN: Capacity. Um-hmm.

22 MR. CONNOLLY: With respect to like a municipal  
23 corporation? Well, I would submit, and the exception would  
24 be a particularized interest in a - - - in a specific fund  
25 of money. But that - - - that whole analysis is in a



1 different category.

2 JUDGE RIVERA: It's an interest not a  
3 particularized interest, right? It's a vested interest.

4 MR. CONNOLLY: Well, I mean, we could - - -  
5 there's a - - - there's I think another whole avenue of  
6 discussion - - -

7 JUDGE RIVERA: Well, I just don't want us to  
8 confuse which are the - - - the exceptions and perhaps some  
9 fifth exception. I want us to be clear as to what line of  
10 cases you are relying on.

11 MR. CONNOLLY: And that's - - - that is exactly  
12 the point.

13 JUDGE RIVERA: It's a confusing area enough.

14 MR. CONNOLLY: Yeah. Exactly. And I - - - my  
15 job is not to help add to the confusion. My - - - I think  
16 you're exactly right because I am - - - there is a  
17 distinction. There are four recognized exceptions when a  
18 municipal corporation, something like the City of New York,  
19 can challenge the State. And it's, you know, when - - -  
20 you know, well, we all know the four - - - the four  
21 exceptions. One of them is - - -

22 JUDGE RIVERA: If we said that's - - - that's the  
23 answer - - - let me just say this. If we said that's the  
24 answer, the - - - those lines of cases, that's the answer  
25 to the certified question, would it be the first time that



1 the court says that that approach taken in that line of  
2 cases applies to a public benefits corporation?

3 MR. CONNOLLY: I think it might be, and I think  
4 it blurs - - - it blurs the line. I think - - - I think  
5 Your Honor is exactly right that we're talking about two  
6 separate things. This is - - - you know, those are the  
7 exceptions availability to a municipal corporation or a  
8 political subdivision of the State. It - - - those - - -  
9 that is not the basis upon which the Battery Park City and  
10 other - - - Authority - - - and other public benefit  
11 corporations enjoy their independence. The jurisprudence  
12 of this - - -

13 JUDGE RIVERA: Even though you were merely a  
14 creature of the State and nothing more?

15 MR. CONNOLLY: Yes. I mean that's exactly what -  
16 - -

17 JUDGE RIVERA: You're a fiction other than the  
18 State says otherwise, right?

19 MR. CONNOLLY: Well, I will say this the - - -

20 JUDGE RIVERA: Perhaps not you. You are quite  
21 real.

22 MR. CONNOLLY: I think we're quite real. We're  
23 all quite real. But the - - - you know, in 1978 this court  
24 said in the John Grace decision: "The mere fact that the  
25 entity is an instrumentality of the State and as such



1 engages in operations which are fundamental government in  
 2 nature - - - governmental in nature does not inflexibly  
 3 mandate a conclusion that it is the State." And that's  
 4 really the point. The point is it's not - - - it's - - -  
 5 it is - - - it's a fifth cat- - - it's another category,  
 6 public benefit corporations. The - - - this court has said  
 7 this repeatedly from the beginning of time that public  
 8 benefit corporations can be - - - you know, can be  
 9 nonpolitical subdivisions, and as a result, as recently as  
 10 in the Bordeleau case, are legal entities that enjoy the  
 11 powers and the - - - that other - - -

12 JUDGE WILSON: So - - - so what is an - - - can  
 13 you give me an example of a lawsuit we would want a public  
 14 benefit corporation to be able to bring to invalidate a  
 15 statute on state constitutional grounds?

