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COURT OF APPEALS

STATE OF NEW YORK

PAUL MURPHY,

Respondent,

-against-

No. 146

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Appellant.

20 Eagle Street
Albany, New York 12207
September 4, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 146, Matter of Murray
2 (sic).

3 Counselor?

4 MR. SUTHERLAND: May it please the court.
5 I'm Brian Sutherland on behalf of the Division of
6 Housing and Community Renewal.

7 CHIEF JUDGE LIPPMAN: Would you like any
8 rebuttal time?

9 MR. SUTHERLAND: I'd like two minutes for
10 rebuttal, please, Your Honor.

11 CHIEF JUDGE LIPPMAN: Okay, counselor.

12 Counsel, what's the issue here, in that it
13 seems obvious that this person lived in the apartment
14 basically his whole life. I mean, I think there's
15 very little to doubt that. In light of that, what's
16 the basis upon which you're saying he can't keep this
17 apartment? Do we put technicalities over what's
18 right here? I mean, this is a person who has never
19 known anything else, basically. Why - - - what is
20 the rationale of why he can't continue to live in
21 this apartment?

22 MR. SUTHERLAND: Yes, Your Honor. DHCR's
23 income affidavit requirement is a separate
24 requirement, and that's separate from the physical
25 presence - - -

1 CHIEF JUDGE LIPPMAN: Yeah, but you say
2 that it's okay one year that it's not in, but not
3 okay another year in '98 and '99? Why is it okay for
4 you to hold to that requirement in one year but not
5 in another, when again, surrounding all of this is
6 the issue that this is the primary resident of this
7 person for virtually his whole life?

8 MR. SUTHERLAND: It's missing for one year,
9 and that fact is undisputed, and therefore Murphy
10 does not - - -

11 JUDGE READ: I thought it was two - - - I
12 thought it was two.

13 MR. SUTHERLAND: It's missing for two
14 years. It's missing for calendar year 1998 and for
15 calendar year 1999.

16 CHIEF JUDGE LIPPMAN: Yeah, but how do - -
17 -

18 JUDGE GRAFFEO: That's the mother's
19 affidavit, right? The mother did not file an income
20 affidavit in '98 and '99 - - -

21 MR. SUTHERLAND: She - - -

22 JUDGE GRAFFEO: - - - is that correct?

23 MR. SUTHERLAND: In one affidavit she said
24 in 1998 and 1999; that's the unsworn 2007 affidavit.
25 In the 2009 affidavit, that was submitted after DHCR

1 had made its decision, she said more correctly, for
2 1990- - - -

3 JUDGE GRAFFEO: No, what I'm asking is, it
4 was the mother that hadn't filed an annual affidavit
5 for one or two years, whatever it was, correct?

6 MR. SUTHERLAND: That's correct.

7 JUDGE GRAFFEO: But DHCR, or the housing
8 corporation here, they didn't move to evict her for
9 not filing that affidavit. So is there some kind of
10 inconsistent application of the requirement?

11 MR. SUTHERLAND: There's no inconsistency
12 here, and a housing company's failure to move to
13 evict, as it could have done as early as 1998,
14 cannot estop DHCR from enforcing its regulations on
15 its - - -

16 JUDGE SMITH: Are you now relying on her
17 illegal occupancy? She may have been occupying the
18 apartment illegally, it seems to me, because she was
19 over the limit. Is that one of your reasons for
20 refusing succession rights for this petition?

21 MR. SUTHERLAND: No. Mr. Murphy doesn't
22 meet the qualifications for succession because he
23 wasn't listed on a required - - -

24 JUDGE SMITH: Okay. But you - - - it's
25 that he wasn't - - - it's that he wasn't listed.

1 MR. SUTHERLAND: That's correct.

2 JUDGE SMITH: It's not that - - - you
3 aren't - - - I mean, I would think you might have an
4 argument that if she was there illegally, how can he
5 have a succession right. But you're not saying that.

6 MR. SUTHERLAND: No, that goes to why
7 enforcing the regulations here - - -

8 JUDGE SMITH: You're saying that the proof
9 of his residence is inadequate because inclusion of
10 him on the income affidavit is indispensable, no
11 matter how much other evidence there is that he lived
12 there?

13 MR. SUTHERLAND: That's correct, Your
14 Honor, and the listing requirement is independent.

15 CHIEF JUDGE LIPPMAN: Yeah, but is it
16 inconsistent that you say it's okay that it's not
17 listed one year but the other year it's not okay?
18 Isn't that arbitrary?

19 MR. SUTHERLAND: That's not what we're
20 saying, Your Honor.

21 CHIEF JUDGE LIPPMAN: Wasn't there two
22 years - - - as Judge Read asked you, it was two years
23 but yet you say, well, one year not a problem, the
24 other year is. Why is one year not a problem and the
25 other year is?

1 MR. SUTHERLAND: Because Ms. Murphy and
2 DHCR assumed, for the purposes of its decision, that
3 she departed in January in 2000. The second missing
4 income affidavit was due after the time she departed,
5 and under the rules, a person must be listed on
6 income affidavits filed during the two years before
7 the tenant departed. So there's no arbitrariness,
8 Your Honor.

9 CHIEF JUDGE LIPPMAN: Do you dispute the
10 fact that this has been his primary residence
11 virtually his whole life? Does that not matter in
12 this context?

13 MR. SUTHERLAND: The basis of DHCR's
14 decision is that Paul Murphy did not meet the
15 eligibility requirements because he was not listed on
16 the income affidavit - - -

17 JUDGE SMITH: Yeah, but that's a regulatory
18 requirement; the statute doesn't say you have to be
19 listed on an income affidavit.

20 MR. SUTHERLAND: The statute doesn't cover
21 succession tenancy at all.

22 JUDGE SMITH: And the requirement that the
23 regulation is implementing, presumably, is that he
24 has to have lived there. This is the evidence of
25 residence that the DHCR requires.

1 MR. SUTHERLAND: No, the statute doesn't
2 speak to succession tenancy at all. It's purely a
3 regulatory system. There is nothing in a statute
4 covering - - -

5 JUDGE ABDUS-SALAAM: If there were no - - -

6 JUDGE READ: But you're not interpreting -
7 - -

8 JUDGE ABDUS-SALAAM: If there - - -

9 JUDGE READ: - - - the statute with your
10 regulations. The regulations - - - the regulations
11 allow for succession, and that's - - - but that's not
12 spoken about at all in the statute.

