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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF LL 410 EAST 78TH,

Appellant,

-against-

NO. 26

DHCR,

Respondent.

20 Eagle Street
Albany, New York
February 13, 2025

Before:

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

Appearances:

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Official court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 matter of LLC 410 East 78th Street v. DHCR.

3 MR. WINIARSKY: May it please the court. I'm ~~an~~
4 Native Winiarsky for the appellant from the law firm of
5 Kucker, Marino Winiarsky & Bittens. I'd like to reserve
6 three minutes for rebuttal, Your Honor.

7 CHIEF JUDGE WILSON: Yes.

8 MR. WINIARSKY: So permit me to illustrate the
9 following. Imagine, if you will, a landlord buys a
10 building in 2025. And in the course of furthering his due
11 diligence, he notices that four years ago, there was a rent
12 increase in a certain apartment. One from 1,000 to \$1,500,
13 based upon \$100,000 in major capital improvements. And in
14 the course of his due diligence, he sees there is no
15 documentation supporting that. And therefore, he says
16 there's only documentation supporting 80,000, and
17 therefore, the rent shouldn't be 1,500, it should be 1,400.
18 And he seeks to correct it, to correct the record to lower
19 the rent.

20 Under the DHCR's interpretation, there is no
21 mechanism to accurately reflect that ~~that~~ amendment.

22 JUDGE SINGAS: So why isn't DHCR free to do that?
23 Why can't they put whatever restrictions they want on the
24 regulation? I mean, the regulation says there's a phrase
25 in there, "propriety of such amendment". Why doesn't that

1 give DHCR the discretion to determine what amendments are
2 proper, regardless of your hypothetical?

3 MR. WINIARSKY: They absolutely should. And it's
4 my position that they never provided ~~they never~~
5 ~~provided~~ an opportunity to present the propriety of the
6 amendment. In fact, if you look what happened here - - -

7 JUDGE SINGAS: Who's the "they" that you're
8 talking about?

9 MR. WINIARSKY: The DHCR.

10 JUDGE SINGAS: Uh-huh.

11 MR. WINIARSKY: Specifically, this application
12 was made in July 16th of 2009 - - - ~~2~~ 2019. Within
13 two weeks DHCR rejected the application. Now, to the
14 extent that we have experience with DHCR, we know they
15 generally take months, if not years in rendering - - -

16 JUDGE HALLIGAN: Do you agree that DHCR could
17 amend the regulation to provide that it would not allow for
18 amendments other than ministerial ones, if it did so
19 explicitly?

20 MR. WINIARSKY: Yes. And it would have to go
21 through SAPA to do that, which they didn't do. Which - - -
22 which - - -

23 JUDGE HALLIGAN: I understand. But ~~but~~
24 ~~but~~ to the extent that ~~that~~ they chose to - - - to
25 do so explicitly, you're not suggesting there's any barrier

1 to that?

2 MR. WINIARSKY: No. I'm - - - I am not. I'm
3 trying simply to read the statute as it exists. As ~~-----~~
4 ~~as~~ Your Honor said, Justice Singh, it's what they're
5 supposed to do. And in fact, if you look at the - - - if
6 you look at the PAR decision, which is rather interesting,
7 and the reason I - - - I raised the claim of this - - - of
8 the IAIs, which is different than ~~-----~~ ~~than~~ our particular
9 instance, is because I want to demonstrate that this
10 impacts so many units. And specifically in relation to the
11 RA audits - - -

12 JUDGE CANNATARO: Can I just ask you how it
13 impacts so many units? What is the impact of this?
14 Because my real question is what's the harm in what they
15 did? Couldn't you file a future registration that
16 accurately reflects what the correct rent is?

17 MR. WINIARSKY: The answer to that is no. And in
18 fact, if we could have, I wouldn't be here. We wouldn't
19 have spent tens of thousands of - - - hundreds of thousands
20 of dollars and years in litigation if we could. And the
21 reason you can't, Your Honor - - -

22 JUDGE CANNATARO: What stops - - - yeah, what
23 stops you?

24 MR. WINIARSKY: The reason you can't, if you look
25 at the registrations - - - in fact if you look at - - - on

1 the record, it's 117 of the record, you'd actually see the
2 registrations. You can only go back one year. And
3 therefore, in my example, when we filed the application in
4 2019, you could not correct something that happened in 2016
5 and 2017.

6 And what needs to be also understood is that
7 registrations are filed on a computer, and you can only
8 allow what the fields allow you, and it doesn't let you go
9 back more than one year. And so you're not getting an
10 accurate representation of the registration. And I think
11 when we were - - - you know, the Court of Appeal - - - Your
12 Honor - - - Your Honors had argument in - - - from Burrows
13 two days ago, and I think it was generally concluded. And
14 I believe you said, Justice Rivera, that it's important
15 that we get accurate numbers. And this doesn't allow for
16 accurate numbers.