16 MR. CONNOLLY: So the - - - well, this one. The  
 17 - - - the circumstances would be if - - - if the State were  
 18 to pass a law that somehow did violence to the  
 19 responsibilities, duties, obligations of the public benefit  
 20 corporation, you would want the public benefit corporation  
 21 to be able to challenge that because if you didn't have  
 22 that - - -

23 JUDGE WILSON: In a way that affected third  
 24 parties or that's irrelevant?

25 MR. CONNOLLY: Well, the - - - to the extent it



1 affects third parties I think is relevant but not critical  
2 to the analysis. I think the - - - I think the - - - you  
3 know, there's an effort to try to distinguish this  
4 Patterson case where it appears the Court of Appeals found  
5 that a public benefit corporation which had demonstrated  
6 its independence and consequently not - - -

7 JUDGE WILSON: Can the State - - - can the State  
8 eliminate the PBCA or BPCA?

9 MR. CONNOLLY: It can but with restrictions.  
10 Again, so it cannot - - - as we stand here today the State  
11 of New York could not dissolve the Battery Park City  
12 Authority because it has outstanding debt. Now could it -  
13 - -

14 JUDGE WILSON: Obligations to third parties.

15 MR. CONNOLLY: Exactly.

16 JUDGE GARCIA: But, counsel - - -

17 JUDGE FAHEY: Can I - - - can I just - - - I want  
18 to focus you just for one second on the due process  
19 challenge because what I'm wondering is Gallewski, serious  
20 injustice, Robinson, reasonableness. Is there a difference  
21 between those two terms? And let me ask this because we  
22 use the phrase serious injustice. What we're talking about  
23 is essentially a descriptor of - - - of injustice and this  
24 court really can't measure injustices. We're - - - we  
25 don't do that. So these terms don't really seem to be in



1 conflict, and I'm wondering if - - - if we can't measure  
2 the differences between them does it matter in your due  
3 process argument?

4 MR. CONNOLLY: I think - - - I think that  
5 question is really an essential question and critical to  
6 helping the Second Circuit understand how to move forward.  
7 I think the answer to your question is that the - - - the  
8 standard matters to the extent that it makes clear that  
9 there's a recognition of the due process rights of the  
10 entity as against the extreme legislative power, extreme  
11 use of legislative power - - -

12 JUDGE FAHEY: Could we tell the Second Circuit  
13 that they mean the same thing?

14 MR. CONNOLLY: I think the jurisprudence of this  
15 court allows you to say that there is no circumstance in  
16 the - - - in our jurisprudence, in the Court of Appeals  
17 jurisprudence in New York State where a claims revival  
18 statute has ever been permitted for anything less than the  
19 serious circumstances or the serious - - - the serious  
20 injustice articulated in every one of the cases from  
21 Robinson, where it's the workman's compensation issue, to  
22 the - - - you know, to McCann, you have the latent disease  
23 - - - I mean latent disease issues.

24 JUDGE RIVERA: And is that as a - - - as a matter  
25 of law? That is to say that if the legislature thinks it's



1 a serious injustice but I might not think it's a serious  
2 injustice, who gets to make that decision?

3 MR. CONNOLLY: Well, the - - -

4 JUDGE RIVERA: Under your analysis?

5 MR. CONNOLLY: In my analysis at the end of the  
6 day the - - - the legislature does what it does and it has  
7 to be reviewed by the courts because it implicates  
8 constitutional rights. And in those circumstances, the  
9 state legislature has demonstrated historically an ability  
10 to create claims revival statutes that pass constitutional  
11 muster. This just happens not to be one of them. This is  
12 a - - - this is a circumstance - - - I mean let's take this  
13 analysis to - - - to where they really want us to go which  
14 is that one of the stated reasons - - - against a  
15 constitutional principle, one of the stated reasons for the  
16 necessity of this law is that these plaintiffs were unaware  
17 of the deadline, of the statute of limitations. If that  
18 passes constitutional muster then no statute of limitation  
19 will - - - will, you know - - -

20 JUDGE RIVERA: Well, there's also questions about  
21 whether or not they were misled and so forth related to the  
22 actual risks involved in participating in this cleanup  
23 under the circumstances in which they worked.

24 MR. CONNOLLY: Right. Those are other rationale  
25 and again I don't mean to drag us into the - - -



1 JUDGE RIVERA: That's what I'm saying.

2 MR. CONNOLLY: Yeah.

3 JUDGE RIVERA: If - - - if that is what persuaded  
4 the legislature, isn't the job done?

5 MR. CONNOLLY: Well, no. I think - - - I think  
6 the court has its traditional rule - - - or traditional  
7 role, I should say, evaluating the standard. And here we  
8 have a very, very, clear roadmap written over decades and  
9 decades of jurisprudence from this court of the kinds of  
10 things that happen. And I just want to say one last quick  
11 point on this which is that in - - -in evaluating this and  
12 evaluating what the other courts - - - the courts - - - the  
13 older courts were looking at is since 1986, this state is a  
14 - - - has a discovery - - - it operates under the discovery  
15 rule versus the exposure rule.