13 MR. SUTHERLAND: That's correct, Your
14 Honor.

15 JUDGE ABDUS-SALAAM: So if there were no
16 regulation allowing succession, would there be any
17 succession?

18 MR. SUTHERLAND: There would be no
19 succession if there were no regulations allowing
20 succession.

21 JUDGE SMITH: Well, where do you get - - -

22 JUDGE RIVERA: But the - - - I'm sorry.
23 The regulations are - - - I think your argument is
24 the regulations are pursuant to the statutes,
25 delegation of authority to regulate to the agency,

1 okay. But I'm unclear as to how this requirement of
2 these income affidavits is in furtherance of the
3 legislative intent.

4 MR. SUTHERLAND: The statute - - -

5 JUDGE RIVERA: That's not clear to me.

6 MR. SUTHERLAND: The statute gives the
7 agency broad authority - - -

8 JUDGE RIVERA: Correct.

9 MR. SUTHERLAND: - - - to issue
10 regulations.

11 JUDGE RIVERA: Correct.

12 MR. SUTHERLAND: It's decided that
13 succession regulations are one way to fulfill the
14 purposes of the Mitchell-Lama program.

15 CHIEF JUDGE LIPPMAN: Counsel, but you
16 didn't answer - - -

17 JUDGE RIVERA: But what's the purpose? I'm
18 sorry.

19 CHIEF JUDGE LIPPMAN: Go ahead.

20 JUDGE RIVERA: What's the purpose that
21 you're trying to fulfill by having someone who is
22 applying for succession rights show that they were
23 indeed on these income affidavits? The affidavits
24 are to ensure eligibility of the family, as Judge
25 Smith indicated, also to ensure you've got the right

1 amount of rent that the family is required to pay.
2 I'm unclear as to how this particular regulatory
3 requirement is indeed in furtherance of some
4 legislative policy or intent that's in the statute.

5 MR. SUTHERLAND: It recognizes that where
6 family members have followed the rules, where a
7 tenant has followed the rules, a family may have an
8 interest in continued occupancy - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but counselor -
10 - -

11 MR. SUTHERLAND: - - - that's worth
12 extending.

13 CHIEF JUDGE LIPPMAN: - - - but that's the
14 same question I'm asking you in a different way.
15 What I'm saying is what are we trying to do here?
16 You didn't really answer my question whether you
17 dispute whether this is his primary residence his
18 whole life. What's the purpose of the legislation?
19 What's the purpose in everything you do? What's the
20 purpose of these regulations if we disregard what I
21 think this is supposed to be all about? It's this
22 guy's primary residence. Has he been there the whole
23 time? Are we putting form over substance, is what
24 I'm asking, which I think is the same question, in a
25 different way, that Judge Rivera is asking. What's

1 the intent here? What are we trying to do? What are
2 you trying to do?

3 MR. SUTHERLAND: The income - - - the
4 listing requirement has four purposes. It creates an
5 incentive to file complete income affidavit - - -

6 CHIEF JUDGE LIPPMAN: Huh-uh, you're
7 answering my question.

8 MR. SUTHERLAND: I'm sorry, Your Honor.

9 CHIEF JUDGE LIPPMAN: You're talking about
10 technical rules. I'm asking you, from a broader
11 perspective of this legislation, what are you trying
12 to accomplish?

13 MR. SUTHERLAND: The legislation is - - -

14 CHIEF JUDGE LIPPMAN: And doesn't it go
15 against the legislative intent and what you're trying
16 to accomplish when you have someone who
17 overwhelmingly has demonstrated that this has always
18 been his primary residence? How do you equate the
19 two? Aren't the regulations, whatever your basis is,
20 this one year, which now you're hanging your hat on
21 that he wasn't listed in the whatever it was, isn't
22 that in conflict with the intent, I guess is - - -
23 I'm trying to get to the substance of what you're
24 doing. What's your purpose?

25 MR. SUTHERLAND: Let me do the best I can,

1 Your Honor.

2 CHIEF JUDGE LIPPMAN: Yes, please.

3 MR. SUTHERLAND: The Mitchell-Lama program
4 exists to make housing available to families of low
5 and moderate income.

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. SUTHERLAND: There is no independent
8 right to succession tenancy. And the judgment that
9 the regulations reflect, and the reason why it's fair
10 to enforce these regulations, is that where a family
11 hasn't followed a core rule of the Mitchell-Lama
12 program, as - - -

13 CHIEF JUDGE LIPPMAN: That in one year - -
14 -

15 MR. SUTHERLAND: - - - the filings - - -

16 CHIEF JUDGE LIPPMAN: That in one year - -
17 -

18 MR. SUTHERLAND: Yes, Your Honor. Yes,
19 Your Honor.

20 CHIEF JUDGE LIPPMAN: - - - didn't list,
21 that's enough to take - - - how many years has this -
22 - - has he lived there?

23 MR. SUTHERLAND: It reflects a balancing -
24 - -

25 CHIEF JUDGE LIPPMAN: How many years has he

1 lived there?

2 MR. SUTHERLAND: Since 1981.

3 CHIEF JUDGE LIPPMAN: Since 1981; and in
4 one year the mother, I assume, didn't list him;
5 that's the balance?

6 MR. SUTHERLAND: He's willing to accept the
7 benefits of his parent's conduct - - - this is a
8 benefit that is entirely derivative of the parents,
9 but he's not willing to accept the consequences of
10 his parent's conduct.

11 JUDGE READ: Well, the regulations were
12 different.

13 MR. SUTHERLAND: They could have made him -
14 - -

15 JUDGE READ: The regulations were different
16 at one point, weren't they? At one point there was a
17 rebuttable presumption.

18 MR. SUTHERLAND: You're thinking of the
19 city's regulations, Your Honor. And the city's
20 regulations - - -

21 JUDGE READ: Okay.

22 MR. SUTHERLAND: - - - which are different
23 from DHCR's regulations, before 2003, had a
24 rebuttable presumption that a person not listed on an
25 income affidavit was ineligible. And because of the

1 city's adverse experience with that regulation, they
2 replaced it with a bright-line rule that aligns with
3 DHCR's bright-line rule in this case, and the courts
4 don't have authority to change that rule.