17 And to go back to Justice Halligan, what you
18 said. This was amended, right? From 1984, when
19 registrations were first filed, for thirty years until 2014
20 - - - in fact, they say so in their statutory - - - in the
21 - - - in their explanatory statement, they say DHCR has
22 allowed owners to file amended registrations at any time.

23 JUDGE HALLIGAN: I don't know, if - - - maybe
24 this is a question for your adversary - - - but do you know
25 if prior to the amendment in 2014, the type of amendment

1 that you're seeking to file here could have been filed
2 unilaterally?

3 MR. WINIARSKY: It was absolutely could have been
4 filed. And what they sought to do - - - and it's perfectly
5 understandable - - - they said, look, we're receiving
6 thousands of applications at this time. It's too much for
7 the DHCR. And it also possibly corrupts the system because
8 landlords can unilaterally file it without any explanation,
9 without seeking to justify it. And so therefore, they say
10 in the explanatory statement, we're going to still allow
11 for such amendments. We're going to still allow you to
12 amend for any time, for any reason, for any purpose, but we
13 want to ensure that the process is regulated by us. Which
14 means, we're going to - - - you're going to need to
15 establish the propriety of the registration, which is fine.

16 And they say something else which is really
17 relevant to the Appellate Division decision. And they say:
18 we also want the tenants to comment on it. Right? And the
19 reason I'll raise that is as follows. Going to the PAR
20 decision. In the PAR decision, the DHCR says - - -

21 JUDGE RIVERA: I'm not clear why, they just - - -
22 it - - - it's their own reg. Why they can't interpret that
23 - - -

24 MR. WINIARSKY: Because it's - - -

25 JUDGE RIVERA: - - - for the purposes you've



1 identified now? Because they're overburdened, ~~they~~
2 they're concerned about the corruption of ~~of~~ these
3 registrations, and so forth. That they're only - - - and
4 you've given me a one-year lookback. So during this one-
5 year lookback, with respect to something that is not
6 ministerial?

7 MR. WINIARSKY: They can.

8 JUDGE RIVERA: Doesn't it incentivize landlords
9 to get it right?

10 MR. WINIARSKY: Well, look, let ~~let~~ me
11 answer your first question, and then the second question.

12 JUDGE RIVERA: Yeah, yeah. Yeah.

13 MR. WINIARSKY: The - - - they ~~they~~ cannot
14 choose to ignore the statute which they amended. And the
15 statute which they amended, the way they did it - - -

16 JUDGE RIVERA: Well, they can't amend a statute.

17 MR. WINIARSKY: They - - - they ~~the~~ can
18 change the Rent Stabilization Code. They write the Rent
19 Stabilization - - -

20 JUDGE RIVERA: Well, the regulations. They can't
21 amend - - -

22 MR. WINIARSKY: Right.

23 JUDGE RIVERA: - - - the statute.

24 MR. WINIARSKY: Right.

25 JUDGE RIVERA: That's for the legislature.

1 MR. WINIARSKY: They can amend the regulation.
2 As Justice Halligan said, if they wanted to do it, limit it
3 to ministerial, they can go ahead and do that. But as it's
4 written, they can't just ignore the statute. And the
5 statute, specifically in ~~in~~ the explanatory
6 statement, said, we're going to continue to allow ~~to~~
7 ~~allow~~ you to do this.

8 Now, the next question you asked is, well, why
9 doesn't the landlord just get it right? Which really
10 brings me to the Appellate Division decision. Because in
11 the Appellate Division decision they say, "DHCR notes that
12 it oversees nearly one million apartments to rent
13 stabilization." Which means there's one million rent
14 regulatory statements that are filed each year. Which also
15 means that with one million applications being filed,
16 inevitably there's going to be mistakes, right?

17 And when I raised this originally, that example I
18 raised, they said in their RA order that we're not going to
19 consider individual apartment improvements, major capital
20 improvements, vacancy guideline increases, renewal
21 increases. We're not doing any of that. We're limiting it
22 only to ministerial items, which is not only in conflict
23 with the statute and the way they - - - and the way they
24 explain the statute. But more to the point, when you look
25 at their PAR in which they - - -

1 JUDGE SINGAS: No. I - - - I ~~-----~~ can we go to
2 where you see the conflict of that? Because I ~~-----~~ I
3 don't see what is arbitrary about the ~~-----~~ the agency
4 saying we're only going to look at ministerial ones and
5 anything else are too time consuming and we've made a
6 decision that there are some amendments that lead to fraud
7 more than others, and we're going to make this ministerial
8 or administrative difference. That's how we're going to
9 comb through the thousands of these. I ~~-----~~ I don't see
10 that as being arbitrary or irrational.

