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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF HUDSON VALLEY PROPERTY OWNERS,

Appellant,

-against-

NO. 59

CITY OF KINGSTON,

Respondent.

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20 Eagle Street  
Albany, New York  
May 15, 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

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1 CHIEF JUDGE WILSON: Last matter on today's  
2 calendar is Hudson Valley Property Owners v. City of Kingston.

3 JUDGE RIVERA: Check it.

4 CHIEF JUDGE WILSON: Oh.

5 JUDGE RIVERA: Not last.

6 CHIEF JUDGE WILSON: Did I miss one?

7 JUDGE RIVERA: Not last.

8 CHIEF JUDGE WILSON: Oh, it's not the last, next  
9 one. I'm rushing ahead.

10 JUDGE RIVERA: You got them all there.

11 JUDGE CANNATARO: Which one's next?

12 JUDGE GARCIA: Next one's Hudson.

13 JUDGE CANNATARO: Hudson?

14 CHIEF JUDGE WILSON: Yeah. Ready when you are.

15 MS. CRUZ: Thank you. Good afternoon, Your  
16 Honors. May I reserve the eight minutes for rebuttal?

17 CHIEF JUDGE WILSON: Eight?

18 MS. CRUZ: Yes.

19 CHIEF JUDGE WILSON: It's a lot, but if that's  
20 the way you - - -

21 MS. CRUZ: Five minutes then, Your Honors.

22 CHIEF JUDGE WILSON: Why don't we take five?

23 MS. CRUZ: May it please the court. I am Magda  
24 Cruz of the firm, Belkin Burden Goldman, for the  
25 appellants. The vacancy survey conducted by the City of

1 Kingston in 2022 was a deeply flawed, patently unreasonable  
2 and not sufficient to declare a housing emergency under the  
3 ETPA. Kingston's methodology and process here - - -

4 CHIEF JUDGE WILSON: So what is our standard  
5 review for thinking about that?

6 MS. CRUZ: Very clearly, this court has held in  
7 Spring Valley v. Marrero that a vacancy survey conducted to  
8 determine whether there should be rent regulation in a  
9 municipality has to be a good-faith study. It cannot - - -  
10 it has to be based on precise data and the ri - - - and it  
11 must cover a substantial majority of the building  
12 complexes. This court has also held - - -

13 JUDGE RIVERA: So do we make that determination  
14 de novo, or do we look to see whether or not there was  
15 enough record evidence for the court below to make that  
16 determination?

17 MS. CRUZ: I would submit that if you look at if  
18 the record evidence indicates that there is enough evidence  
19 to establish that criteria.

20 JUDGE CANNATARO: I'm sorry. So you're saying we  
21 make our own factual determination - - -

22 MS. CRUZ: No.

23 JUDGE CANNATARO: - - - about that?

24 MS. CRUZ: You determine what the record evidence  
25 shows if it supports the standard in Spring Valley.

1 JUDGE HALLIGAN: But is that a de novo  
2 determination, or are we simply looking for any record  
3 support?

4 MS. CRUZ: I think that you need to do a record  
5 support analysis. And in this case, there should be no  
6 presumption that what was done by the legislature here, by  
7 the government, City of Kingston, there is no presumption  
8 of validity according to the holding in Spring Valley  
9 because the ETPA requires the municipality to make a  
10 particular factual finding as a predicate to declare the  
11 housing emergency. And here, that particular factual  
12 finding is a vacancy rate of five percent or less.

13 CHIEF JUDGE WILSON: Let me try the question one  
14 more time. We're reviewing the appellate Division's  
15 decision, right?

16 MS. CRUZ: Yes.

17 CHIEF JUDGE WILSON: So how should we review that  
18 decision? That is, do - - - if the Appellate Division has  
19 made findings, is what we're asking, is there any evidence  
20 from which those findings could be supported, or are we  
21 asking something different?

22 MS. CRUZ: I think that the Appellate Division's  
23 findings, as I outlined in my brief, have numerous errors  
24 in them. And when there has been a demonstration that  
25 there is a conflict between what the record shows, and we

1 have demonstrated that.

2 JUDGE RIVERA: Does that mean you're arguing  
3 there's no record support for their conclusion?

4 MS. CRUZ: There's a - - - correct. There is no  
5 record support for the conclusion by the Appellate  
6 Division. And the supreme court as well - - -

7 JUDGE CANNATARO: So it's - - - I'm sorry.

8 MS. CRUZ: - - - indicated that there were  
9 errors. We indicated that there were substantial errors.

10 JUDGE CANNATARO: So when you say conflict, you  
11 don't mean that some evidence points in one direction and  
12 other evidence points in another. You're saying that there  
13 are aspects of the findings here that are totally  
14 unsupported by record evidence?

15 MS. CRUZ: Yes. Yes, Your Honor.

16 JUDGE CANNATARO: And specifically, can you just  
17 enumerate so it's easier - - -

18 MS. CRUZ: Absolutely.

19 JUDGE CANNATARO: - - - to find them?

20 MS. CRUZ: And I will indicate to you that the  
21 most significant errors here was that the survey that the  
22 city conducted included hundreds of units that could not  
23 have been subject to the ETPA. It excluded scores of  
24 others that should have been included. It suppressed - - -

25 JUDGE RIVERA: Isn't that in part - - -

1 JUDGE HALLIGAN: But this - - -

2 JUDGE RIVERA: - - - because the owners didn't  
3 want to participate?

4 MS. CRUZ: Absolutely not, Your Honor. That - -  
5 - there is no evidence of that in this record. And in  
6 fact, there would have been no incentive for the owners not  
7 to participate had they been given - - -

8 JUDGE HALLIGAN: It - - - it's - - -

9 MS. CRUZ: - - - a fair opportunity.

10 JUDGE RIVERA: There's evidence they were  
11 directed not to participate, so I guess there's - - -

12 MS. CRUZ: Excuse me?

13 JUDGE RIVERA: I thought there was evidence that  
14 they were directed not to participate.

15 MS. CRUZ: Absolutely not.

16 JUDGE RIVERA: So they must have thought there's  
17 some value in not participating.

18 MS. CRUZ: No, not on this record, Your Honor.  
19 In fact - - -

20 JUDGE HALLIGAN: It seems to me the points you're  
21 making go to the methodology - - -

22 MS. CRUZ: Yes.

23 JUDGE HALLIGAN: - - - as opposed - - - okay.

24 MS. CRUZ: Yes.

25 JUDGE HALLIGAN: So your attack is on the

1 methodology, not on the specific determinations that there  
2 were X or Y responses?

3 MS. CRUZ: The methodologies led to the  
4 inaccurate results by the City.

5 JUDGE HALLIGAN: Are you saying that the specific  
6 - - - you know, the return numbers were inaccurate? In  
7 other words, are you saying it was twenty-two instead of  
8 twenty or whatever the number might be?

9 MS. CRUZ: Right.

10 JUDGE HALLIGAN: Or that that is not a good-faith  
11 assessment of the state of affairs?

12 MS. CRUZ: It was - - -

13 JUDGE HALLIGAN: I thought it was the latter.

14 MS. CRUZ: It is. It - - -

15 JUDGE HALLIGAN: Okay.

16 MS. CRUZ: It was not a good faith assessment.

17 JUDGE HALLIGAN: And so then, if we conclude that  
18 there is some record support for the methodology, then we  
19 should affirm, and if we think there's no record support  
20 for the methodology, we should reverse?

21 MS. CRUZ: No. I think that you need to examine  
22 the methodology that, on the one hand, the City said it was  
23 going to do the survey - - -

24 JUDGE HALLIGAN: But just - - -

25 MS. CRUZ: - - - in a certain way, and in fact,

1 it did not.

