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COURT OF APPEALS

STATE OF NEW YORK

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IN THE MATTER OF THE APPLICATION OF  
REGINA METROPOLITAN CO., LLC,

Petitioner-Respondent,

-against-

No. 1

NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL,

Respondent-Appellant,

- and -

LESLIE E. CARR and HARRY A. LEVY,

Intervenors-Respondents.

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20 Eagle Street  
Albany, New York  
January 7, 2020

Before:

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



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Appearances:

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Sharona Shapiro  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.  
2 The first appeal on this afternoon's calendar is appeal  
3 number 1, the Matter of Regina Metropolitan v. the New York  
4 State Division of Housing and Community Renewal.

5 Counsel?

6 MS. MURDUKHAYEVA: May it please the court.  
7 Ester Murdukhayeva for DHCR. May I please reserve two  
8 minutes for rebuttal?

9 CHIEF JUDGE DIFIORE: Two minutes?

10 MS. MURDUKHAYEVA: Yes.

11 CHIEF JUDGE DIFIORE: You may.

12 MS. MURDUKHAYEVA: Thank you. In the HSTPA, the  
13 legislature unambiguously directed DHCR to consider all  
14 available rent history in calculating a legal regulated  
15 rent and overcharge.

16 CHIEF JUDGE DIFIORE: Counsel, if we were to  
17 agree with the Appellate Division, and we were to conclude  
18 that the new law presents a sea change in terms of the  
19 overcharge calculation methodology, wouldn't the  
20 retroactive application of the new provisions work a  
21 fundamental hardship on the owners?

22 MS. MURDUKHAYEVA: Your Honor, the question of  
23 fundamental hardship or fairness, in the abstract, has  
24 never been a part of this court's constitutional inquiry.  
25 And in this case, the relevant changes in the HSTPA amend,



1 at most, what was known as the evidentiary portion of the  
2 four-year rule. And it is well-established that the  
3 legislature can change evidentiary rules and apply those  
4 changes to pending proceedings without triggering  
5 constitutional scrutiny at all.

6 JUDGE FAHEY: Well, isn't it correct that in 1997  
7 these amendments were added in, applied retroactively?

8 MS. MURDUKHAYEVA: That's exactly correct, Your  
9 Honor.

10 JUDGE FAHEY: So in other words, it's - - - the  
11 answer's yes, right?

12 MS. MURDUKHAYEVA: Yes.

13 JUDGE FAHEY: Yeah, so - - - so in other words,  
14 the rules were changed in 1997 to benefit one side. Now  
15 the legislature's made a policy decision to do the opposite  
16 thing, almost twenty years later. That's what we have  
17 legislatures for.

18 MS. MURDUKHAYEVA: And because these are  
19 evidentiary rules, these changes can be made without  
20 triggering the kind of constitutional analysis that - - -

21 JUDGE FAHEY: Well, has there ever been an  
22 instance where an evidentiary rule has been treated as a  
23 vested right?

24 MS. MURDUKHAYEVA: I'm not aware of any, Your  
25 Honor, and I think it is important to note - - -



1 JUDGE FAHEY: Is there any statutory or  
2 constitutional provision that you're aware of that would -  
3 - - could be relied upon? There are certainly statutory  
4 provisions; is there any constitutional provision, outside  
5 of the due-process clause which the Chief made reference  
6 to, that could be relied upon to support such a substantive  
7 due-process claim?

8 MS. MURDUKHAYEVA: Not that I'm aware of. I  
9 believe that some of the litigants in the other cases have  
10 raised arguments about the takings clause or contracts  
11 clause, but those arguments have not been raised here.

12 JUDGE STEIN: So as a practical matter, how far  
13 back does - - - if the HSTPA rules are effective  
14 retroactively, how far back do they go? I mean, how far  
15 back can - - - can DHCR or a court look in determining a  
16 rent overcharge question?