11 MR. WINIARSKY: It's arbitrary to the extent that
12 when they put this statute in place, they said in their
13 explanatory statement, we are going to continue to allow
14 you to file amended registrations at any time for any year.
15 And then they enact a statute which simply says, all you
16 have to do is establish the propriety of the registration.
17 They do not say - - - so what they're saying in saying that
18 is, we're going to take a substantive look at the
19 application and determine if you've established a
20 propriety. They don't say here - - - they could have, but
21 they don't say - - - and such registrations or amendments
22 are limited to ministerial in nature also - - - only. And
23 if they were to take that - - -

24 JUDGE CANNATARO: And that doesn't fall under the
25 purview of their right, ability to interpret their

1 regulations as they like?

2 MR. WINIARSKY: They - - - I understand that this
3 court ~~--- that this court~~ generally gives deference to
4 the state agency in relation to their interpretation of
5 regulations. But - - -

6 JUDGE CANNATARO: Their own regulations.

7 MR. WINIARSKY: Their own regulations.

8 JUDGE CANNATARO: We're not even talking about a
9 statute here.

10 MR. WINIARSKY: But not when it's not - - -

11 JUDGE CANNATARO: We're talking about their code.

12 MR. WINIARSKY: - - - consistent with the - - -
13 with the - - - with the ~~--- with the --- with the~~ words
14 of the regulation which they enacted. And - - - and you -
15 - - you look at this, and all it says is establish the
16 propriety of the registrations, which is consistent with
17 what we've always done. But now we just want to have ~~---~~
18 ~~we want to have~~ oversight over this.

19 Which brings me again to the ~~--- the~~ PAR
20 decision. And in the PAR decision, what the agency said
21 is, "In reviewing an amendment application, the rent
22 administrator is tasked with determining whether sufficient
23 justification has been provided." So they say what we're
24 going to do is we're going to look as to whether you
25 provided sufficient justification. In other words, they're

1 looking at the merits of the application. They say - - -

2 JUDGE HALLIGAN: Is this ~~is this~~ the 2018
3 Rosenberg that you're referring to?

4 MR. WINIARSKY: No. This is our case, but you're
5 ~~you're~~ correct. In Rosenberg, they did exactly this
6 - - -

7 JUDGE HALLIGAN: You mean, the PAR, here?

8 MR. WINIARSKY: In the PAR - - -

9 JUDGE HALLIGAN: So - - -

10 MR. WINIARSKY: - - - here.

11 JUDGE HALLIGAN: - - - so if - - - ~~if~~ what
12 has the practice been, if you know, since 2014 to now? You
13 pointed us, I think, to Rosenberg, which is one case in the
14 last ten years. What has DHCR done - - - and I'm sure
15 they'll be able to respond to this as well, but - - - with
16 respect to substantive amendments as opposed to
17 ministerial?

18 MR. WINIARSKY: I can't tell you what - - - how
19 many applications have been filed. What we know is this,
20 what we know within the explanatory statements they say
21 there were thousands of amended applications being filed to
22 - - - before 2014, and we want to limit that, and we want
23 to have it - - -

24 JUDGE HALLIGAN: But ~~but~~ in your
25 experience, I mean, maybe the answer is ~~is~~ you - - -

1 ~~you~~

2 MR. WINIARSKY: It's very limited.

3 JUDGE HALLIGAN: - - - you can't say. Okay.

4 MR. WINIARSKY: It's very limited. But - - - but
5 - - - you know, you raised the Rosenberg case. In
6 Rosenberg they considered something that was substantive.
7 Specifically, the facts were almost exactly the same, which
8 was you had a free ~~free~~ market unit in which they
9 filed a - - - by mistake a temporary exemption, and they
10 considered it. Now, what they say in this case is, well,
11 in Rosenberg you provided us copies of leases, and here you
12 didn't provide the justification for that. But that's not
13 - - -

14 JUDGE GARCIA: Counsel, can I ~~can I~~ ask you
15 something practically? So let's say the same facts here,
16 say it's temporarily, you know, and not registered. Tenant
17 comes in and sues and says, you had a filing that said this
18 was temporarily not subject to regulation, and then you
19 took it out again. And it is out, because it had been
20 deregulated. But based on this erroneous filing, a tenant
21 now brings an action against you. What happens?

22 MR. WINIARSKY: I ~~I~~ think in - - - I ~~I~~
23 ~~I~~ think it leads to a perception that there was a possible
24 fraud committed. Which is why, exactly, the landlord in
25 this case brought this application when it did. Keep in



1 mind the HSTPA, the Housing Stability Tenant Protection
2 Act, was enacted in June of 2019. It's within a month that
3 my client brings this case because HSTPA imposes penalties
4 if you don't get your registrations right. And I don't see
5 how we can impose penalties for not having proper
6 registrations - - -

7 JUDGE GARCIA: Well, I guess they could say,
8 well, you get a penalty if you don't correct it within a
9 year. But what would happen in the lawsuit? Tenants bring
10 an overcharge claim saying this ~~-----this~~ apartment should
11 be regulated. It was temporarily unregulated. And then
12 you put it back on and it should have been regulated.