2 JUDGE HALLIGAN: To go back to your exchange with  
3 the Chief, I thought you said that the standard was the  
4 record support?

5 MS. CRUZ: Yes.

6 JUDGE HALLIGAN: Okay. And so if the question is  
7 - - -

8 MS. CRUZ: For purposes of reviewing - - -

9 JUDGE HALLIGAN: For us?

10 MS. CRUZ: - - - the question, yes.

11 JUDGE HALLIGAN: Yes. And so if the question is  
12 whether the methodology was a good-faith methodology and we  
13 find that there is record support for the conclusion that  
14 it was a good-faith methodology, then I assume we should  
15 affirm, and conversely, if we find there was no record  
16 support for it being a good-faith methodology, we should  
17 reverse?

18 MS. CRUZ: I submit that if the court determines  
19 and that we have presented evidence to support this  
20 argument, that the methodology itself that was applied was  
21 not a good-faith methodology, and therefore, the record  
22 evidence that was presented shows in fact that the  
23 methodology was inaccurate, flawed, and led to a vacancy  
24 rate that could not be supported under the legal standard  
25 of Spring Valley, then this court - - -

1 JUDGE HALLIGAN: So on - - -

2 MS. CRUZ: - - - must reverse.

3 JUDGE HALLIGAN: - - - on Spring Valley, I  
4 believe the decision from this court was very brief, yes?  
5 A memorandum decision?

6 MS. CRUZ: It was fairly brief, yes.

7 JUDGE HALLIGAN: Okay. And I don't think that  
8 this court recites the details in terms of the standard  
9 that the Appellate Division recites that you would have us  
10 adopt, but I take it you don't think we're bound by the  
11 Appellate Division's recitation in Spring Valley simply by  
12 what we - - - the only precedent from this court is what's  
13 in that memorandum opinion.

14 MS. CRUZ: Yes. But if I understand you  
15 correctly, you're referring to the Appellate Division in  
16 this case in the Third - - -

17 JUDGE HALLIGAN: No. No. What I'm saying is - -  
18 -

19 MS. CRUZ: Oh, the Appellate Division in Spring  
20 Valley?

21 JUDGE HALLIGAN: In Spring Valley, which is where  
22 I think the more detailed examination - - -

23 MS. CRUZ: Yes. Yes.

24 JUDGE HALLIGAN: Okay. So part of what I'm  
25 puzzling about is, I think, before us, we have both an

1 Article 78 and a declaratory judgment; is that - - -

2 MS. CRUZ: Yes.

3 JUDGE HALLIGAN: - - - right? Okay.

4 MS. CRUZ: Yes.

5 JUDGE HALLIGAN: So generally, with Article 78,  
6 you know, one of the things we look at is whether the  
7 decision was arbitrary and capricious.

8 MS. CRUZ: Right.

9 JUDGE HALLIGAN: Declaratory judgment may present  
10 a different kind of inquiry. So what do we make of the  
11 presence of both of those causes of action here and how  
12 that affects our standard of review?

13 MS. CRUZ: I think that the - - - this court  
14 should look at this from an arbitrary and capricious  
15 standard and whether the decision by the City of Kingston,  
16 whether the declaration was rational or not.

17 JUDGE HALLIGAN: But I thought you just said that  
18 the question was whether there was record support, which I  
19 think - - -

20 MS. CRUZ: As well. I mean, all of that - - -  
21 it's intertwined, Your Honor. Our - - - something has to  
22 be arbitrary and capricious if there is no record support  
23 for the decision, and that is what we submit. That, in  
24 fact, when the City of Kingston determined the vacancy rate  
25 to be 1.57 percent, it had committed material errors that

1 rendered that conclusion to be unreliable contrary to law  
2 and could not be sustained under the Spring Valley  
3 standard, as I indicated. And I was enumerating for you  
4 the types of errors. As I said, the City of Kingston, in  
5 doing its survey, included hundreds of units that could not  
6 be subject to the ETPA. It excluded - - -

7 JUDGE SINGAS: Isn't it true that if - - - even  
8 if they put back in the units where the assumption of  
9 nonvacancy was applied, that it still would have been under  
10 five percent?

11 MS. CRUZ: No. I think what you are referring to  
12 is their concession that there were at least five buildings  
13 for which they did not receive a survey response, and that  
14 if they included those units, that doing their calculation,  
15 it would still be less than five percent. That's not what  
16 I am saying. I am saying that there were hundreds of units  
17 that were considered that could not be subject to the ETPA.  
18 Units, and well, buildings in - - - in that were subject to  
19 the Mitchell-Lama Program, buildings that were constructed  
20 or substantially rehabilitated after 1974, and even a  
21 building that had a vacate order. That could not be  
22 considered subject to this survey. City considered  
23 hundreds of those units. It also failed - - -

24 CHIEF JUDGE WILSON: Do you know if in that  
25 subset of units that you say should not have been

1 considered, what the vacancy rate was compared to the  
2 vacancy rate in the buildings that should have been  
3 considered? We don't know that.

4 MS. CRUZ: Well, I know that it consisted of  
5 approximately twenty percent of all of the buildings that  
6 was in the - - -

7 CHIEF JUDGE WILSON: Right. But if the vacancy  
8 rate were the same, it would make no difference.

9 MS. CRUZ: When you combine that error and the  
10 error of excluding scores of others - - -

11 CHIEF JUDGE WILSON: I just want to stick with my  
12 question if I can for a second.

13 MS. CRUZ: Well, just with - - - with - - -

14 CHIEF JUDGE WILSON: Just - - -

15 MS. CRUZ: I - - - I have not done that - - -  
16 that math.

17 CHIEF JUDGE WILSON: No.

18 MS. CRUZ: But - - -

19 CHIEF JUDGE WILSON: No. I'm sorry. I'm asking  
20 if there's anything in the record - - - whether you've done  
21 the math or not, if there's anything in the anything in the  
22 record that shows what the vacancy rate was for the  
23 buildings you say should not have been included but were.

24 MS. CRUZ: I can say that those were very large  
25 buildings for the most part.

1 CHIEF JUDGE WILSON: That's a different issue.

2 MS. CRUZ: Yeah. I - - -

3 CHIEF JUDGE WILSON: You've already told me it's  
4 twenty percent. I'm not asking about it's - - -

5 MS. CRUZ: Yeah. It was twenty percent.

6 CHIEF JUDGE WILSON: I'm not asking about its  
7 relation in size or the number of units.

8 MS. CRUZ: How many vacant - - - vacancy - - -

9 CHIEF JUDGE WILSON: There's - - - there's a  
10 vacancy rate for the units that you say should have been  
11 included.

12 MS. CRUZ: Right.

13 CHIEF JUDGE WILSON: And there's a vacancy rate  
14 for the units that you say should not have been concluded.

15 MS. CRUZ: Right.

16 CHIEF JUDGE WILSON: Do you know if the - - - is  
17 there anything in the record that would show us whether  
18 those two vacancy rates are different? Because if they're  
19 exactly the same - - -

20 MS. CRUZ: Yeah.

21 CHIEF JUDGE WILSON: - - - the error you're  
22 claiming doesn't make any difference.

23 MS. CRUZ: Yeah. You know, I believe that, yes,  
24 that they would come out differently.

25 CHIEF JUDGE WILSON: I'm sorry. Is there

1 anything in the record from which we can tell that?