16 I suspect that there hasn't been - - - there will  
17 - - - there will not be a valid challenge in the - - - in  
18 the aftermath of CPLR 214(e), a valid claims revival  
19 statute under these bases because efforts are made - - -  
20 the legislature has already accounted for that serious  
21 injustice, whether it be caisson disease or DES exposure or  
22 what have you. And it - - - and it deals with that not  
23 only in 214(e) but in 214(e)(4) it provides ample  
24 opportunity for plaintiffs to have access to the court.  
25 And so under - - - under those circumstances - - - under



1 those circumstances evaluating the action of the  
2 legislature and, indeed, the legislature has never sent  
3 this kind of - - - this type of claims revival statute has  
4 never been reviewed before likely under - - - with these  
5 facts. It simply can't pass muster.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MR. CONNOLLY: Thank you, Your Honor.

8 CHIEF JUDGE DIFIORE: Counsel.

9 MR. NIKAS: Good afternoon. May it please the  
10 court, I'm Luke Nikas from Boies Schiller Flexner on behalf  
11 of the Alvear plaintiffs. I'd like to take my very short  
12 time to address two critical decisions the District Court  
13 made, and I'd like to do so in the context of Judge  
14 Rivera's question about the serious - - - serious injustice  
15 standard and who ought to be making decisions about that  
16 standard and how it applies in the particular case for the  
17 purpose of focusing the court on how its choice of the test  
18 and how it answers the two certified questions, in  
19 particular, the substantive due process question, will  
20 implicate the decisions that gave rise, for my particular  
21 clients, to the - - - the Second Circuit's certification.  
22 And so I'd like to do so first by focusing on the District  
23 Court's conclusion that a serious injustice did not exist  
24 because my particular clients had the benefit of the  
25 discovery rule under 214(c). The court's conclusion in



1 that respect and it's - - - it's right in its view to go to  
2 that question was error. The discovery rule in a latent  
3 defect or latent injury case was designed for the purpose  
4 of protecting - - -

5 JUDGE GARCIA: But again, these are the merits of  
6 - - - of your argument. I think perhaps the - - - of the  
7 argument you're going to make in the federal court. But  
8 the issue perhaps that you're raising that Judge Rivera I  
9 think was raising is do the courts look at the serious  
10 injustice issue, whatever the merits of it is, or do we  
11 defer to the legislature. That's the general issue that's  
12 here and that I think Judge Rivera was speaking to. But  
13 should we do that with reasonableness too? Why do we apply  
14 any standard? If the legislature thought it was  
15 reasonable, who are we to say it's not?

16 MR. NIKAS: Sure. So - - - so the question - - -  
17 the answer is the court should defer to the legislature  
18 with respect to making judgments about what a serious  
19 injustice - - -

20 JUDGE GARCIA: Of justice.

21 MR. NIKAS: Of justice. That's correct.

22 JUDGE GARCIA: The court should defer to the  
23 legislature.

24 MR. NIKAS: Well, the reason is illustrated  
25 perfectly in these cases because when the court - - - the



1 District Court evaluated whether an unjust circumstance  
2 occurred, whether an injustice occurred, it did so contrary  
3 to the legislature's judgment on two fundamental grounds  
4 that were wrong. When you look at, for example, it's  
5 evaluation of the discovery rule it concluded these  
6 plaintiffs under New York Law had the benefit of the  
7 discovery rule because they had the right to toll this - -  
8 - to invoke tolling on the grounds that they weren't aware  
9 of their injury. And the problem is in this case these  
10 plaintiffs' injuries occurred shortly after 9/11. In 2003,  
11 for example for Alvear, and the - - - the benefit of  
12 tolling under the discovery rule did not apply here and the  
13 benefit of the additional year under the causation  
14 provision of that rule.