13 MR. WINIARSKY: I ~~-----I~~ think it certainly
14 leads to a possible inference of fraud, despite the fact
15 that none existed. And specifically the reason for that
16 is, in 2002 you have a registration which says this
17 apartment is deregulated as a result of high rent
18 vacancies. No registrations are filed from 2003 - - -

19 JUDGE GARCIA: Right.

20 MR. WINIARSKY: - - - to 2015. All of a sudden
21 you have - - - 2016 you have, oh, it's temporarily exempt,
22 meaning it should be regulated. And so now a tenant comes
23 in and say something doesn't smell right here. And mind
24 you, the sSupreme cCourt determined that it's undisputed
25 that these registrations were filed mistakenly. Which



1 brings me back to my original point of - - -

2 JUDGE HALLIGAN: So why wouldn't that be enough,
3 in response to Judge Garcia's question, to address a claim
4 should a tenant bring one?

5 MR. WINIARSKY: Look - - - so if ~~if~~
6 sSupreme court, in this case, said it was filed mistakenly,
7 it doesn't - - - it doesn't necessarily bar a future tenant
8 for saying it wasn't - - - that ~~that~~ wasn't the case.
9 But I also don't want to limit it to this specific case.
10 This case impacts thousands of ~~of~~ possible
11 registrations.

12 JUDGE HALLIGAN: So is it the uncertainty that -
13 - - that - - -

14 MR. WINIARSKY: Yes. I - - - I think it goes to
15 the accuracy of the registrations. And I will - - - and I
16 will want to get accurate - - - accurate registrations on
17 file, which is all we're seeking to do in this instance.

18 JUDGE GARCIA: If you were allowed to do this,
19 hypothetically, would there be a record of the correction?

20 MR. WINIARSKY: Yes. I see my time is up, and I
21 reserved a few minutes for rebuttal.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. AMBARAS: May it please the court. I'm
24 Robert Ambaras. I'm of counsel to Mark F. Palomino, who's
25 the counsel for the respondent - - - respondent, New York



1 State Division of Housing and Community Renewal.

2 JUDGE TROUTMAN: Does the regulation facially
3 restrict amendments to ministerial and clerical errors?

4 MR. AMBARAS: No, it does not facially restrict
5 it. Our position is that the ~~the the~~ agency's
6 practical determination to ~~to~~ restrict the scope of
7 allowed registration amendments to ~~to~~ clerical and
8 ministerial errors, which is the term that was used in the
9 administrative determination, is a rational exercise of the
10 agency's discretion in the administration of the rent
11 registration system.

12 JUDGE HALLIGAN: So could you - - - you could, I
13 take it, you think amend the regulation to say that
14 explicitly, yes?

15 MR. AMBARAS: Absolutely. Yes.

16 JUDGE HALLIGAN: And ~~and~~ so we've held in -
17 - - I think Visiting Nurses Service is one case, but there
18 are others - - - that the agency gets a lot of deference
19 when it's construing its own regulations, but that it can't
20 adopt a construction of a regulation that doesn't conform
21 with the plain language of the regulations. So I think
22 it's clear there's not a distinction between ministerial
23 and substantive in the regulation. How can we read it that
24 way?

25 MR. AMBARAS: It's not really a question - - -

1 it's not really a question of reading. It's a question of
2 - - - it's a question of the exercise of administrative
3 discretion, which several members of the panel have touched
4 on here.

5 JUDGE HALLIGAN: But you still have to exercise
6 your discretion, I think, in a manner that is consistent
7 with the language of the regulation. Right? So for
8 example, if the regulation said you may only file
9 ministerial amendments and not substantive ones, I am going
10 to guess you would say that you would lack the discretion
11 to take a substantive amendment; is that fair?

12 MR. AMBARAS: That's ~~that's~~ correct.

13 JUDGE HALLIGAN: Okay. And so I'm - - - just
14 looking at the regulation, not seeing any distinction of
15 the sort that you're trying to make here. And I'm ~~---~~
16 ~~I'm~~ trying to understand how we can see that as a fair
17 reading of the language of the regulation itself.

18 MR. AMBARAS: My response would be that the
19 DHCR's practice is a rational exercise of the discretion
20 afforded to it in the administration of the ~~--- of the~~
21 registration system.

22 JUDGE HALLIGAN: Do you know if ~~--- if~~ before
23 2014, when the reg was adopted and there were unilateral
24 amendments, as I understand it, could an amendment of the
25 sort we have at issue here have been filed unilaterally

1 before this regulation was adopted?