2 MS. CRUZ: When the City - - - well, we had - - -  
3 we had requested under FOIL for a spreadsheet with all the  
4 information that the City used to reach its conclusion.  
5 And in that spreadsheet, and then that is in the record,  
6 you have an itemization of the surveys, what the city says  
7 the - - - those surveys reflect, and that's how they do  
8 their math. So in other words, the City, looking at those  
9 buildings and looking at the numbers that they calculate,  
10 you can derive a number by excluding buildings that should  
11 not have been included in the survey, but in fact were  
12 included. And in doing so, Your Honors, in combine - - -  
13 in combination with the other errors, which also are very  
14 material, most notably was the fact that even of the  
15 responses that they did receive, in many instances, those  
16 responses were not accurately recorded. So for example, I  
17 outline in the brief at least five buildings that had  
18 vacancies and yet, the survey data that the city recorded  
19 indicated that those buildings were - - - had no - - - had  
20 no vacancies, that there were zero - - - zero vacancies in  
21 the building, and that was not accurate. And most material  
22 was because they only received nineteen surveys from sixty-  
23 four that were sent. They excluded over fifty - - - over  
24 forty-five buildings. Forty-five buildings were deemed by  
25 the city to have zero vacancies, to be fully occupied, and

1 yet that could not have been accurate. And the reason that  
2 occurred, Your Honors, why? And going back to what Justice  
3 Rivera had asked before about owners not responding, they  
4 were given nine business days by this surveyor to respond  
5 to the survey. It is not surprising that there would have  
6 been a high number of owners that did not submit the survey  
7 response within that nine days.

8 JUDGE RIVERA: Well, there were also follow-up  
9 calls and so forth.

10 MS. CRUZ: There were allegedly six follow-up  
11 calls, Your Honor, yet forty-five buildings never answered.  
12 And of the six, we submitted affidavits from each of the  
13 owners saying those calls did not occur. When you have - -  
14 -

15 JUDGE RIVERA: Let's say we disagree with you.  
16 When would be the next time that there's an opportunity to  
17 determine what the vacancy rate is?

18 MS. CRUZ: You mean, when does the City have to  
19 do another survey?

20 JUDGE RIVERA: Yes.

21 MS. CRUZ: They're actually involved in that  
22 process right now. They have to conduct another survey  
23 within three years, and so they are engaged in that right  
24 now. But it is critical that the standard for conducting  
25 these surveys be clarified by the court because it is not

1 just Kingston that is engaged in this exercise. Across the  
2 state, after the HSTPA was amended, now all municipalities  
3 in the State of New York can engage in this exercise. And  
4 if they're not given clear standards for determining what  
5 is the proper way to conduct a vacancy survey, it cannot  
6 just simply be, you know, a good-faith effort so that the -  
7 - - that the results are fairly debatable as my adversaries  
8 indicate. It should be a stringent - - -

9 JUDGE RIVERA: And so I thought it was a good-  
10 faith study. Are you making a distinction between a good-  
11 faith effort and the study itself?

12 MS. CRUZ: I am saying that the study has to be a  
13 meaningful one, Your Honor. It has to be based on precise  
14 data. It has to be on a review of a substantial majority  
15 of the building complexes subject to this. It cannot be -  
16 - -

17 CHIEF JUDGE WILSON: I thought we have a - - - I  
18 thought we have a factual - - -

19 MS. CRUZ: - - - a response rate of less than  
20 thirty percent.

21 CHIEF JUDGE WILSON: I thought we have a factual  
22 finding here from below that the survey responses covered  
23 71.7 percent of the - - -

24 MS. CRUZ: And - - - and - - -

25 CHIEF JUDGE WILSON: - - - of the units.

1 MS. CRUZ: We showed, Your Honor, that was not  
2 accurate at all.

3 CHIEF JUDGE WILSON: I'm sorry. We have a fact -  
4 - - do we have a factual finding from the lower court as to  
5 that effect?

6 MS. CRUZ: Yes, we do. We do have a factual  
7 finding.

8 CHIEF JUDGE WILSON: So can we upset that factual  
9 finding?

10 MS. CRUZ: Excuse me?

11 CHIEF JUDGE WILSON: Can we upset? Do we have  
12 the power to upset that factual finding?

13 MS. CRUZ: When there is a conflict between what,  
14 for example, the Supreme Court stated as to one fact - - -  
15 one data point and then what the Appellate Division says  
16 something differently, and the parties indicate that there  
17 is yet - - - in record evidence that shows that those  
18 factual findings are incorrect, this court has the  
19 authority to look at the - - - at the record and to make  
20 that - - - a new determination. I guess that goes to one  
21 of the original questions here, a de novo examination.  
22 It's in IMO, in Matter of YK, 87 N.Y.2d 430. When  
23 confronted with inconsistent findings of facts in the court  
24 below, this court can review them and choose which findings  
25 more nearly comport with the evidence in the record. And

1 then to respond specifically to that question, we have  
2 evidence in the record that shows there were only nineteen  
3 buildings that responded to the survey. That means less  
4 than a thirty-percent response rate. And I would like to  
5 reserve the balance of my time for rebuttal. Thank you.

6 CHIEF JUDGE WILSON: Thank you.

7 MS. GRAVES-POLLER: May it please the court.  
8 Barbara Graves-Poller, for the City of Kingston.

9 JUDGE HALLIGAN: Counsel, do you want to start by  
10 addressing the standard for us?

11 MS. GRAVES-POLLER: Sure. This court has stated  
12 many times, and most powerfully in *Alpert v. 28 Williams*  
13 *Street*, that an affirmed finding that is supported by any  
14 record evidence is beyond the scope of this court's - - -

15 JUDGE HALLIGAN: Sorry. I mean mean the question  
16 of how we are reviewing the methodology. The good-faith  
17 study, is that the appropriate standard or something else?

18 MS. GRAVES-POLLER: Well, while the study itself,  
19 if it were a final administrative determination, would have  
20 been subject to a kind of arbitrary and capricious  
21 standard, we're not here dealing with an administrative  
22 question. This is legislative finding. And the vacancy  
23 study was the beginning of that legislative finding - - -

24 JUDGE CANNATARO: But the legislative finding is  
25 based upon a vacancy study, right?

1 MS. GRAVES-POLLER: Not only - - - not at all.

2 JUDGE CANNATARO: What else goes into it?

3 MS. GRAVES-POLLER: Well, that's a very important  
4 part of the HSTPA. So we begin with the vacancy study,  
5 which, in this case, as opposed to 2020, alerted our common  
6 council to the possibility that they may have power to  
7 declare emergency - - -

8 JUDGE HALLIGAN: So you think we don't have power  
9 to review whether the study was - - - whatever the metrics  
10 are that we would decide whether it's a good-faith study,  
11 precise data, you think we lack the authority to do that?

12 MS. GRAVES-POLLER: Well, I want to be careful in  
13 telling this court it doesn't have authority.

14 JUDGE HALLIGAN: I don't - - - no. I'm just  
15 asking - - - you know, I thought that we had indicated that  
16 this was a different enterprise than one where there is a  
17 legislative finding of fact in the classic sense because  
18 this was a antecedent condition to proceeding.

19 MS. GRAVES-POLLER: I guess I see it a little  
20 differently, Your Honor, in part, because that vacancy  
21 report has to be subjected to the other procedures that the  
22 HSTPA lays out for common council to follow, and  
23 specifically - - -

24 JUDGE HALLIGAN: And so if we disagreed and we  
25 thought that there was some review that was appropriate by



1 this court with respect to the methodology, is the standard  
2 in the Spring Valley Appellate Division and Executive  
3 Towers the right one, or is there something else we should  
4 be looking at?