15 JUDGE GARCIA: I guess - - - and those are all  
16 again the facts of this case. But the - - - the general  
17 question is do we look at that and then come to a  
18 conclusion that what this legislature did is reasonable?  
19 Or do we just leave that entire analysis, whatever the  
20 facts are in a particular case, to the legislature and then  
21 just say, hey, you know, what they did is that reasonable  
22 without us engaging in any review of the analysis that  
23 supposedly the legislature has done over the extraordinary  
24 circumstances or however you want to phrase the height and  
25 scrutiny.



1 MR. NIKAS: You should leave that judgment to the  
2 legislature, Your Honor, and you should ask the District  
3 Court to do the same because if you don't two reasons.  
4 One, you lead the District Court into an area where it has  
5 no standards for determining what an injustice - - - or  
6 injustice or whether an unjust result has occurred. And  
7 that's what happened here. What is the serious injustice?  
8 The legislature - - -

9 JUDGE GARCIA: Isn't what the Court of Appeals  
10 was doing in - - - in Robinson and in Gallewski, wasn't  
11 that a review of, yes, the legislature certainly could look  
12 at whether the workers' comp scheme had been overturned by  
13 the Supreme Court. Yes. They could look at World War II's  
14 effect on the ability of this plaintiff's estate or whoever  
15 to bring that claim, but we didn't, in those cases, say,  
16 you know, we don't have to worry about those facts because  
17 the legislature's already considered them. At the end of  
18 the day we just have to say is this a reasonable extension.  
19 We didn't do that in those cases so why would we do that  
20 here?

21 MR. NIKAS: You - - - what you did in those cases  
22 is - - - is you did peek behind what it is it to be  
23 reasonable in the particular circumstances. But the  
24 question is how much deference is the legislature entitled  
25 to. And in this particular case, which your decision will



1           implicate, what are the factors that you need to look at to  
2           determine whether an injustice occurred and is the court  
3           equipped in this particular case to do that. And in other  
4           words, here we've got an injustice or not based on whether  
5           the plaintiffs were aware of costs.

6                   JUDGE GARCIA: We do that in what I call the Eli  
7           Lilly case, which I guess others call something else, but  
8           did - - - didn't we do that in Eli Lilly? I mean didn't we  
9           do that exact analysis in a case that's more analogous to  
10          yours?

11                   MR. NIKAS: Your Honor, here the case is  
12          distinguishable because you've got a situation where the  
13          underlying facts in the case that the court put a burden on  
14          my clients to demonstrate. Did the plaintiffs in this  
15          particular case in this litigation introduce evidence that  
16          they were unaware of the cause of their injuries? And if  
17          those particular plaintiffs did that or didn't do that then  
18          we can take a step back and test whether the legislature  
19          made a reasonable judgment, if that's going to be the test,  
20          in deciding that these particular plaintiffs deserved a  
21          remedy. And so the problem here and looking at the prior  
22          cases for this is that the underlying judgment, the  
23          underlying judgment of injustice was done by the district  
24          court by burdening the plaintiffs with producing evidence  
25          to support the legislative judgment. And that's that type





1 of reverse as applied challenge. Make the plaintiffs show  
2 that as applied to them the statute is constitutional is  
3 not an approach that this court has ever adopted, no  
4 federal court has ever adopted that approach in a due  
5 process challenge, and in this case, because those facts  
6 were - - - were within the record or not and that's what  
7 the District Court did - - -

8 JUDGE GARCIA: Isn't - - - again isn't that the  
9 Second Circuit's business? I mean really what they're  
10 asking us is not to approve or disapprove of how the  
11 district court applied anything. They're asking us what  
12 the test is.