5 JUDGE RIVERA: Okay. But what - - - again,
6 I'm sorry. What is the policy that this furthers?
7 I'm not understanding the policy that this furthers,
8 because it sounds to me like you've just said it's a
9 sanction, it's to penalize people. And is that what
10 you believe is a statutory policy?

11 MR. SUTHERLAND: Can I ask, Your Honor, the
12 policy of the Mitchell-Lama program as a whole or the
13 policy of the succession regulations?

14 JUDGE RIVERA: Both.

15 MR. SUTHERLAND: The policy of the
16 succession regulations is to recognize that a family
17 that abides by the rules may have a continuing
18 interest in occupancy that's worth extending. But in
19 cases like this one, there are hundreds of people on
20 years' long waiting lists that don't have those same
21 opportunities that Paul Murphy has had. And if this
22 court rules in favor of DHCR, that will only put Paul
23 Murphy in the same position as everyone else - - -

24 CHIEF JUDGE LIPPMAN: But let me ask - - -

25 MR. SUTHERLAND: - - - who have to go to

1 the - - -

2 CHIEF JUDGE LIPPMAN: Let me ask you - - -

3 MR. SUTHERLAND: - - - end of the line.

4 CHIEF JUDGE LIPPMAN: Let me ask you

5 another way. Do you think this is fair?

6 MR. SUTHERLAND: Yes, I absolutely think

7 this is fair.

8 CHIEF JUDGE LIPPMAN: Because in that one

9 year the mother didn't follow the rule and therefore

10 - - - he's lived there for thirty-one years, did you

11 say, and that balance, that that's fair to you?

12 MR. SUTHERLAND: Yes, it is fair. He has

13 had a benefit, paid for by the taxpayers of this

14 state, worth hundreds of thousands of dollars. If he

15 doesn't get succession in this case, he'll be like

16 everyone else who wants to claim that benefit - - -

17 JUDGE SMITH: Isn't there - - -

18 MR. SUTHERLAND: - - - and who goes to the

19 end of the line like everyone else.

20 JUDGE SMITH: Isn't there a difference

21 between being evicted from your home and not getting

22 into a Mitchell-Lama?

23 MR. SUTHERLAND: There is a difference.

24 This is - - - he's not a tenant. This is about

25 denial of admission to Mitchell-Lama housing.

1 JUDGE SMITH: Well, he may not be a tenant
2 but he has lived - - - I mean, it's - - - yeah, it's
3 one thing to apply for Mitchell-Lama housing and not
4 get in; it's another thing to have the sheriff at the
5 door taking your possessions out. Isn't that rather
6 obvious?

7 MR. SUTHERLAND: Well, he doesn't need to
8 provoke that circumstance, but there is no tenancy by
9 estoppel. This court has never held - - -

10 JUDGE GRAFFEO: There's - - -

11 MR. SUTHERLAND: - - - that equitable
12 considerations are sufficient to override agency
13 regulations.

14 JUDGE GRAFFEO: There's no evidence in this
15 record that this was done for some fraudulent
16 purpose, is there?

17 MR. SUTHERLAND: Misrepresentations is a
18 ground for eviction, but absence of misrepresentation
19 doesn't make someone eligible for succession tenancy.

20 JUDGE SMITH: Well, wait a minute, couldn't
21 - - - I mean, to Judge Graffeo's question, it looks
22 to me as though the omission of the affidavits could
23 have been for the purpose of concealing the fact that
24 she was over the income limit.

25 MR. SUTHERLAND: That's entirely possible.

1 JUDGE SMITH: And you don't - - -

2 MR. SUTHERLAND: His application - - -

3 JUDGE SMITH: But you keep disavowing
4 reliance on that. It seems to me the strongest part
5 in your case.

6 MR. SUTHERLAND: The fact - - -

7 JUDGE SMITH: If she - - -

8 MR. SUTHERLAND: - - - that the mother
9 could have been - - -

10 JUDGE SMITH: If the mother was there
11 unlawfully, then I can see - - - understand saying
12 the son shouldn't be there, either. But you won't
13 say that.

14 MR. SUTHERLAND: I'm saying he's not
15 eligible for succession tenancy because he wasn't
16 listed on income affidavits, and I'm separately
17 saying it's fair to deny him succession tenancy
18 because he stands in the shoes of a tenant who failed
19 to file income affidavits, and those income
20 affidavits are essential to the administration of the
21 Mitchell-Lama program - - -

22 JUDGE READ: Could the admini - - -

23 MR. SUTHERLAND: - - - as reflected in the
24 Agency's regulations.

25 JUDGE READ: Could that requirement of the

1 income affidavit have been - - - the fact that they
2 weren't filed, could that have been disregarded upon
3 a showing of undue hardship?

4 MR. SUTHERLAND: Yes, it could have, and I
5 thank Your Honor for bringing up that point. If you
6 look at this regulatory scheme as a whole - - -

7 JUDGE READ: But was that a - - - did he
8 assert that or not?

9 MR. SUTHERLAND: He has never - - -

10 JUDGE READ: Or she.

11 MR. SUTHERLAND: - - - asked for
12 application of the undue hardship exception; you'll
13 find that on page 13 of the addendum to your brief.
14 DHCR does provide persons in the position that Mr.
15 Murphy found himself in here, where someone hasn't
16 filed the income affidavits, they have an option of
17 seeking an undue hardship exception. He didn't seek
18 that exception in this case.

19 JUDGE ABDUS-SALAAM: But how is this - - -

20 MR. SUTHERLAND: If he had done so - - -

21 JUDGE ABDUS-SALAAM: Counsel, how is this
22 case different from Matter of Schorr, where we threw
23 out a - - - essentially said DHCR or HPD, who has a
24 similar program, was able to evict a young man who
25 wasn't listed on an income affidavit because he was

1 at college for one year, or the year that the income
2 affidavit should have been - - - should have listed
3 him, he was away at college.