5 MS. GRAVES-POLLER: If this court were looking  
6 only at the vacancy study, then the good-faith effort  
7 common sense approach would be the standard to apply. But  
8 the City submits that, in this case, where we're dealing  
9 with a legislative fact-finding, where our vacancy study  
10 report, which was finalized on June 1st of 2022, was posted  
11 for the public before our common council began its  
12 deliberative process. Then, in accordance with 8623(c), we  
13 hold a - - -

14 JUDGE CANNATARO: Well, Counsel, that may be  
15 true. You may be entitled to some level of deference for  
16 determinations made outside the vacancy study, but the  
17 vacancy study is part of it. And if that doesn't rise to  
18 the level of the standard, which I'm still not sure I fully  
19 understand how arbitrary and capricious interplays with the  
20 methodology here. But you know, if the vacancy study were  
21 to fail, it would - - - it seems to me that no amount of  
22 deference is going to - - - is going to cure that.

23 MS. GRAVES-POLLER: Well, respectfully, it's not  
24 just about deference. It's about the fact that that public  
25 hearing is a check on the vacancy study itself.

1           JUDGE HALLIGAN: Well, what do you do about the  
2 statement in our opinion in Spring Valley that the  
3 presumption, you know, of - - - that the legislature has  
4 investigated and found sufficient facts cannot be applied  
5 in a case such as this one where the implementing  
6 legislation requires the antecedent finding?

7           MS. GRAVES-POLLER: The way that we understand  
8 that is that our common council couldn't simply say we see  
9 that our population is changing. We've heard from our  
10 constituents; therefore, we believe we have authority to  
11 declare a housing emergency. They could not simply look at  
12 the many New York Times articles that talked about changes  
13 in Kingston's population and say, you know what? I heard  
14 that from my constituents too. Instead, since this has - -  
15 - the statute has a numeric precondition, we had to deal in  
16 numbers.

17           JUDGE HALLIGAN: So suppose you sampled two  
18 buildings and you concluded, based on that, that the  
19 vacancy rate was under five percent, we wouldn't have  
20 authority to review the adequacy of the methodology under  
21 your view?

22           MS. GRAVES-POLLER: I think in that circumstance,  
23 the legislative finding would fail on other grounds because  
24 if a municipality only considered two buildings, for  
25 example - - -

1                   JUDGE CANNATARO: What about just on the basis -  
 2                   - - if you accept all the propositions in that question,  
 3                   including that we found that the vacancy study was legally  
 4                   inadequate, and this is the question I think you were  
 5                   asking - - - the question I was trying to ask, wouldn't  
 6                   that really be the end of it? We don't have to look at  
 7                   what other factors you considered.

8                   MS. GRAVES-POLLER: Again, you know, I do want to  
 9                   go back to defending our study, which we stand behind. But  
 10                  an answer to Your Honor's question, I do believe that that  
 11                  requirement under 8623(c) for a public hearing, the - - -  
 12                  almost has a kind of aging requirement built into it. If  
 13                  we have a vacancy study that says - - - just is egregious  
 14                  in its errors, which ours absolutely was not - - -

15                  JUDGE CANNATARO: Yours is perfect. But if - - -  
 16                  assume it's not perfect - - -

17                  MS. GRAVES-POLLER: Pretty close. We reached out  
 18                  to ninety-two percent of all presumptively eligible  
 19                  property owners. We know that those ninety-two percent - -  
 20                  -

21                  CHIEF JUDGE WILSON: No. No. But take what the  
 22                  - - -

23                  MS. GRAVES-POLLER: - - - represent ninety-eight.

24                  CHIEF JUDGE WILSON: - - - what - - - what - - -  
 25                  what we're concerned about - - -

1 MS. GRAVES-POLLER: But to the point - - -

2 CHIEF JUDGE WILSON: Yeah.

3 MS. GRAVES-POLLER: - - - to the point, Your  
4 Honor, if we had that sort of problem, there would be a  
5 public hearing record where every property owner who was  
6 entitled to notice would come in and say, hold on a second.  
7 I didn't hear about this vacancy study, or I have ten  
8 vacancies in my building.

9 JUDGE CANNATARO: But wait a minute. Are you  
10 saying that these parties over here didn't have the right  
11 to come into court and bring an Article 78 proceeding to  
12 challenge the adequacy of the vacancy study?

13 MS. GRAVES-POLLER: I'm not saying that they  
14 don't have the right to challenge the legislative finding.  
15 They absolutely do, and that's why we're here. But what  
16 I'm saying is, what would be before this court and what  
17 this court should look at is what the HSTPA requires. It  
18 requires compliance with both a reasonable data collection  
19 effort to ascertain the vacancy rate.

20 JUDGE RIVERA: So what if those are opposition?  
21 What if the survey says that the rate is twenty percent,  
22 and you have the hearing, and you hear from the  
23 constituents, and any one hearing that might say, oh, it's  
24 probably three percent. How do you resolve that?

25 MS. GRAVES-POLLER: We would - - - these property

1 owners are very good at advocating for themselves. And  
2 they would come in to the public hearing - - -

3 JUDGE RIVERA: No. No. But then let's go with  
4 what I - - - I get your point there. Thank you. Let's go  
5 with this hypothetical.

6 MS. GRAVES-POLLER: And in your hypothetical, the  
7 public - - -

8 JUDGE RIVERA: Let's say the property owners did  
9 show up. We'll go with what you suggested. And again,  
10 anyone reading the transcript or had been there would say,  
11 that's three percent.

12 MS. GRAVES-POLLER: Then we - - -

13 JUDGE RIVERA: How do you - - -

14 MS. GRAVES-POLLER: - - - we would be in court?

15 JUDGE RIVERA: How do you decide what the vacancy  
16 rate is and whether or not you can declare the emergency?  
17 Survey is twenty, hearing from constituents, it sounds like  
18 less than five.

19 MS. GRAVES-POLLER: Again, they could come to  
20 court, as they did, and the appellate and - - -

21 JUDGE RIVERA: No. No. How - - - how the - - -

22 MS. GRAVES-POLLER: Oh, sorry.

23 JUDGE RIVERA: No.

24 MS. GRAVES-POLLER: You're asking about the good-  
25 faith effort?

1 JUDGE RIVERA: How would common council resolve  
2 that? That's my point.

3 MS. GRAVES-POLLER: You would look at the efforts  
4 of the municipality. And the effort of the municipality  
5 would be governed by the opportunity to participate - - -

6 JUDGE RIVERA: I mean, how would under - - - yes,  
7 I understood your point to be the statute has certain  
8 requirements the common council had to follow. It's the  
9 survey, it's public hearings. Perhaps there's other way to  
10 gather information. So my question is, if those things are  
11 in contradiction, how would they resolve that?

12 MS. GRAVES-POLLER: They being the - - -

13 JUDGE RIVERA: What does that mean that it  
14 doesn't establish the vacancy rate?

15 MS. GRAVES-POLLER: Sorry. They being the common  
16 council?

17 JUDGE RIVERA: Yes. Yes.

18 MS. GRAVES-POLLER: The common council would have  
19 to use its best efforts to maybe gather additional data.  
20 Or there - - - I get - - - I guess that answers Your  
21 Honor's question to a point. If there were some great  
22 conflict, or if, for example, at the public hearing,  
23 property owners said, you know, we were never surveyed,  
24 only to receive the survey, then perhaps this court would  
25 be faced with a different question about the reasonableness



1 of the fact-finding.

2 JUDGE HALLIGAN: But I take it you're arguing  
3 that, if we disagree with you and think that some scrutiny  
4 along the lines of Spring Valley or Executive Towers is  
5 appropriate, that your methodology comports with that?

6 MS. GRAVES-POLLER: A hundred percent.

7 JUDGE HALLIGAN: Okay.

8 MS. GRAVES-POLLER: It - - -

9 JUDGE HALLIGAN: One - - - just one specific  
10 question. Do you agree with the state's position that,  
11 under the regulations, the earliest possible refund would  
12 be for rent paid in August 2020 and not prior to that?