13 MR. NIKAS: It is the Second Circuit's business  
14 ultimately as to how to apply that test in the  
15 circumstances. But the test you choose, will it require  
16 serious injustice and what implications that will have for  
17 the underlying application. The test you choose, is it  
18 simply reasonableness and we can harmonize your initial  
19 decisions about this issue by saying you look at what's  
20 reasonable when you then decide peeking back behind that  
21 test whether there was a serious injustice and the  
22 legislature made a reasonable judgment about that. The  
23 test you decide in this case will impact what facts a  
24 District Court's looking at, whether it's permitted to look  
25 at the facts in the record of these particular cases to



1           decide injustice. And the guidance that I respectfully  
2           request you give in the test that you create is that when  
3           the court looks at what's reasonable and not arbitrary and  
4           whether it decides to harmonize a serious injustice  
5           standard or not is separate and apart from that. But when  
6           the court makes its judgment in applying that test it is  
7           not the prerogative of the District Court to shift the  
8           burden to look at the facts in this case to the plaintiffs.  
9           And this - - - this applies not just in - - - when the  
10          District Court says did these plaintiffs create a record of  
11          their absence of knowledge, which is problem number one,  
12          but it also was - - - occurred when the District Court said  
13          let's also look at New York Law and figure out whether this  
14          discovery rule fills the gap that the legislature sought to  
15          fill in enacting the Jimmy Nolan Law. And what I mean by  
16          that - - -

17                   JUDGE RIVERA: Is that because you think the  
18                   legislature already made the facts - - - they've already  
19                   decided the facts - - -

20                   MR. NIKAS: The - - -

21                   JUDGE RIVERA: - - - therefore - - - therefore  
22                   the District Judge could not make separate independent  
23                   factual findings specific to your clients? The legislative  
24                   facts, is that what you're arguing?

25                   MR. NIKAS: I'm - - - I'm arguing that the Jimmy



1 Nolan Law is a blanket protection based on a legislature's  
2 judgment that this group of plaintiffs as a whole deserves  
3 protection against the injustice that would result, and  
4 they did that because the plaintiffs were uniformly infect-  
5 - - - affected by the public message that the EPA put out  
6 in early 2001, 2002 with respect to the quality of the air,  
7 that the New York City Mayor had put out with respect to  
8 the safety of the working conditions, that they confused  
9 medical records and research - - - research, excuse me,  
10 demonstrated in 2005 and 2006 where there was uncertainty.  
11 And the legislature made a reasonable judgment that given  
12 those facts it was within its authority and was reasonable  
13 to create this law to fill that gap. And if you don't  
14 leave that judgment with the legislature then what you're  
15 doing is you're shifting the judgment that the court needs  
16 to the - - - what the court needs to do and that is figure  
17 out whether this particular plaintiff can create enough of  
18 a record to put him within the intention or the scope of  
19 what the legislature intended to undo or the injustice it -  
20 - - it intended to avoid.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. NIKAS: You're welcome.

23 CHIEF JUDGE DIFIORE: Mr. Amend.

24 MR. AMEND: Hi. Just two quick points. First,  
25 the particularized inquiry test that Battery Park City



1 Authority relies on so heavily has never been applied to  
2 hold that a public benefit corporation is anything other  
3 than an agent of the State.

4 JUDGE GARCIA: Couldn't you look at it in the way  
5 I think Judge Stein was getting at? We could do this as a  
6 policy matter, but you could kind of look at this, to me,  
7 as, okay, we're going to apply the particularized inquiries  
8 test and anytime one of these corporations is challenging  
9 the constitutionality of a statute, you lose.

10 MR. AMEND: We have no objection to that  
11 characterization, certainly. And that's - - - and there's  
12 an important underlying policy consideration here because  
13 allowing public benefit corporations, and in particular  
14 allowing BPCA to bring its challenge here, would seriously  
15 undermine the legislature's ability to supervise - - -

16 JUDGE RIVERA: Well, coun- - - - counsel, let me  
17 just ask you. So just to be clear, so the State's position  
18 is that as a general matter BPC - - - sorry public benefit  
19 corporations do not have capacity to sue unless they fit  
20 under the four exceptions that the court has set out?

21 MR. AMEND: Yes. That's correct.

22 JUDGE RIVERA: Okay. So now - - - now let's just  
23 stay right there. So why - - - why isn't then, as I was  
24 listening to counsel for Battery Park City Authority, why  
25 isn't what he's describing as this particularized inquiry



1 really akin to some of these exceptions but - - - but  
2 really framed towards the fact that this is a public  
3 benefit corporations and not a municipality? So it - - -  
4 it sounded to me almost like the suits by municipalities to  
5 protect their constitutionally own rule of power. Sort of  
6 their - - - their interest in protecting whatever rights  
7 they have as this entity that you created, right, to  
8 protect the function for which they exist.