4 MR. SUTHERLAND: DHCR's position is that
5 Schorr is materially indistinguishable with this case
6 and Matter of Schorr controls here. That case holds
7 that the Agency cannot be estopped from enforcing its
8 regulations, notwithstanding the equities that
9 someone might assert. And in that case, the tenant -
10 - - the person applying for succession tenancy,
11 rather, had been in the apartment for a very long
12 time, I believe since childhood. It was essentially
13 the same circumstance. And on page 32 of Mr.
14 Murphy's brief, he says, well, Schorr didn't comply
15 with many criteria, whereas I only failed to comply
16 with one of them. Well, in both cases, both Schorr
17 and Mr. Murphy failed to file - - - failed to comply
18 with the requirements for succession tenancy - - -

19 JUDGE RIVERA: Well, you keep say - - -

20 MR. SUTHERLAND: - - - and both should be
21 denied succession tenancy - - -

22 JUDGE RIVERA: You keep - - -

23 MR. SUTHERLAND: - - - in accordance with
24 this court's decision in Schorr.

25 JUDGE RIVERA: You keep saying "him", but

1 he had no control over this, right? It's the mother
2 who filed; she's the tenant of record.

3 MR. SUTHERLAND: That's correct, Your
4 Honor.

5 JUDGE RIVERA: So what you're penalizing
6 him for is something over which he had no control.
7 And I assume if he had actually filed that, that you
8 would have rejected it because he's not the tenant of
9 record and he would not have been able to file - - -

10 JUDGE ABDUS-SALAAM: But he didn't - - -

11 MR. SUTHERLAND: I'm sorry; filed what,
12 Your Honor?

13 JUDGE RIVERA: The affidavit.

14 JUDGE ABDUS-SALAAM: But he filed - - - did
15 he file - - -

16 MR. SUTHERLAND: I don't think I understand
17 your question.

18 JUDGE ABDUS-SALAAM: - - - any of the
19 affidavits? Who filed the income affidavits after -
20 - -

21 JUDGE READ: He did.

22 JUDGE ABDUS-SALAAM: - - - 1998 or 2000?
23 Didn't he file income affidavits between 2000 and
24 2003?

25 MR. SUTHERLAND: He did, but those are

1 irrelevant because the listing requirement pertains
2 to the income affidavits filed during the two-year
3 period before the - - -

4 JUDGE ABDUS-SALAAM: Understandable, but -
5 - -

6 MR. SUTHERLAND: - - - tenant vacated.

7 JUDGE ABDUS-SALAAM: - - - why was he able
8 to do that if he was not the tenant of record?

9 MR. SUTHERLAND: He should not have been
10 able to do that. He should - - - the housing company
11 should have acted on this earlier, but Matter of
12 Schorr squarely holds that the housing company's
13 acquiescence in his illegal tenancy - - - or his
14 illegal occupancy, I should say - - - has no bearing
15 here. Matter of Schorr squarely precludes that
16 consideration.

17 JUDGE GRAFFEO: So if we agree with - - -

18 MR. SUTHERLAND: I want to go back - - -

19 JUDGE GRAFFEO: If we agree with the
20 Appellate Division, what happens here?

21 MR. SUTHERLAND: Well, confusion would
22 ensue, because the First Department hasn't defined
23 the excuse exception. If I could turn - - -

24 CHIEF JUDGE LIPPMAN: No, no, no, no, no,
25 you can't turn; you can answer the questions now;

1 case really has nothing to do with this case. The
2 Schorr case - - - the Schorr case - - - in the Schorr
3 case, the person seeking to remain in the apartment
4 argued that since the housing company had allowed him
5 to stay in the apartment for six, seven, eight years,
6 that he should be allowed to remain in the apartment.

7 JUDGE SMITH: But in Schorr - - -

8 MR. SUTHERLAND: There was no co-occupancy
9 in Schorr. There was no co-occ - - - it wasn't a
10 succession.

11 JUDGE SMITH: In Schorr - - - I mean,
12 Schorr was a college student who had moved out, as I
13 understand it.

14 MR. HERSHEY-WEBB: He moved out of the
15 apartment for eight or nine years, then moved back,
16 but didn't co-occupy with the tenant of record. This
17 isn't a waiver case. We're not seeking the - - - my
18 client didn't seek a waiver - - -

19 JUDGE SMITH: Well, you're saying - - -
20 you're not saying it's a wai - - - you're saying the
21 regulation, if it means what - - - it means what your
22 adversary says it means, you're saying the regulation
23 is arbitrary and capricious as applied to your guy.

24 MR. HERSHEY-WEBB: That's what we're
25 saying, Your Honor, that to - - -

1 JUDGE GRAFFEO: You don't deny there's an
2 important purpose in requiring income verification
3 affidavits, do you?

4 MR. HERSHEY-WEBB: Absolutely, and the
5 Appellate Division decision didn't do away completely
6 - - - didn't do away with the income affidavit
7 requirement. It is a requirement. This is a rare -
8 - -

9 CHIEF JUDGE LIPPMAN: But what about the
10 fact that - - - how do you argue away the one year -
11 - - and we know that there were two years, but they
12 say only one matters. What's the answer to the fact
13 that it wasn't filed in this - - - undisputedly
14 wasn't filed with him included - - - wasn't filed,
15 period.

16 MR. HERSHEY-WEBB: Mrs. Murphy - - - Paul
17 Mur - - - my client's mother, Mrs. Murphy, provided a
18 reasonable explanation for not filing that one year,
19 to wit, there was corruption on the part of DHCR.

20 JUDGE PIGOTT: That came later. I found
21 that interesting that she's saying later on that
22 there was corruption. Whatever corruption she's
23 talking about was in '05 and that's why she didn't
24 file in '99. I - - - you know, there was a lot of
25 inconsistencies in her whole story. She seemed to

1 come up with a different reason. I think at one
2 point Kevin said that we have privacy reasons why we
3 decided not to file in '98, '99. Is that your
4 recollection?

5 MR. HERSHEY-WEBB: Your Honor, there were -
6 - - it was privacy reasons, and the - - -

7 JUDGE PIGOTT: Well, these are the rules.
8 I mean, if you want to live in an apartment that's
9 regulated, you've got to live with the regulations,
10 don't you? And to say well, we're not filing because
11 we have privacy concerns, many of them may be that
12 we're way over the limit and we'd get thrown out of
13 here if we filed, would be significant. And in fact,
14 I thought in the record there was a point at which
15 the Housing Authority thought they had vacated the
16 apartment. He may have stayed there, but they were
17 gone. Kevin had left, of course, you know, at one
18 time or another, but at one point they said sometime
19 thereafter Kevin and Paula vacated the apartment. So
20 there may have even have been a break in the chain.