2 MR. AMBARAS: Yes.

3 JUDGE TROUTMAN: And so what's here supports that
4 the interpretation is, in fact, rational?

5 MR. AMBARAS: In the - - - in the explicit text
6 of the regulation, you're correct, Your Honor. There is no
7 explicit support for it. Our argument, which we've made in
8 our brief, is that the way that the registration - - - the
9 way that the rent registration system is structured, the
10 way it functions, is as a ~~-----~~ a historical record over
11 the decades of contemporaneous representations by landlords
12 as to the regulatory status, legal rent, and occupancy, and
13 other information about their apartments. And that - - -
14 that those - - - those representations are just that. They
15 are representations, they're unilateral, they're
16 unverified. The agency does not have the resources to
17 check on the - - - to check on the accuracy of - - -

18 JUDGE RIVERA: Can I - - - just to be clear,
19 because it appears you - - - I think you've answered Judge
20 Troutman's questions. If not, she'll correct me and ask
21 you something else.

22 Since its enactment, DHCR has always interpreted
23 the regulation in the way it has here, correct?

24 MR. AMBARAS: I believe so, Your Honor.

25 JUDGE RIVERA: So this is not a case where there

1 has been varying interpretations of the language by DHCR?

2 MR. AMBARAS: As far as I know, Your Honor, this
3 is not an aberration.

4 JUDGE RIVERA: Okay. And if I'm understanding, I
5 think perhaps the argument in the briefing and perhaps what
6 you're suggesting today, DHCR, when it enacted this,
7 intended it to be interpreted in this way? Or is that an
8 interpretation that's evolved over time?

9 MR. AMBARAS: I don't ~~-----I don't~~ have a
10 specific answer for that, Your Honor.

11 JUDGE RIVERA: Okay. Thank you.

12 JUDGE GARCIA: Counsel, could - - - my
13 hypothetical before, what would happen in the case that the
14 tenant comes in and says you said this was temporary, and
15 now - - -

16 MR. AMBARAS: Right. The landlords are not
17 powerless to protect themselves against ~~-----against~~ such
18 future - - -

19 JUDGE GARCIA: Well, now, if we rule for you in
20 this case, hypothetically, they wouldn't be able to even
21 say, well, I tried to amend it, right? Because you're
22 going to say, don't bother.

23 MR. AMBARAS: That's correct. That's correct.
24 They could say we tried to amend it. They have a record of
25 that.

1 JUDGE GARCIA: But now they won't because we'll
2 say you don't have to take that. So what would they say?

3 MR. AMBARAS: Well, my answer to that would be
4 that they can take protective measures to - - - to - - -

5 JUDGE HALLIGAN: What would those be?

6 MR. AMBARAS: Pardon?

7 JUDGE GARCIA: Yes, such as what?

8 MR. AMBARAS: Such as preserving documentary
9 evidence.

10 JUDGE GARCIA: But let's say they discover this
11 years after the lookback period is over; they don't have
12 the records?

13 MR. AMBARAS: Well, if they don't have the
14 records, that's a problem. But they can also - - - one of
15 the arguments that the appellant makes in its - - - in its
16 briefs is that if a challenge did not occur for years or
17 decades, witnesses might no longer be available. Well,
18 they can take affidavits of witnesses while they are still
19 available and use them in the future.

20 There's also - - - something else they could do
21 is when a future tenant takes occupancy, they can
22 preemptively advise the tenant there - - - that there is
23 this - - - there is this seeming inconsistency in the
24 registration, and this is the - - - this is the
25 explanation. And support that with documentary evidence

1 and ~~and~~ thereby preempt what - - - preempt what the ~~-~~
2 ~~the~~ kind of litigation that they're concerned about.

3 JUDGE HALLIGAN: But it's - - -

4 CHIEF JUDGE WILSON: Why isn't the request here
5 ministerial? Over here, straight ahead of you.

6 MR. AMBARAS: Pardon?

7 CHIEF JUDGE WILSON: Why isn't the request
8 ministerial here?

9 MR. AMBARAS: Why is the?

10 CHIEF JUDGE WILSON: Request. They're asking for
11 something. Why isn't that ministerial? They're saying we
12 made a mistake.

13 MR. AMBARAS: Because it - - - because it - - -
14 it's - - - it's - - - it pertains to one of the three core
15 elements of a registration which is regulatory status,
16 legal regulated rent, and occupancy.