13 MS. GRAVES-POLLER: The city has not taken a  
14 position on any of the rent guidelines - - - board's  
15 guidelines that - - -

16 JUDGE HALLIGAN: So you don't have a contrary  
17 position? Okay.

18 MS. GRAVES-POLLER: No, we do not. But again,  
19 just if - - - I know my red light is on, but I just want to  
20 make a couple of points about the so-called errors that the  
21 property owners have raised here. There's no - - - there  
22 was no answer to the Chief's Judge's question about the  
23 impact of inclusions and exclusions. The matter of fact is  
24 that we explained in detail why we excluded transiently  
25 occupied boarding houses. That's actually consistent with

1 the discussion in Spring Valley, which excluded rooming  
2 homes. But the fact of the matter is that housing of last  
3 resort is almost always fully occupied and it actually - -  
4 - if we had included them, our rate would probably be  
5 lower. There is also additional evidence in the record.  
6 Looking at other surveys that found Kingston's rate of  
7 vacancy was even lower at page 620. The American Community  
8 Survey found that it was under one percent. I think it's  
9 also useful to look at the affidavits that the property  
10 owners put in. And not one of them says we needed more  
11 time, we submitted data that was not considered, nor do  
12 they actually address the vacancy rate at the time we  
13 conducted our survey. They say things that are sort of  
14 open-ended. Our - - - our property usually has a vacancy  
15 factor. And so I see my red light is on. And so in  
16 closing, I would just like to leave this court with the  
17 comments from one of the small building owners. It's on  
18 page 177 - - - 71 of the record. One of the owners said in  
19 our open-ended question, is there anything else the city  
20 should know? And that owner said, we need to build more  
21 housing. And that statement, consistent with our vacancy  
22 rate and consistent with - - - is consistent with our  
23 emergency declaration. And we ask this court to affirm.

24 CHIEF JUDGE WILSON: Thank you.

25 MS. ROSENBLUTH: Good - - - excuse me. Good



1 afternoon, Your Honors. May it please the court. Sarah  
2 Rosenbluth for DHCR and the Kingston Rent Guidelines Board.  
3 Assuming the court reaches the validity of the board's  
4 guidelines, it should affirm. The only issue regarding  
5 those guidelines that is properly before the court is  
6 whether the board's fair market rent guideline is  
7 impermissibly retroactive.

8 JUDGE HALLIGAN: What is your - - -

9 JUDGE CANNATARO: Meaning the other issue - - -  
10 the adjustment is not properly before the court?

11 MS. ROSENBLUTH: That is our position, yes.

12 JUDGE CANNATARO: And that's preservation  
13 argument on your part?

14 MS. ROSENBLUTH: Correct.

15 JUDGE CANNATARO: Okay.

16 MS. ROSENBLUTH: Correct. And I can get there in  
17 just a minute. But just to address the fair market rent  
18 guideline first, so that issue is actually far narrower  
19 than Petitioners suggest, as neither the board nor DHCR - -  
20 -

21 JUDGE HALLIGAN: And just to make sure I follow,  
22 you mean the 116 percent?

23 MS. ROSENBLUTH: Correct.

24 JUDGE HALLIGAN: Thanks.

25 MS. ROSENBLUTH: Yes.



1 JUDGE GARCIA: And narrow in the sense of the  
2 time period it covers?

3 MS. ROSENBLUTH: Yes. Yes. And because neither  
4 the board nor the DHCR argues that that guideline attaches  
5 any consequences to conduct that predated the enactment.

6 JUDGE RIVERA: Your position is it's the DHCR,  
7 two years, correct?

8 MS. ROSENBLUTH: I'm sorry?

9 JUDGE RIVERA: Your position, it's the DHCR, two  
10 years?

11 MS. ROSENBLUTH: That's - - - yes. The DHCR  
12 regulation - - -

13 JUDGE RIVERA: Yeah. But doesn't that still mean  
14 that you would go back to before the emergency declaration  
15 is made, granted it's after the passage of the state - - -

16 MS. ROSENBLUTH: Correct.

17 JUDGE RIVERA: - - - legislation, of course.

18 MS. ROSENBLUTH: Yes, it does, but that is  
19 controlled by Freeport Randall. And Freeport Randall says  
20 you can't do that.

21 JUDGE RIVERA: Why isn't it controlled by Regina?

22 MS. ROSENBLUTH: So I just would like to - - -  
23 okay. So Regina Metro addressed a different question.  
24 Regina Metro addressed whether the HSTPA could be applied  
25 to increase an owner's liability to refund rent that was

1 lawfully collected before the enactment of the statute;  
2 whereas, here, the question is whether owners can be  
3 required to refund rent that was collected before the local  
4 effective date, but after the enactment of the statute.

5 JUDGE RIVERA: But isn't the point before the  
6 rent could actually be collected? And if you don't have  
7 the emergency, you're not able to - - -

8 MS. ROSENBLUTH: No. Because - - -

9 JUDGE RIVERA: - - - make a finding regarding  
10 that rent?

11 MS. ROSENBLUTH: That specific question was  
12 addressed in Freeport Randall, and that came to a very  
13 different conclusion than did Regina Metro. So the facts  
14 of Freeport Randall from 1982 are directly on point here,  
15 and that case controls. So in - - -

16 JUDGE GARCIA: What if you entered a longer term  
17 lease before the effective date of HSTPA?

18 MS. ROSENBLUTH: So in that case, we agree that  
19 that would be a problem. So our argument is limited to  
20 leases that were executed after the effective date of the  
21 HSTPA. But yeah, just to go back to - - -

22 JUDGE GARCIA: That position, though, is not  
23 entirely consistent with Kingston's position, right? Both  
24 in the term of coverage and in lease enter - - - dates  
25 leased rent, right?

1 MS. ROSENBLUTH: With Kingston or with the  
2 interveners?

3 JUDGE GARCIA: Well, it seems like the lower  
4 courts were suggesting that that refund period was longer  
5 than the period that you say.

6 MS. ROSENBLUTH: Right. That's the  
7 misunderstanding of the lower court that was corrected by  
8 the Appellate Division. Because our position is that, in  
9 no event - - - and this is very clear under DHCR's  
10 regulations, in no event may a refund be ordered more than  
11 two years prior to the local effective date. So that date  
12 here would be August 1st, 2020.

13 JUDGE GARCIA: With the lease caveat as well?

14 MS. ROSENBLUTH: Correct. Correct.

15 JUDGE GARCIA: Is that in the lower court  
16 decisions?

17 MS. ROSENBLUTH: The caveat?

18 JUDGE GARCIA: About lease - - - the date lease -  
19 - -

20 MS. ROSENBLUTH: I don't think that specific  
21 issue was addressed.

22 JUDGE CANNATARO: And the lease caveat - - - just  
23 so I'm sure - - -

24 MS. ROSENBLUTH: Yeah.

25 JUDGE CANNATARO: - - - the lease has to post-

1 date the enactment of HSTPA?

2 MS. ROSENBLUTH: Correct.

3 JUDGE CANNATARO: So no lease is prior to 2019?

4 MS. ROSENBLUTH: Right.

5 JUDGE CANNATARO: That's when HSTPA - - -

6 MS. ROSENBLUTH: Right.

7 JUDGE CANNATARO: - - - was, right?

8 MS. ROSENBLUTH: And so the local - - - the sort  
9 of two-year - - - the outer bound of that two-year period  
10 would be August 1st, 2020.

11 JUDGE CANNATARO: Right.

12 MS. ROSENBLUTH: So assuming a one-year lease,  
13 that would be enact - - - I mean, entered into on August  
14 1st, 2019. So that would be after the enactment of the  
15 HSTPA.