21 MR. HERSHEY-WEBB: Judge - - -

22 JUDGE PIGOTT: And it just seems to me,
23 anecdotally, there's an awful lot of games getting
24 played in these apartments, and this organization is
25 supposed to be trying to hold them together, you

1 know, and as Mr. Sutherland points out, you know,
2 trying to get the poor people in. And you've got
3 other people saying, well, this is too good for me to
4 give up and I want to keep it, and by the way, I want
5 to bring my uncle, James Soucy, in, who then will
6 have succession rights when I decide that I'm no
7 longer going to be here because he will be on the
8 lease with me and another family that may be entitled
9 to this type of housing will be aced out because of
10 the primogeniture going on here.

11 MR. HERSHEY-WEBB: Judge, to answer the
12 beginning part of your comments. There were a lot of
13 comments, and I'm not sure which one to respond to,
14 Judge. But first of all, the corruption is
15 documented; there's no question about the corruption.
16 And it occurred - - - just to get the time frame
17 correctly, the period under investigation was 2000 -
18 - -

19 JUDGE SMITH: But she was over the limit,
20 wasn't she?

21 JUDGE READ: She was over the limit.

22 JUDGE SMITH: She even filed one affidavit
23 that showed her more than fifty percent over the
24 limit.

25 JUDGE READ: Didn't she pay something extra

1 because of that, a surcharge?

2 MR. HERSHEY-WEBB: The policy of the
3 housing company is that when your income reaches a
4 certain amount, you pay a surcharge and - - -

5 JUDGE SMITH: Yeah, but statute says that
6 can only go up to fifty percent over the limit, and
7 she was more than fifty percent over the limit in
8 '97, as I read it.

9 MR. HERSHEY-WEBB: Your Honor, that wasn't
10 the basis of the decision, and as my adversary said
11 repeatedly, that wasn't - - - that's not going to be
12 - - - that's the not the basis of their decision.
13 That's not a matter - - -

14 JUDGE ABDUS-SALAAM: So one could say - - -

15 JUDGE SMITH: Put that aside for just a
16 moment. Suppose it were, could they be saying - - -
17 could he be staying - - - they're saying, look, this
18 woman was not entitled to be there herself, and if
19 he's right about that, wouldn't it follow that her
20 son is not entitled to succession?

21 MR. HERSHEY-WEBB: That's not in the
22 record.

23 JUDGE PIGOTT: Well, yes, there is because
24 - - - I'm sorry, Judge - - -

25 JUDGE ABDUS-SALAAM: Could someone stay in

1 an apartment when they are over the limit, and just
2 continue to pay surcharges unless there is a cap on
3 the surcharge that they can pay?

4 MR. HERSHEY-WEBB: Yes, Your Honor. And
5 unfortunately - - -

6 JUDGE SMITH: Even if they're over - - -
7 even if they're more than fifty percent over the
8 limit?

9 MR. HERSHEY-WEBB: Yes, Your Hon - - - yes,
10 Your Honor. It's the policy - - -

11 JUDGE SMITH: The statute doesn't seem to
12 say that.

13 MR. HERSHEY-WEBB: It's the policy of the
14 Agen - - - it's the policy of the Agency. My - - -
15 my adversary did not raise one decision, because
16 there is not one decision, as far as I am aware - - -
17 did not point to one decision where a Mitchell-Lama
18 tenant was evicted because they were over income.
19 That's not - - -

20 JUDGE PIGOTT: We're talking about a
21 rational basis for the - - -

22 MR. HERSHEY-WEBB: That's not the policy -
23 - -

24 JUDGE PIGOTT: You want to argue this - - -

25 JUDGE READ: So you mean it doesn't - - -

1 JUDGE PIGOTT: - - - individual case, and I
2 don't blame you, so to say they didn't raise, you
3 know, this issue some other time is - - - but didn't
4 Paula, in an affidavit in 2007, say that she left in
5 January of 2000?

6 MR. HERSHEY-WEBB: She left in January of
7 2000, yes.

8 JUDGE PIGOTT: All right. So where's the
9 succession?

10 MR. HERSHEY-WEBB: They lived together - -
11 -

12 JUDGE PIGOTT: He didn't make the
13 application - - -

14 MR. HERSHEY-WEBB: - - - for twenty years,
15 Your Honor, twenty - - -

16 JUDGE PIGOTT: He didn't make the
17 application then.

18 MR. HERSHEY-WEBB: They lived - - - they
19 lived together for twenty - - -

20 JUDGE PIGOTT: No, but she's gone.

21 MR. HERSHEY-WEBB: - - - years.

22 JUDGE PIGOTT: She's gone in 2000. The
23 tenants have left. Kevin's gone. Paula's gone. The
24 only one sitting there is, apparently, your client,
25 Paul. But he hasn't signed a lease.

1 MR. HERSHEY-WEBB: No - - -

2 JUDGE PIGOTT: And he's twenty-five years
3 old.

4 MR. HERSHEY-WEBB: He filed an income - - -
5 he filed income affidavits for the next six, seven
6 years, and he filed a succession application in 2004.

7 JUDGE READ: Excuse me, but could you - - -
8 something that you said, there's no limit on the
9 income? I don't - - - I didn't understand it.
10 There's no cap?

11 MR. HERSHEY-WEBB: What I said is the
12 Agency hasn't pointed to one decision because there
13 is none.

14 JUDGE SMITH: But what about - - -

15 MR. HERSHEY-WEBB: There is no - - -

16 JUDGE SMITH: What about the statute - - -

17 JUDGE RIVERA: It is a practice of the
18 Agency - - -

19 MR. HERSHEY-WEBB: It is a policy of the
20 Agen - - -

21 JUDGE RIVERA: - - - to allow families to
22 stay even if they are over the income, as long as
23 they're paying the surcharge, although they can at
24 any time be evicted, is that correct?