17 CHIEF JUDGE WILSON: So if they - - -

18 MR. AMBARAS: And that's why it's not - - -

19 CHIEF JUDGE WILSON: - - - if - - - so if they
20 had mistakenly listed the rent, let's say, as they've added
21 an extra zero - - -

22 MR. AMBARAS: That would take - - -

23 CHIEF JUDGE WILSON: - - - could we - - -

24 MR. AMBARAS: - - - that would be a - - - that
25 would be clerical or ministerial.



1 CHIEF JUDGE WILSON: Well, but that might affect
2 the rent regulatory status. It might fit into one of your
3 three categories you just gave me. Right? So I'm trying
4 to decide whether you're defining ministerial based on
5 somebody at a typewriter hit an extra key and that was a
6 ministerial error, or however they made it, substantively
7 it fits into one of these three categories and therefore
8 we're calling it not ministerial? And I don't perceive a
9 consistent answer from you so far.

10 MR. AMBARAS: I think that the - - - I think that
11 my answer would have to be, Your Honor, that that
12 determination would be made on a case-by-case basis.

13 JUDGE SINGAS: Well, wouldn't you have to look at
14 the entire rental history from 2002 to ~~to~~ make a
15 determination if it was legally deregulated? And what does
16 that entail, versus changing the rent amount?

17 MR. AMBARAS: Could you?

18 JUDGE SINGAS: Like, in order for you to figure
19 out if the amendment was proper, you would have to look
20 back at the entire rental history since 2002 to make the
21 determination that when it was deregulated - - -

22 MR. AMBARAS: That would be a substantive - - -
23 that would be a substantive determination, and that would -
24 - -

25 JUDGE SINGAS: So is that your - - -

1 MR. AMBARAS: - - - that would - - - that would -
2 - - that would ~~that would~~ inherently go beyond the -
3 ~~beyond the~~ clerical or ministerial category.

4 JUDGE SINGAS: And would that have to happen
5 here?

6 MR. AMBARAS: In ~~in~~ what case?

7 JUDGE SINGAS: In the case that's before us.

8 MR. AMBARAS: Right. It would - - - that'd have
9 to happen in the context of an - - - of a registration
10 amendment?

11 JUDGE SINGAS: Yes. If he's saying it's not - -
12 - we - - - it - - - it - - - it really is deregulated, so
13 we'd like to correct that. Don't you have to go back and
14 make a determination whether - - -

15 MR. AMBARAS: Of course. You have to - - - of
16 course you have to go back - - -

17 JUDGE SINGAS: And is that a little bit of work
18 or is that a lot of - - - is that a lot of work? I'm
19 trying to understand why it's not ministerial.

20 MR. AMBARAS: All I can say, Your Honor, is that
21 we were - - - we were - - - we were discussing this
22 yesterday with counsel and deputy counsel and supervising
23 attorneys, and we - - - we - - - our - - - our position is
24 that anything that affects one of those three core - - -
25 one of those three core characteristics of an apartment is



1 by definition. Unless it's a matter of a decimal point or
2 something like that.

3 CHIEF JUDGE WILSON: So how do you ~~how do~~
4 ~~you~~ explain Rosenberg?

5 MR. AMBARAS: Okay. In Rosenberg - - -

6 CHIEF JUDGE WILSON: How many more cases like
7 that are there?

8 MR. AMBARAS: I don't know. But the distinction
9 in Rosenberg, which we made in our brief, is that in that
10 case the landlord had, l came forward with three - - - three
11 leases, and it was in the context of an adversarial
12 proceeding where the tenant was involved and had notice and
13 an opportunity to respond.

14 CHIEF JUDGE WILSON: So does that sound
15 ministerial to you? An adversary proceeding with a tenant
16 and leases?

17 MR. AMBARAS: Well, one of the - - - one of our -
18 - - one of our rationales that we put forward in our brief
19 for not entertaining this kind of application is that there
20 is not a real - - - a real tenant-in-interest, who - - -
21 who would have - - - who would be given notice and an
22 opportunity to be heard and have an incentive to - - - to
23 investigate the ~~the~~ apparent inconsistency. And in
24 Rosenberg - - -

25 CHIEF JUDGE WILSON: Yeah, but that - - - right.



1 But again, that makes it seem even less ministerial because
2 now you have an adverse proceeding. I mean, what you're
3 telling the ~~the~~ landlord here is that what they
4 should do is, kick the super out, put a tenant in and then
5 refile, and then you would consider it. That sounds
6 nothing like ministerial. And I feel sorry for the super
7 if that happened.

8 MR. AMBARAS: Pardon?

9 CHIEF JUDGE WILSON: I would feel sorry for the
10 super if they had to do that to get the relief they want.

11 MR. AMBARAS: It's - - - my answer to all these
12 questions would be that it's - - - it is ~~it is~~ hard
13 to draw a bright line distinction.

14 JUDGE RIVERA: Well, sounds like a pretty bright
15 line distinction to say it's either on the ministerial side
16 or the substantive side. I think the questions are to get
17 a sense of how that line has been drawn. But can I just -
18 - - I just want to be clear. The hypothetical he started
19 with, is it DHCR's position that that can never be amended?
20 Or if a tenant - - - there was a new tenant and they wanted
21 to raise it, they could raise it? Is that - - - I'm just
22 trying to understand what DHCR says might be the only way
23 they could address this problem.