16 JUDGE HALLIGAN: And so if there was a two-year  
17 lease - - -

18 MS. ROSENBLUTH: Correct.

19 JUDGE HALLIGAN: - - - I understand you're saying  
20 that would not be covered. But what would happen as a  
21 practical matter? Would there be some action that was  
22 taken and a property owner would have to come in and say, I  
23 have a two-year lease? How does that work?

24 MS. ROSENBLUTH: Sorry. How does what work - - -

25 JUDGE HALLIGAN: Okay. You - - -

1 MS. ROSENBLUTH: - - - exactly?

2 JUDGE HALLIGAN: I take it you were saying that a  
3 two-year lease would create a different concern - - -

4 MS. ROSENBLUTH: Yes.

5 JUDGE HALLIGAN: - - - because the lease would  
6 have been in effect before the - - -

7 MS. ROSENBLUTH: Yes.

8 JUDGE HALLIGAN: - - - enactment of HSTPA, right?

9 MS. ROSENBLUTH: Right.

10 JUDGE HALLIGAN: And so what is it that prevents  
11 the imposition of whatever the amount is to someone with a  
12 two-year lease as opposed to a one-year lease? How is that  
13 distinction actually made operationally?

14 MS. ROSENBLUTH: So I think what you're getting  
15 at is that this would take place in the context of  
16 adjudicating a fair market rent appeal?

17 JUDGE HALLIGAN: Yes. Exactly. Yes.

18 MS. ROSENBLUTH: Right. So - - - and so the  
19 tenant would file that fair market rent appeal - - -

20 JUDGE HALLIGAN: Yeah.

21 MS. ROSENBLUTH: - - - if that tenant had a two-  
22 year lease, and - - - then they would not be entitled to  
23 refunds of money paid prior to - - -

24 JUDGE HALLIGAN: So it would get sorted out in an  
25 individualized - - -

1 MS. ROSENBLUTH: Yes.

2 JUDGE HALLIGAN: - - - adjudication - - -

3 MS. ROSENBLUTH: Yes.

4 JUDGE HALLIGAN: - - - when brought by the  
5 tenant?

6 MS. ROSENBLUTH: That's right, yes. So - - -  
7 right. So just with respect to that issue, I just want to  
8 underscore that Freeport Randall directly controls, and  
9 Regina Metro does not apply for the reasons I explained.  
10 If there are no other questions on that, I would move  
11 forward to the next issue, which is the issue of whether  
12 the ETPA permits negative rent adjustments in the abstract.  
13 And so that issue, we think the Appellate Division got it  
14 right on the merits, but we actually don't think it has  
15 been preserved for this court's review. And I would just  
16 say that nowhere in their position - - - petition, nor at  
17 any other point before supreme court, did petitioners argue  
18 that, as a matter of statutory interpretation, the ETPA's  
19 reference to the term adjustment precludes downward  
20 adjustments. And in fact, when the interveners argued in  
21 Supreme Court that the ETPA does permit negative  
22 adjustments at page 524 of the record, Petitioners  
23 responded by calling that argument, quote, "irrelevant" to  
24 the litigation at page 2525, and did not address it on the  
25 merits. In any case, we do believe that negative

1 adjustments are indeed consistent with the plain text of  
2 the statute.

3 JUDGE SINGAS: But what is the purpose of a rent  
4 adjustment?

5 MS. ROSENBLUTH: What is the - - - it is to take  
6 into account costs and other relevant data that have - - -  
7 you know, that are prevailing in the intervening year and  
8 to set an appropriate level of adjustment for that year.

9 JUDGE GARCIA: Off the base rent, which is a fair  
10 market value rent, right?

11 MS. ROSENBLUTH: That's right.

12 JUDGE GARCIA: So you're really lowering the fair  
13 market value if you have a negative adjustment. And how  
14 can you do that on an adjustment basis?

15 MS. ROSENBLUTH: No. I don't think that's right.  
16 I think that - - -

17 JUDGE GARCIA: My fair market value base rent is  
18 1,000 dollars. Now you tell me I can only charge 985. How  
19 is my fair - - -

20 MS. ROSENBLUTH: No. So the - - - the - - - - -  
21 -

22 JUDGE GARCIA: - - - market value 1,000 dollars?

23 MS. ROSENBLUTH: - - - the negative fifteen  
24 percent number, I believe, would be adjusted downward from  
25 whatever the previous rental agreement specified, not

1 necessarily as adjusted by the fair market rent guideline.

2 JUDGE CANNATARO: It's not an adjustment to the  
3 base rent that was established?

4 MS. ROSENBLUTH: No. I believe that the annual  
5 adjustment guideline operates on whatever the last  
6 prevailing rent was as agreed to in the rental agreement.

7 JUDGE GARCIA: But your view - - -

8 JUDGE RIVERA: Because that's the rent that  
9 exceeds what the council believes is the appropriate rent -  
10 - - what would have been the base rent? Is that what you  
11 mean?

12 MS. ROSENBLUTH: Okay. So I want to distinguish  
13 between the fair market rent guideline on the one hand and  
14 the annual adjustment - - -

15 JUDGE GARCIA: Right.

16 MS. ROSENBLUTH: - - - guideline on the other  
17 hand. It is true that - - - okay. So let me just take a  
18 step back to the fair market rent guideline - - - is - - -  
19 operates to sort of align rents in Kingston with an  
20 understanding of what a fair market rent is - - -

21 JUDGE GARCIA: Right.

22 MS. ROSENBLUTH: - - - at the time of when they  
23 opt into the statute. And then the annual adjustment  
24 guideline is sort of a year over year - - -

25 JUDGE GARCIA: But when you start, as I

1 understand it - - -

2 MS. ROSENBLUTH: Yeah.

3 JUDGE GARCIA: - - - here, people were all  
4 operating on the fair - - - on their base rent. That's  
5 year one, right?

6 MS. ROSENBLUTH: Right. But the base rent would  
7 - - - it would - - - it would be adjusted down to the fair  
8 market rent if they take the fair market rent appeal. And  
9 then - - - I mean, I - - -

10 JUDGE GARCIA: Right. But let's say you don't.

11 MS. ROSENBLUTH: Yeah.

12 JUDGE GARCIA: Your 1,000 dollars is your base  
13 rent. You take an appeal, you lose. That's your fair  
14 market value. Now it's your base rent. Year goes by. Now  
15 you go to the adjustment and you say negative fifteen  
16 percent. How is that not an adjustment of your fair market  
17 value?

18 MS. ROSENBLUTH: No. So I - - - I see what  
19 you're saying. I'm, to be honest, like, not exactly sure  
20 how - - - I have to think about that a little more. But I  
21 mean, the - - - what I would say - - -

22 JUDGE GARCIA: Rent control to me - - -

23 MS. ROSENBLUTH: Yeah.

24 JUDGE GARCIA: - - - seems like it's not a fair  
25 market value analysis. It's, here's your fair market

1 value. You might be able to increase 200 dollars. We're  
2 going to limit you to 50 dollars because you're  
3 artificially depressing rent to control them. You're  
4 resetting fair market value every year by a negative  
5 adjustment.

6 MS. ROSENBLUTH: No. The negative adjustment is  
7 just - - - it was the one-year adjustment.

8 JUDGE GARCIA: Right.

9 MS. ROSENBLUTH: And - - -

10 JUDGE CANNATARO: It may have something to do  
11 with how close in time the base rent was set and when the  
12 adjustment was done. But it does seem because - - -  
13 because of the closeness in time and because of the  
14 severity of the adjustment, downward adjustment, it goes  
15 below what had - - - what had been established as the fair  
16 market value rent.