25 MR. HERSHEY-WEBB: That's correct, Your

1 Honor.

2 JUDGE RIVERA: At any time.

3 MR. HERSHEY-WEBB: That's correct, Your - -

4 -

5 JUDGE RIVERA: Let me ask you - - -

6 MR. HERSHEY-WEBB: And - - -

7 JUDGE RIVERA: Thank you for that answer.

8 MR. HERSHEY-WEBB: Go ahead, Your Honor.

9 JUDGE RIVERA: I just have this question.

10 I wasn't sure what your opponent was saying. Is
11 there a mechanism by which someone who, like the son,
12 your client in this case, is unable, because they're
13 not the tenant of record, to file these affidavits,
14 but knows that the tenant is not filing them, is
15 there any way that they can file them, to make up for
16 the failure of the tenant filing them, so that he
17 could have preserved his succession rights?

18 MR. HERSHEY-WEBB: There's no such
19 mechanism that I'm aware of, Judge. The person
20 seeking succession is completely at the - - -

21 JUDGE SMITH: You told - - -

22 MR. HERSHEY-WEBB: - - - mercy, if that's
23 the right word - - -

24 JUDGE RIVERA: Of the tenant.

25 MR. HERSHEY-WEBB: - - - of the tenant.

1 JUDGE RIVERA: Of the tenant.

2 JUDGE SMITH: You told Judge Rivera a
3 minute ago that the policy of the Agency is to let -
4 - - is basically to let them stay no matter how high
5 the income is. That's flatly contrary to the
6 statute, isn't it? Section 31-3. That's - - - the
7 statute says in plain terms you can stay - - - if
8 you're more than twenty-five percent above you can
9 pay a surcharge until you hit fifty percent, and then
10 you're out.

11 MR. HERSHEY-WEBB: What I understand - - -
12 Your Honor, what I understand the policy is, there's
13 - - -

14 JUDGE SMITH: I didn't ask you what the
15 policy was; I asked you what the statute says.

16 MR. HERSHEY-WEBB: There's a separate
17 provision that says that the Agency can waive that in
18 the case of hardship, and the Agency has - - -

19 JUDGE SMITH: Isn't it the provision that I
20 was just reading? It can waive it until it hits
21 fifty percent above?

22 MR. HERSHEY-WEBB: There's a separate
23 provision, Your Honor - - -

24 JUDGE SMITH: Which one is that?

25 MR. HERSHEY-WEBB: Unfortunately, I don't -

1 - -

2 JUDGE PIGOTT: What would be the hardship
3 if you're making 150 percent more than you need to be
4 in subsidized housing?

5 MR. HERSHEY-WEBB: Your Honor, I think that
6 the cases seen in the cont - - - have to be seen in
7 the context of the overall social value of succession
8 that was recognized by the Agency when they adopted
9 the succession provisions in 1991. That's been
10 repeatedly recognized by this court in Braschi and
11 Higgens (ph.) and a number of other cases, that
12 there's a value in allowing a person who's been in a
13 home for twenty years to remain in their home.

14 CHIEF JUDGE LIPPMAN: In this case, though,
15 what's the - - - what's your argument hinge on?
16 What's arbitrary about what they did? Relying on the
17 one year, is that arbitrary? What is it that makes
18 this more consistent with what this housing is all
19 about, what the legislation is all about? What is it
20 that they did wrong, and why should your client stay
21 there? Why is it fair? The same question I asked
22 your adversary; why is it fair that he stay in this
23 housing?

24 MR. HERSHEY-WEBB: Because this is - - - he
25 moved into the apartment when he was one month old.

1 It's the only home that he's ever known. And when
2 you balance out the fact that he's been there his
3 entire life - - -

4 CHIEF JUDGE LIPPMAN: So - - -

5 MR. HERSHEY-WEBB: - - - and no other home,
6 with the fact that his mother failed to file one
7 income affidavit and had a good explanation for doing
8 so.

9 CHIEF JUDGE LIPPMAN: So your argument is
10 this balancing, the same thing that your adversary
11 says, you're putting the thirty-one years, or
12 whatever it is, against a one year.

13 But one more question. Is - - - are you -
14 - - is the Appellate Division making this new rule
15 that well, if you have a good excuse, it's okay? Is
16 that what they're doing? Is - - -

17 MR. HERSHEY-WEBB: No, Your Honor. No,
18 Your Honor. There are two components. First, this
19 is clearly - - - it's a unique and rare instance.
20 It's a unique and rare instance. And what the
21 Appellate Division is saying, not that you can come
22 forward with any excuse. First of all, you have to
23 show co-occupancy, which the Appellate Division, at
24 the end of the day, said the primary inquiry has to
25 be co-occupancy. You have to show co-occupancy.

1 CHIEF JUDGE LIPPMAN: But their rule - - -
2 what you're saying, the Appellate Division is not
3 giving a general excuse, new rule about if you have
4 an excuse. But you're say - - - but does it go to
5 the primary purpose? Is that what this is about?
6 Because - - - because you've lived there your whole
7 life, it's arbitrary, based on the one year, to evict
8 you? Is that what it is - - -

9 MR. HERSHEY-WEBB: Yes - - -

10 CHIEF JUDGE LIPPMAN: - - - in the
11 balancing - - -

12 MR. HERSHEY-WEBB: Yes, Your Honor.

13 CHIEF JUDGE LIPPMAN: And this is unique?
14 What's unique about this? What's unique is he's
15 lived there for thirty years, always lived there, and
16 in that particular circumstance - - - are there other
17 circumstances that could be this unique, or is it
18 basically when you have your primary residence for
19 many years, that's kind of the balance, and then it
20 becomes arbitrary to take you out because you don't
21 file for one year?

22 MR. HERSHEY-WEBB: Yes, Your Honor.

23 JUDGE GRAFFEO: Why doesn't that - - -

24 MR. HERSHEY-WEBB: The primary inquiry is
25 co-occupancy. The primary inquiry has to be co-

1 occupancy. If - - - there's a difference in this
2 case also than all of the cases, every single
3 Appellate Division, except for one case cited by the
4 other side. The difference in this case is no income
5 affidavit was filed at all. So that's another thing
6 that's unique about this case.