24 MR. AMBARAS: Right. In - - - ~~in in~~
25 in the event of a tenant challenge. And - - - and the - -

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JUDGE RIVERA: So whenever a tenant ~~-----a~~
~~tenant~~ challenges, you're going to review it?

MR. AMBARAS: Well, the distinction is - - -

JUDGE RIVERA: Is that perhaps the bright line in
the sand? If a tenant challenges it, you're going to
review it, and you give the landlord the opportunity to
make their case?

MR. AMBARAS: Well, certain kinds of - - -
certain kinds of determinations are - - - are mandatory,
and among those are overcharge applications by - - - and -
- - are applications by tenants. And in case there was
such a challenge, an overcharge challenge and/or a - - - a
status challenge, the agency would be mandated to ~~-----to~~
adjudicate and determine that.

JUDGE HALLIGAN: So you say in your brief that
one of your concerns and the reasons for your construction
of the regulation is how your investigative and auditing
resources are allocated. So if we were to disagree with
you, is there anything that would stop DHCR from
promulgating a regulation that more precisely comported
with its priorities? Understanding that if you had to go
through SAPA, whatever ~~-----whatever~~ those ~~-----those~~
procedural requirements would be.

MR. AMBARAS: Absolutely not, Your Honor. The

1 agency could - - - the agency could promulgate such an
2 amendment.

3 JUDGE HALLIGAN: And I assume would have some
4 leeway as long as you were within the statute to allocate
5 your ~~your~~ resources as you chose? I mean, the RSL,
6 not the RSC. To promulgate a regulation that ~~that~~
7 ~~that~~ allows you to allocate those resources as you
8 wanted?

9 MR. AMBARAS: Correct.

10 If the panel has no more further - - - has no
11 further questions, I'll rest, and thank you.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. WINIARSKY: So - - -

14 JUDGE SINGAS: Can I just ask you about
15 Rosenberg, please? Because it's come up. So the way I see
16 Rosenberg is, there was an amendment based on the fact that
17 the owner didn't live in the apartment. And basically all
18 they did was provide a lease of a tenant to demonstrate
19 that the owner didn't live in the apartment. So to me,
20 that sounds pretty ministerial. As opposed to here, where
21 we'd have to go back to 2002 and recreate the rental
22 history to make a determination if the deregulation was
23 proper in the first instance.

24 MR. WINIARSKY: So - - -

25 JUDGE SINGAS: Why am I wrong about that?



1 MR. WINIARSKY: Respectfully, the facts in
2 Rosenberg are exactly like this case because it was a free
3 market. It was a deregulated unit, as in this case. They
4 filed a temporary exemption based upon owner occupancy.
5 The distinction that he told you, which is, by the way,
6 contrary to Justice Rivera's question when she asked him
7 did you ever issue a decision like this and his answer was
8 no, but Rosenberg clearly indicates otherwise.

9 So the distinction that they raise in Rosenberg
10 is that, well, you offered leases. We offered leases in
11 that case, and there was a current tenant in possession.
12 And that's distinguishing factor, which I can abide by.
13 And they say in their brief that our reliance on the
14 registrations to contradict another without proffering
15 substantive evidence indicates the rationality of their
16 decision. The problem with that is they never reached a
17 substantive determination in this case. Within two weeks
18 of the filing, they just said - - -

19 JUDGE SINGAS: Right. But ~~-----~~ but why isn't it
20 within their discretion to say we're not going to put in
21 the legwork where we have 5,000, 10,000 of these coming in,
22 because we know we have to go back to 2002 and make a
23 determination about deregulation, which is not easy. And
24 we're saying that that is substantive, and we've made a
25 decision that unless it's ministerial, we're not going to

1 allow these amendments. And that might be in response to
2 the flood of amendments that they've gotten, whatever their
3 reasoning is. Why isn't it rational for them to say, look,
4 we're not going to spend the man hours that we need to to
5 figure this out because it's going to take us away from all
6 the other amendments that we're getting?

7 MR. WINIARSKY: Because they only provide one
8 mechanism, 2528.3(c), which says, here is how you amend it.
9 And in - - - and we heard a very important admission from
10 my adversary in response to Justice Halligan's question,
11 which is we - - - did you previously allow such amendments
12 before 2014, and his answer was yes.

13 JUDGE SINGAS: Yes. I mean, that's a given. But
14 are they not free to change their regulations in response
15 to circumstances?