17 JUDGE GARCIA: I mean, can New York City say,  
18 this year's adjustment is minus fifty percent?

19 MS. ROSENBLUTH: I mean, it would have to depend  
20 on the data that they considered. I mean, if the - - -

21 JUDGE GARCIA: On a case - - - would it be a  
22 case-by case-basis or could they do an across the board?  
23 We looked at the data and the rent. I mean, what data was  
24 considered here?

25 MS. ROSENBLUTH: Well, so I want to be clear that

1 that issue is very clearly not before the court.

2 JUDGE GARCIA: I understand - - -

3 MS. ROSENBLUTH: But - - -

4 JUDGE GARCIA: - - - that argument. But - - -

5 MS. ROSENBLUTH: But there was all - - - I mean,  
6 the statutory data under ETPA 4(b) was indeed considered -  
7 - -

8 JUDGE GARCIA: That fair market value had  
9 decreased by fifteen percent. What's the basis for a  
10 decrease in fifteen based on the cost to landlord?

11 MS. ROSENBLUTH: Well, that number - - - again,  
12 that - - - the rationality of that number is not before the  
13 court. We're only talking about whether the - - - in the  
14 abstract, the concept of a negative rent adjustment is  
15 permissible.

16 JUDGE CANNATARO: Yeah.

17 MS. ROSENBLUTH: And I think, based on the  
18 statutory text, the - - -

19 JUDGE GARCIA: So under your view, when,  
20 hypothetically, would it be permissible?

21 MS. ROSENBLUTH: I'm sorry. Well, any time it's  
22 supported by the data.

23 JUDGE GARCIA: And what would the data have to  
24 show?

25 MS. ROSENBLUTH: It would have to show that costs

1           went down.

2                         JUDGE GARCIA: But my fair market rent is X,  
3           right? That's what people are willing to pay. That was  
4           what was established. That's my base rent. What cost  
5           could go down to decrease my fair market rent?

6                         MS. ROSENBLUTH: I mean, theoretically, the cost  
7           - - -

8                         JUDGE GARCIA: Cost adjustment - - - right.

9                         MS. ROSENBLUTH: I mean, theoretically, the cost  
10          of fuel could go down as it did during COVID. I mean, any  
11          number of costs could go down. Tax rates could go down as  
12          they did in some cases in this case. I mean,  
13          theoretically, if there was - - -

14                        JUDGE GARCIA: But could you apply that across  
15          the board if tax rates went down in one area?

16                        MS. ROSENBLUTH: Well, yes. I mean, that's how  
17          this is supposed to be done. You are supposed to do it on  
18          an across the board basis.

19                        JUDGE GARCIA: So doesn't that kind of suggest  
20          that going by things like tax rates in certain areas of  
21          town wouldn't - - - doesn't support a negative adjustment  
22          to your base rent?

23                        MS. ROSENBLUTH: Again, that question would be  
24          open for this court to decide in a future case. That's not  
25          the case that's - - - that's not the issue that's presented

1 here. The question that's presented here, to the extent  
2 that its presented at all, is merely a question of  
3 statutory interpretation and whether the word adjustment  
4 encompasses adjustments - - -

5 JUDGE RIVERA: So - - -

6 MS. ROSENBLUTH: - - - in either direction.

7 JUDGE RIVERA: - - - whether they could have - -  
8 - choose a negative number, not the actual number they  
9 chose here - - -

10 MS. ROSENBLUTH: Correct.

11 JUDGE RIVERA: - - - if it's preserved?

12 MS. ROSENBLUTH: Correct. Correct.

13 JUDGE HALLIGAN: But - - - I know your light is  
14 on, but do you have a position on the question of the right  
15 standard for the emergency declaration?

16 MS. ROSENBLUTH: We believe the Spring Valley  
17 standard continues to articulate the correct standard, yes.  
18 Unless there are further - - -

19 CHIEF JUDGE WILSON: Thank you.

20 MS. ROSENBLUTH: - - - questions, we ask the  
21 court to affirm. Thank you.

22 MS. KOBAK: Good afternoon, Your Honors. May it  
23 please the court. Marcie Kobak, Legal Services of the  
24 Hudson Valley, for interveners. I'll jump right back to  
25 8629 or Section 9(b) of the ETPA, which does not use the

1 words fair market value, nor actually the words fair market  
2 rent appeal that comes from the regulation. That provides  
3 for a tenant to apply for an individual adjustment to the  
4 initial legal regulated rent. This relates to the  
5 alternative argument we have presented, which, if this  
6 court accepted it, could avoid, thereby, questions of  
7 impermissible retroactivity because ETPA 8626 or Section 6,  
8 which I'm more used to the sections, provides that an  
9 initial legal regulated rent comes into existence on the  
10 local effective date, and then goes on to provide that that  
11 amount may be adjusted pursuant to ETPA 9(b).

12 Therefore, although my colleague was correct and  
13 the Appellate Division was correct that refund orders, if  
14 DHCR chose to analyze an individual case that way, could go  
15 back two years and be constitutionally permissible, that  
16 the only thing a rent guidelines board can do is guide  
17 DHCR, and the only thing that it can guide DHCR to do is to  
18 refund excessive rents paid after the local effective date.  
19 The record is replete with spikes in rents at particular  
20 times when regulation was being anticipated in 2019 and in  
21 2022. And it is entirely proper for a regulation to  
22 contemplate there may be attempts to thwart its purpose and  
23 to account for that in the effective dates and how the  
24 regulation operates. Everything the Kingston Rent  
25 Guidelines Board did here was in accordance with the

1 purposes of ETPA, which are to prevent hardship and  
2 displacement for tenants, which have been found to be  
3 legitimate legislative purposes repeatedly by both the  
4 Second Circuit and this court.

5 CHIEF JUDGE WILSON: Thank you.

6 MS. KOBAK: Thank you, Your Honors.

7 MS. CRUZ: Your Honors, I'd like to focus on the  
8 rent guidelines part of our argument.

9 JUDGE GARCIA: Could you first address the  
10 preservation point on the adjustment? The state is arguing  
11 as to the guideline concerning the rent rollback, that  
12 somehow we are precluded from arguing about the 4(b)  
13 factors. That's how I understand - - -

14 JUDGE GARCIA: What they're saying is, you never  
15 raised this issue below, and this court has no jurisdiction  
16 to - - -

17 MS. CRUZ: Yes.

18 JUDGE GARCIA: - - - hear it for the first time.

19 MS. CRUZ: We absolutely raised the statutory  
20 violation by the rent guidelines board in our amended  
21 petition. We raised it so well, Your Honor, that the  
22 supreme - - -

23 JUDGE GARCIA: Do you have a record cite for  
24 that?

25 MS. CRUZ: It's in the - - - I can provide you -

1 - -

2 JUDGE GARCIA: That's okay. We'll - - -

3 MS. CRUZ: - - - but - - -

4 JUDGE GARCIA: Okay.

5 MS. CRUZ: - - - the - - - we raised it so well  
6 that the supreme court annulled the guidelines, finding  
7 that they were inappropriate. And then when the state took  
8 a cross-appeal from the annulment of the guidelines by the  
9 supreme court, it was in the Appellate Division that we  
10 fully fleshed out the ETPA 4(b) argument. And in that  
11 context, this court certainly has the ability to review the  
12 full range of the arguments concerning these - - - the  
13 RGB's - - -

14 JUDGE GARCIA: The specific - - -

15 MS. CRUZ: - - - noncompliance with - - -

16 JUDGE GARCIA: - - - argument about the - - -

17 MS. CRUZ: - - - with the ETPA.

18 JUDGE GARCIA: The specific argument about the  
19 adjustment, where - - - that was raised in the trial court?

20 MS. CRUZ: It was raised generally as an  
21 allegation that the RGB did not comply with the ETPA.  
22 However, Your Honor, at the time that the amended petition  
23 was filed, we did not have the transcript of the actual RGB  
24 proceedings. That transcript was not provided by the state  
25 until they answered, and therefore, there was no