7 JUDGE READ: Well - - -

8 MR. HERSHEY-WEBB: In a case where an
9 income affidavit - - -

10 JUDGE READ: - - - if the whole - - -

11 JUDGE ABDUS-SALAAM: Counsel, isn't it - -
12 - I'm sorry.

13 JUDGE READ: - - - with the whole - - - if
14 the whole rule lodges or if the whole thing rests on
15 whether or not - - - or your right to succession
16 rests on whether or not you can show that you've
17 lived there, then the whole income affidavit just
18 becomes irrelevant, doesn't it?

19 MR. HERSHEY-WEBB: No, Your - - - no, Your
20 Honor. And I don't think the Appellate - - -

21 JUDGE READ: It does for succession
22 purposes.

23 MR. HERSHEY-WEBB: No, because I don't
24 think the Appellate - - - the Appellate Division said
25 you don't have to file an income - - - clearly you

1 have to file an income affidavit; no one's arguing
2 you don't have to file an income affidavit.

3 JUDGE ABDUS-SALAAM: Counsel, in the cases
4 - - -

5 MR. HERSHEY-WEBB: What they're arguing is
6 that - - - I'm sorry.

7 JUDGE ABDUS-SALAAM: - - - in most cases,
8 as you say, the income affidavit for succession
9 rights has been filed, but the person who's lived
10 there for twenty years, thirty years, wasn't listed
11 on the income affidavit. That's the general case - -
12 -

13 MR. HERSHEY-WEBB: Yes, Your Honor. And
14 Greichel, Cog- - -

15 JUDGE ABDUS-SALAAM: And so but those
16 people, because they were not listed on the
17 affidavit, are in the same position that your client
18 is in. They're with no affidavit, meaning they can't
19 show that they were cohabitating with the tenant of
20 record, and they get evicted or they don't get - - -
21 they don't get to succeed to the apartment. So what
22 makes this case so unique?

23 MR. HERSHEY-WEBB: It's unique for a couple
24 of reasons. As I said, because of the years of co-
25 occupancy, because there was an explanation for not

1 filing - - -

2 JUDGE ABDUS-SALAAM: But there have been -
3 - -

4 MR. HERSHEY-WEBB: - - - and because - - -

5 JUDGE ABDUS-SALAAM: There have been people
6 who lived in the apartment with an alleged spouse for
7 twenty years but they weren't listed on the income
8 affidavit, and then when they try to apply for
9 succession rights when the tenant dies or leaves,
10 they don't get the apartment.

11 MR. HERSHEY-WEBB: In the cases - - - I
12 believe in the Appellate Division, cases that have
13 been raised in both briefs, in Greichel, Cognata,
14 Meyers, Miney, Taylor and all of the cases, but one -
15 - - one exception, in all of the cases the tenant had
16 filed - - -

17 JUDGE PIGOTT: But in this case - - -

18 MR. HERSHEY-WEBB: - - - for three or four
19 years - - - for three or four years it had filed
20 income affidavits during the period where there was
21 claimed co-occupancy and not listed - - -

22 JUDGE PIGOTT: If I under - - -

23 MR. HERSHEY-WEBB: - - - and not listed - -
24 -

25 JUDGE PIGOTT: If I understand it right, in

1 he didn't apply to be a successor until 2004.

2 MR. HERSHEY-WEBB: He - - - he - - - that's
3 right. He applied four years after - - - after they
4 vacated. That's correct.

5 JUDGE PIGOTT: Did that break have any
6 significance in these cases?

7 MR. HERSHEY-WEBB: I don't think so, Your
8 Honor.

9 CHIEF JUDGE LIPPMAN: Counselor, let me ask
10 you one final question, at least for me. Would it
11 matter if it was more than the one year that they're
12 alleging that that statement wasn't filed? Would it
13 matter if it was five years? Is it the thirty-one
14 years versus the one year that's, kind of, the
15 disconnect here? Would it matter if there were five
16 years, let's say, where they're saying they didn't
17 file? That would be a better balance against the
18 thirty-one, right?

19 MR. HERSHEY-WEBB: Yes. Yes, Your Honor.
20 I think it - - - I think it would matter. When the
21 court has undertaken review of Agency actions in
22 these cases, the courts always looked at the totality
23 of the circumstances and the facts. The facts do
24 matter, yes - - -

25 CHIEF JUDGE LIPPMAN: Okay.

1 MR. HERSHEY-WEBB: - - - I think they - - -

2 CHIEF JUDGE LIPPMAN: Thanks, counselor.

3 Let's hear your adversary.

4 Rebuttal?

5 MR. SUTHERLAND: Three points, Your Honor.

6 There's never been a challenge to the validity of
7 this regulation. Mr. Murphy has always said that he
8 met the eligibility requirements. That's plainly not
9 true, as he just admitted today. What he's really
10 seeking here is a tenancy by estoppel theory that
11 turns on the - - -

12 JUDGE SMITH: Is he right that there's
13 something in the statute that lets people stay even
14 when they're more than fifty percent over the limit?

15 MR. SUTHERLAND: No, he's not right about
16 that. The Mitchell-Lama statute provides - - -

17 JUDGE SMITH: Is he right that you don't
18 enforce that feature of the statute?

19 MR. SUTHERLAND: I don't have with me today
20 data about the enforcement history by the housing
21 companies or by DHCR, so I'm afraid I can't answer
22 the question any more completely than that.

23 And third, I want to - - -

24 JUDGE RIVERA: But the primary enforcer is
25 basically the landlord - - -

1 MR. SUTHERLAND: Basically, Your Honor.

2 JUDGE RIVERA: - - - because they are the
3 ones who get the documents, they are the ones who
4 decide whether or not to - - -

5 MR. SUTHERLAND: That's correct, Your
6 Honor.

7 JUDGE RIVERA: - - - to evict someone.

8 Can I ask you, why is not DHCR's
9 determination arbitrary and capricious if you already
10 have an exception to the regulation, the one you've
11 already conceded, the undue hardship, right? So
12 someone could show undue hardship and you would then,
13 for lack of a better word, forgive - - - forgive them
14 for not submitting these affidavits. Or, and correct
15 me if I'm wrong, if someone actually filed them in
16 the two-year window that's required under the
17 regulation, but didn't file them for twenty years
18 before that and didn't file them for ten years after
19 that, it wouldn't be a problem as long as they filed
20 it those two years? Why is that not arbitrary and
21 capricious, to not make an exception for him but to
22 create these other exceptions?