16 MR. WINIARSKY: They are absolutely free to do
17 so. But when they instituted these regulations and they
18 provided the explanatory statements, they said we will
19 still allow you to make these type of registrations
20 provided we have oversight. And that's where the - - - and
21 - - - and again, if they wanted to implement a different
22 rule, they - - -

23 JUDGE SINGAS: But aren't they still allowing
24 them if they're ministerial?

25 MR. WINIARSKY: Excuse me?

1 JUDGE SINGAS: Aren't they still allowing them if
2 they are ministerial?

3 MR. WINIARSKY: They're still allowing what?

4 JUDGE SINGAS: The amendment.

5 MR. WINIARSKY: They're only allowing ministerial
6 amendments. They're not allowing substantive amendments.
7 And when you read the regulation - - -

8 JUDGE CANNATARO: Bit isn't that consistent with
9 their policy from the time it went into effect post - - -

10 MR. WINIARSKY: 2014? No.

11 JUDGE CANNATARO: - - - 2014?

12 MR. WINIARSKY: Because we know in Rosenberg that
13 - - - that was a substantive determination. That was a
14 determination as to status, which is exactly why they
15 rejected it here. So you know - - -

16 JUDGE RIVERA: Let's say we don't view Rosenberg
17 the way you do. Why is it that ~~that~~ this is not
18 wholly appropriate for them, given the concern that you
19 yourself identified as to why you have this amendment, that
20 they are trying to reduce the number of registrations that
21 they have to deal with?

22 MR. WINIARSKY: They are trying to - - -

23 JUDGE RIVERA: That's the intent behind it and
24 their - - -

25 MR. WINIARSKY: Understood.



1 JUDGE RIVERA: - - - their interpretation is the
2 one that they've - - -

3 MR. WINIARSKY: And I don't think there's any
4 question that it has been reduced. And that's why we don't
5 see a lot of these cases. And which is why I couldn't
6 answer Justice Halligan's question of how many are there.
7 There's been a tremendous reduction. But while we have the
8 reduction, and while we're seeking to make sure that we
9 have an accurate registration history and maintain the
10 integrity of this, my suggestion for this case is what the
11 Appellate Division intended. Which is, remand this case
12 back ~~to~~ ~~back~~ to the DHCR, there's a tenant in
13 possession now who can participate in the process, and
14 decide it. And I think that's what needs to happen when
15 that was clearly the intention.

16 JUDGE RIVERA: I'm a little unclear now. Why - -
17 - why can't the tenant just file some claim? I'm - - - I'm
18 - - -

19 MR. WINIARSKY: The tenant can file - - -

20 JUDGE RIVERA: - - - confused now.

21 MR. WINIARSKY: - - - the tenant can file a
22 claim, but it hasn't. And what we're looking to do is make
23 sure that we have an accurate history. So allow this case
24 to be remanded back to DHCR. To the extent the tenant
25 wants to participate, it can. Notice should be sent to the

1 tenant to invite it to participate in the process. And
2 then make that substantive determination as to whether - -
3 - as to whether the registration history should - - - was
4 erroneously filed or not erroneously filed, and allow for
5 the maintaining of the integrity of the system which
6 provides - - - which seeks to ensure - - -

7 JUDGE RIVERA: Well, let me ask you this. Is
8 there some legal doctrine that would prohibit us from
9 saying it is obvious, given the articulation of the purpose
10 of the 2014 reg, that they are trying to reduce the
11 caseload; they're trying to limit this in a particular way;
12 and they always intended for it to be interpreted in the
13 way they have now articulated their interpretation? That
14 any legal doctrine that bars us from resolving the case in
15 that way?

16 MR. WINIARSKY: Yes.

17 JUDGE RIVERA: Okay. Go ahead.

18 MR. WINIARSKY: And as Justice Halligan raised
19 matter of Visiting Nurse Services, 5 NY - - - NY 3d 499,
20 "Courts are not to embrace a regulatory construction that
21 conflicts with the plain meaning of the language."

22 And similarly, Kurcsics v. Merchants Mutual, 49
23 NY 2d 451. Where this court said, "Where the question is
24 one of pure statutory reading", which is all this is,
25 especially in light of what just happened six - - -

1 JUDGE RIVERA: Well, I'm - - - I'm saying I'm not
2 - - - one would have to agree there's a conflict or
3 inconsistency. That - - - you've got to start there.

4 MR. WINIARSKY: It - - - if it's running counter
5 to the clear wording of the provisions and they're putting
6 in - - - and ~~and~~ he's answered your question, is this
7 evolving? And he said, yes, it's evolving. Meaning we
8 don't have a clear policy here. And what they did instead,
9 is they implemented a regulation which says we're going to
10 continue to allow for all of these regulations, provided we
11 have oversight. And then they implement a rule saying, no,
12 only ministerial, sometimes. Well, then you have that
13 conflict.

14 CHIEF JUDGE WILSON: Thank you.

15 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of LL 410 East 78th Street v. DHCR, No. 26 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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