9 MR. AMEND: Yes. But the function - - -

10 JUDGE RIVERA: But again - - -

11 MR. AMEND: Sorry.

12 JUDGE RIVERA: All I'm suggesting is is it  
13 possible to look at the particularized inquiry as something  
14 that properly responsive to the creature the State has  
15 created? I - - - I'm with you on that. You've created - -  
16 - sorry - - - you've created this fiction. And to the  
17 extent that there's something instructive in this line of  
18 cases with these four exceptions, there might be something  
19 that's an appropriate exception that fits for them.

20 MR. AMEND: That's entirely possible, but we have  
21 nothing of that character here because we have the same  
22 characteristics that led this court to conclude in Black  
23 River Regulating District that there was no capacity to sue  
24 and the same thing in Off-Track - - - Capital Regional Off-  
25 Track Betting Corp.



1 JUDGE STEIN: But then are you conceding that we  
2 should make this inquiry in every case?

3 MR. AMEND: We don't think there is a need for  
4 this inquiry to be made in any case. If, however, the  
5 court is concerned that there might someday be some public  
6 benefit corporation that has some really distinct - - -  
7 some really distinctive feature we - - - the court need not  
8 go that far. On the policy ground - - -

9 JUDGE RIVERA: But I thought you agreed that if  
10 they fit under any of the - - - well, obviously, not the  
11 one on home rule - - - that fit under the exceptions that  
12 then they should be treated liked the municipalities, along  
13 those same lines of cases.

14 MR. AMEND: Yes. That's true. But - - -

15 JUDGE RIVERA: Okay. So you're already then  
16 conceding that it is possible?

17 MR. AMEND: Yes.

18 JUDGE RIVERA: In - - - in some case to have  
19 capacity to sue.

20 MR. AMEND: Yes. That's - - -

21 JUDGE RIVERA: Because again the question for us  
22 is not to decide whether they do in this case. That's for  
23 the Second Circuit to decide. It's just what is the test.

24 MR. AMEND: And the test is they fall under Black  
25 River Regulating District and Capital Regional Off-Track



1 Betting Corp., which puts them in the category - - - the  
2 same category as a municipality - - -

3 JUDGE RIVERA: Then all - - - all I was asking is  
4 - - - is would it not be appropriate for the court, given  
5 what these four exceptions reflect, to perhaps recraft one  
6 or two of them to respond to the Second Circuit's question  
7 about how you treat a public benefit corporation given that  
8 it is not a municipality.

9 MR. AMEND: There is no functional reason to do  
10 that, and doing so would potentially seriously undermine  
11 the legislature's ability to supervise public benefit  
12 corporations which actually have less autonomy than  
13 municipalities. And it would therefore thwart the  
14 legislature's ability to continue to oversee these entities  
15 to make sure that they're continuing to serve the public  
16 interest. If I could just make one final point - - -

17 CHIEF JUDGE DIFIORE: You may.

18 MR. AMEND: - - - on the due process standard.  
19 This court has repeatedly, both in Robinson and Gallewski,  
20 referred to due process in this context as a constitutional  
21 limitation of doubtful application. It requires a degree  
22 of injustice. Calibrating how much injustice, as Judge  
23 Fahey pointed out, is not something that courts are  
24 particularly calibrated to do. And in any event, whatever  
25 standard of injustice applies, however it's been described,



1 McCann makes clear that where a claimant could reasonably  
2 lose their right to recovery because they failed to  
3 recognize the cause of their injuries within the time  
4 between when they discovered their symptoms and when they  
5 had to ask, there's an injustice.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MR. AMEND: Thank you, Your Honor.

8 (Court is adjourned)

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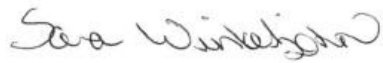




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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of In re: World Trade Center Lower Manhattan Disaster Site Litigation (Faltynowics et al v. Battery Park City Authority and two others), No. 119 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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