1 opportunity to then clearly make those arguments that they  
2 did - - -

3 JUDGE RIVERA: I'm a little - - -

4 MS. CRUZ: - - - not comply with the 4(b).

5 JUDGE RIVERA: I'm a little unclear. You're  
6 saying, until you had the transcript, you didn't know that  
7 there was a negative - - - that they - - -

8 MS. CRUZ: No.

9 JUDGE RIVERA: - - - had declared a - - -

10 MS. CRUZ: No. We - - -

11 JUDGE RIVERA: - - - negative adjustment? I'm  
12 unclear.

13 MS. CRUZ: Yes. We brought the amended petition  
14 to challenge the rollback. And we did contest it in the  
15 amended petition, and we did allege they violated, in  
16 enacting that rollback, ETPA provisions. What we did not  
17 do - - -

18 JUDGE RIVERA: What did you describe as the  
19 rollback?

20 MS. CRUZ: - - - is go through the - - -

21 JUDGE RIVERA: What did you describe as the  
22 rollback? What's this rollback? Have you described it?

23 MS. CRUZ: The fifteen percent.

24 JUDGE CANNATARO: The adjustment?

25 MS. CRUZ: Rent adjustment, yes.

1 JUDGE RIVERA: The negative.

2 MS. CRUZ: And they also, of course, contested  
3 the fair market rent guideline.

4 JUDGE GARCIA: The argument as to the adjustment  
5 was based on what?

6 MS. CRUZ: Was mainly based on the ETPA Section  
7 4(b), noncompliance, that the RGB failed to examine the  
8 factors that the ETPA requires in order to set any kind of  
9 an adjustment - - -

10 JUDGE CANNATARO: Oh, so your argument wasn't  
11 based on their author - - - their legis - - - statutory  
12 authorization to do that. You're just arguing that they  
13 did it incorrectly?

14 MS. CRUZ: That's correct.

15 JUDGE CANNATARO: So you agree then with the  
16 attorney general that they could do a downward adjustment  
17 under - - -

18 MS. CRUZ: No. No.

19 JUDGE CANNATARO: I - - -

20 MS. CRUZ: Because - - -

21 JUDGE CANNATARO: Then you lost me.

22 MS. CRUZ: Because you are correct that in the  
23 supreme court, the - - - the two-prong argument, one, that  
24 they didn't comply with the factors, and two, that our  
25 position is there is no provision in the ETPA for a

1 rollback. That second argument was fleshed out in the  
2 Appellate Division.

3 JUDGE HALLIGAN: But in the trial court, your  
4 reply brief references page 342 of the record in - - - in  
5 laying out where - - - I'm reading from page 3 of your own  
6 reply brief, where you made this argument to the trial  
7 court. And I think there that there is, in a header, a  
8 statement that decreases at lease renewal are not legal,  
9 and then a statement that reducing the rent by fifteen  
10 percent on renewal is outside the bounds of the ETPA. So  
11 is that the full treatment of the legal argument about the  
12 authority before the trial court? I take it it is because  
13 it's all that's in the reply brief.

14 MS. CRUZ: I mean, Your Honor, I - - -  
15 concededly, yes.

16 JUDGE HALLIGAN: I'm just trying to confirm if -  
17 - -

18 MS. CRUZ: Yes.

19 JUDGE HALLIGAN: - - - if I - - -

20 MS. CRUZ: - - - it was not fleshed out.

21 However, if you look at our briefing in the Appellate  
22 Division, it's a full briefing, and the Appellate Division  
23 at no point said that we had not preserved the arguments in  
24 the supreme court.

25 JUDGE GARCIA: But we have different rules than

1 the Appellate - - -

2 JUDGE CANNATARO: Yeah. We - - -

3 MS. CRUZ: Understood, Your Honor. But your - -  
4 - this court - - - as I also indicated in my reply brief,  
5 when the questions deal with statutory construction, this  
6 court can and has the authority to review it and make a  
7 determination because in this instance where it is so  
8 starkly evident that such an extreme unprecedented act was  
9 committed by the rent guidelines board, newly empaneled, to  
10 roll back rent to set a retroactive fair market rent  
11 adjustment - - -

12 JUDGE GARCIA: Part of why we have this  
13 preservation requirement is we have very limited fact-  
14 finding than other authority.

15 MS. CRUZ: Yes.

16 JUDGE GARCIA: So our general view is it's much  
17 better for the trial court and then the Appellate Division  
18 to flesh out that record so that we can review those  
19 findings.

20 MS. CRUZ: Understood. But clearly, the supreme  
21 court found that our presentation was sufficient to  
22 invalidate the guidelines - - -

23 JUDGE RIVERA: Can - - -

24 MS. CRUZ: - - - at the supreme court level.

25 JUDGE RIVERA: Can you respond to the argument

1 that Freeport, not Regina, controls?

2 MS. CRUZ: Uh-huh. I submit, Your Honor, that  
3 the entire argument about the two-year limitation on  
4 refunding any amount that is in excess of the, quote, "fair  
5 market rent" when a fair market rent appeal is filed, that  
6 is missing the point of our argument. We are not  
7 contesting DHCR's enforcement of the guideline. We are  
8 contesting that the guideline itself, the fair market rent  
9 guideline, was retroactive, improper, particularly because  
10 the start date and the lookback period goes back to January  
11 of 2019, a time when there was no rent regulation in  
12 Kingston, a time that predates the HSTPA, certainly it  
13 predates the local effective date, which is when the  
14 declaration was made.

15 JUDGE CANNATARO: It also predates COVID, doesn't  
16 it?

17 MS. CRUZ: It does, Your Honor. But I don't - -  
18 - I don't know whether the guidelines board was even  
19 considering that. And in fact, the ETPA, when it discusses  
20 fair market rent guidelines, there's nowhere in the statute  
21 that talks about a lookback period. Here, again, like the  
22 rollback, the - - - this RGB just literally invented a new  
23 procedure in the City of New York, where rent stabilization  
24 has been in effect since at least 1969 there was an RGB,  
25 there has never been a fair market rent guideline

1 established in this manner. And certainly, no rollback.  
2 It's the first time in the history of stabilization that a  
3 rollback was presented to these prop - - -

4 JUDGE RIVERA: The only question is whether or  
5 not they could do it, not whether or not they're - - -

6 MS. CRUZ: True.

7 JUDGE RIVERA: - - - the first to do it.

8 MS. CRUZ: And I know my light is on, and if I  
9 may just sum up, Your Honor - - -

10 CHIEF JUDGE WILSON: Sure.

11 MS. CRUZ: - - - that in terms of their ability  
12 to do it, I brief for you the many instances in the  
13 regulations that talk about increasing the rent as a  
14 reflection of the fact that it is not appropriate when you  
15 have evidence of rising cost in an inflationary economic  
16 environment, how could you logically impose a rent  
17 reduction of this form? And as Justice Garcia noted, the  
18 inconsistency between having a fair market rent and then  
19 immediately directing for a fifteen percent reduction, that  
20 is decreasing the fair market rent. It was a totally  
21 inconsistent, irrational determination by this rent  
22 guidelines board. And like the vacancy survey, Your  
23 Honors, we submit neither of those two governmental acts  
24 can be affirmed. They are irrational. They are  
25 prejudicial, and they are not data-driven. They were

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determined in a manner contrary to law. Thank you.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)



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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Hudson Valley Property Owners v. City of Kingston, No. 59 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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