17 MS. MURDUKHAYEVA: Well, Your Honor, under the  
18 new law, the calculation begins with the last reliable rent  
19 from at least six years prior to the date of the complaint.

20 JUDGE STEIN: So could that be in 1969 when there  
21 was first federal regulation? Is that possible?

22 MS. MURDUKHAYEVA: I think it depends on the  
23 circumstances of the case. I would point this court to its  
24 decision in Partnership 92 LP, and in that case - - - that  
25 case involved the retroactivity of the 1997 amendments.



1 And in that case the complaint was originally filed with  
2 DHCR in 1987 and was still pending as an Article 78 in this  
3 court in 2008. And the court looked at the text of the  
4 1997 amendments and said the legislature plainly intended  
5 that these changes apply to cases that are pending, even if  
6 they had been pending for - - - I think the court used the  
7 word "inordinate" - - - for an inordinate period of time.  
8 And there's really - - -

9 JUDGE FAHEY: Well, the case law on that involved  
10 a case that was ten years old, didn't it?

11 MS. MURDUKHAYEVA: It was, and this case is as  
12 well.

13 JUDGE FAHEY: I forget the title, Park some - - -  
14 Spark Square, I'm not - - - I don't have the title off the  
15 top of my head, but - - -

16 MS. MURDUKHAYEVA: Well, in this case - - -

17 JUDGE STEIN: But in this case we're not talking  
18 about when the claim was brought and - - - and during that  
19 period of time. We're talking about going back maybe  
20 decades before any claim was brought. Isn't that a  
21 different question?

22 MS. MURDUKHAYEVA: I think that will depend on  
23 what is necessary to establish a reliable rent which is the  
24 - - - the starting point for calculating the overcharge.

25 JUDGE STEIN: So theoretically, it could go back



1 that far or farther - - - further.

2 JUDGE FEINMAN: So I want to focus. When you say  
3 it's an evidentiary rules, which part of the statute are  
4 you focused on, because there's many, many parts to the  
5 statute, and I don't know that all of them are so-called  
6 evidentiary rules.

7 MS. MURDUKHAYEVA: Well, Your Honor, the statute  
8 that the Appellate Division relied on is the pre-HSTPA  
9 version of 26-516(a)(2) and, in relevant part, that  
10 provided: "This paragraph shall preclude examination of  
11 the rental history of the" - - -

12 JUDGE FEINMAN: So you're talking about just in  
13 terms of the calculation method and in terms of what  
14 records you can use?

15 MS. MURDUKHAYEVA: Well, that was the basis of  
16 the Appellate Division's decision. What the Appellate  
17 Division held was not that DHCR was req - - -

18 JUDGE FEINMAN: But you don't think we have to  
19 look at this in a - - - in a holistic context of the whole  
20 scheme that's been set up by the new statute?

21 MS. MURDUKHAYEVA: Well, for purposes of this  
22 case, I think the question is how the amendments are  
23 relevant to the issues presented in this case. And in this  
24 case, they're really only relevant with respect to these  
25 evidentiary provisions about the scope of records that a



1 fact finder can consider in calculating the legal regulated  
2 rent and overcharge. So to the extent there are questions  
3 about the retroactivity of other portions of the HSTPA,  
4 those cases may be presented in different cases, but  
5 they're not presented here.

6 JUDGE FEINMAN: So you think we can start  
7 severing out different subdivisions and say this part's no  
8 good but this part's okay?

9 MS. MURDUKHAYEVA: Well, the facial validity of  
10 the new law is not at issue here. I think the question  
11 that is at issue is to what extent have the amendments  
12 affected the issues presented in this case and whether - -  
13 -

14 JUDGE FAHEY: Well, you're not arguing that the  
15 legislature can or cannot or is restricted to having a four  
16 or a six-year statute of limitation. Really the only  
17 question is whether it applies to pending claims.