23 MR. SUTHERLAND: Well, you're assuming the
24 existence of a twenty-year period in which no income
25 affidavits were filed, and I don't know if that's - -

1 -

2 JUDGE RIVERA: Five years.

3 MR. SUTHERLAND: - - - fair under - - - the
4 requirements are two years before the income
5 affidavit was filed, and that's why, Your Honor - - -

6 JUDGE RIVERA: But it is true that if prior
7 to those two years someone failed to file one, that
8 that would not be part of this equation, is that
9 correct?

10 MR. SUTHERLAND: That's correct. And in
11 that instance, eviction would be a possible remedy
12 and the housing company could pursue that, but the
13 eligibility requirements are two years before the
14 tenant vacated.

15 I have to turn to the substantial evidence
16 in this question.

17 CHIEF JUDGE LIPPMAN: Go ahead.

18 MR. SUTHERLAND: There was an excuse that
19 was proffered and the agency reasonably rejected it
20 for numerous reasons. Ms. Murphy said that
21 Southbridge Towers board member and DHCR employee
22 Jody Wolfson was indicted on embezzlement charges.
23 That single line is false in four material respects.
24 Wolfson didn't run for the board until 2002. Wolfson
25 wasn't arrested until 2005. She wasn't charged with

1 embezzlement. And the 1999 income affidavit that
2 I've been discussing with Chief Judge Lippman wasn't
3 due until after Ms. Murphy said that she had vacated
4 the apartment, and that's the reason - - -

5 CHIEF JUDGE LIPPMAN: Counselor, why - - -

6 MR. SUTHERLAND: - - - why she didn't file
7 it - - -

8 CHIEF JUDGE LIPPMAN: Why are you - - - I
9 ask this as a straight question. Why are you so
10 intent upon getting him out? Is it because of the
11 one year not filing, or is there a bigger - - - there
12 obviously, as Judge Pigott was talking, a lot of
13 inconsistencies here, it's hard to follow this story.
14 Is it - - - do you never allow that they don't file
15 the affidavit? Sometimes people stay, right, even if
16 - - - there's more to this than just this one year.
17 Is that what's going on here? Do you know what I
18 mean? Why - - - why - - -

19 MR. SUTHERLAND: Because there are huge - -
20 -

21 CHIEF JUDGE LIPPMAN: - - - he's lived
22 there his whole life, why are you - - - why are you
23 so intent, when we all would agree, I think, that
24 obviously the most basic consideration is has this
25 been the primary residence for all those years.

1 What's the utility of getting - - -

2 MR. SUTHERLAND: Because - - -

3 CHIEF JUDGE LIPPMAN: - - - getting him
4 out?

5 MR. SUTHERLAND: - - - there are - - -

6 CHIEF JUDGE LIPPMAN: Why is this so
7 important?

8 MR. SUTHERLAND: There are lots and lots of
9 people on waiting lists who actually meet the income
10 requirements, and he stands in the shoes of someone
11 who didn't follow DHCR's most important - - -

12 CHIEF JUDGE LIPPMAN: If someone just
13 inadvertently - - -

14 MR. SUTHERLAND: - - - most important rule,
15 Your Honor.

16 CHIEF JUDGE LIPPMAN: If someone just
17 inadvertently didn't file the affidavit for one year,
18 and they've been a tenant forever and the child has
19 lived there their whole life, you wouldn't evict
20 them.

21 MR. SUTHERLAND: They ought to seek an
22 undue hardship exception - - -

23 CHIEF JUDGE LIPPMAN: Yeah, but if you give
24 it - - - I think Judge Rivera asked if you give an
25 undue hardship exception, again, why would you force

1 him out?

2 MR. SUTHERLAND: If this - - -

3 JUDGE SMITH: Would you give a hardship
4 exception to somebody who is over the income limit?

5 MR. SUTHERLAND: I doubt it, Your Honor.
6 That's probably the reason why he didn't seek an
7 undue hardship exception in this case.

8 JUDGE SMITH: Let me ask you - - -

9 JUDGE ABDUS-SALAAM: Is he - - -

10 JUDGE SMITH: - - - one more question if I
11 - - -

12 JUDGE ABDUS-SALAAM: Is he, himself, over
13 the income limit or just his parents?

14 MR. SUTHERLAND: At the time of the
15 application, Mr. Murphy was - - - I don't know if - -
16 - I think he was - - - he may have been close. His
17 parents are way over, and the undue hardship
18 exception would be a consideration of broader
19 circumstances. He could have moved right across the
20 river and lived with his parents in 2 Grace Court in
21 Brooklyn Heights near the private high school that he
22 attended.

23 JUDGE SMITH: Can I - - -

24 MR. SUTHERLAND: So there would be no - - -

25 JUDGE SMITH: Can I ask you one more? Are

1 there any cases, except this one, where you've
2 enforced the income affidavit limitation in a case
3 where it really was proved, as conclusively as it's
4 proved here, that the guy really was living there?

5 MR. SUTHERLAND: There are innumerable
6 cases in which the income affidavit listing
7 requirement has been enforced.

8 JUDGE SMITH: I understand that. My
9 question is do any of them involve the kind of proof
10 that we have here, that despite the absence from the
11 income affidavit, that person really was living in
12 that apartment?

13 MR. SUTHERLAND: That's difficult for me to
14 say. In some of these decisions, for example,
15 Greichel, First Department decision, they simply say
16 the person wasn't listed on the income affidavit and
17 that's the end of the inquiry.

18 If the court rules in favor of DHCR here,
19 the same number of people in the state of New York
20 will live in subsidized housing. It just won't be
21 Mr. Murphy. The Mitchell-Lama statute wasn't created
22 for Mr. Murphy's benefit - - -

23 CHIEF JUDGE LIPPMAN: Okay, thanks, couns -
24 - - obviously it determined whether Mr. Murphy should
25 live there or someone else, and we're going to try

1 and do it.

2 MR. SUTHERLAND: Thank you, Your Honors.

3 CHIEF JUDGE LIPPMAN: Thanks. Appreciate

4 it.

5 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Paul Murphy v. New York State Division of Housing and Community Renewal, No. 146 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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Date: September 11, 2013