18 Let me ask this. You know, since we're talking  
19 about statute of limitations and we're talking about  
20 commencement, and these claims were pending, all of these  
21 statutes - - - all of these claims here, though, are - - -  
22 are within the four-year statute of limitations. So going  
23 to six years is really not even an issue that's relevant on  
24 these facts; is that correct?

25 MS. MURDUKHAYEVA: That is correct, and - - -



1 JUDGE FAHEY: So that being the case, then the  
2 whole four or six-year thing is kind of irrelevant to these  
3 cases. It really doesn't matter. What really matter is  
4 the part that Judge Feinman was talking about which is  
5 what's the - - - if this lookback period is an evidentiary  
6 rule to govern - - -

7 JUDGE GARCIA: But if we find for you and we send  
8 you back, would you be entitled - - - and we say this is  
9 retroactive and it's okay, would you be entitled to six  
10 years of damages then, when you go back to the Appellate  
11 Division?

12 MS. MURDUKHAYEVA: Well, Your Honor, there is  
13 some jurisdictional issues with what has been preserved for  
14 this court's review. I think as we mentioned in our reply  
15 brief, DHCR would be willing to accept a limited remit for  
16 purposes of calculating the extended damages recovery  
17 period. And - - -

18 JUDGE GARCIA: But to my question, if you win and  
19 you go back, are you going to ask for six years' worth of  
20 damages?

21 MS. MURDUKHAYEVA: Well, if - - - if the relevant  
22 provisions apply retroactively, the tenants may be entitled  
23 to the six years of damages.

24 JUDGE GARCIA: So wouldn't that be relevant to us  
25 in deciding whether you're going to win here?



1 MS. MURDUKHAYEVA: No, Your Honor, because as  
2 Judge Fahey mentioned, these claims have always been  
3 timely, and legislatures can always extend damages - - -

4 JUDGE GARCIA: Yeah, but it's not only a six-year  
5 statute. It's different, right, what they did here. They  
6 could have said you had four years to bring this; now you  
7 have six. But that's not what the law really says, right?  
8 The law says you get six years' worth of damages, no matter  
9 when you bring the case, and you look back as long as you  
10 want to establish a reliable base rent.

11 So if you go back, I would think, if you're a  
12 good lawyer, you're going to say I'm entitled, under the  
13 new law, to six years of damages. It doesn't matter what  
14 the statute of limitations is really; the claim is timely,  
15 as you said. But I'm entitled to six years' worth of  
16 damages, and you can go back as far as you want to  
17 establish a base rent.

18 MS. MURDUKHAYEVA: Well, but a legislature can  
19 extend the damages recovery period for a claim that has not  
20 run. There is no vested right in having a particular  
21 damages recovery period.

22 JUDGE GARCIA: Right, but we're going back to  
23 relevancy here, not what can and can't be done, right? So  
24 isn't it relevant that it's six years?

25 MS. MURDUKHAYEVA: I don't think it is relevant



1 in this case. And I would also note that, for purposes of  
2 this case, even the extended the damages period would only,  
3 I think, for provide for four additional months of damages  
4 because of when these tenants moved in. So for purposes of  
5 this case, that extended damages period would only be, I  
6 think, four - - - four years and four months. But because  
7 - - - I see - - - I see that my time has expired. I'll  
8 reserve the rest for rebuttal. Thank you.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 Counsel?

11 MR. VERNON: Thank you, Your Honor. May it  
12 please the court. My name is Darryl Vernon, and with Yoram  
13 Silagy, we're representing the tenants, Leslie Carr and  
14 Harry Levy. May I reserve two minutes for rebuttal?

15 CHIEF JUDGE DIFIORE: Sir, you - - -

16 MR. VERNON: As a respondent. Okay.

17 CHIEF JUDGE DIFIORE: As a respondent, you are  
18 not entitled to rebuttal.

19 MR. VERNON: So I'd like to address some of the  
20 questions and get right to the applicability of the HSTPA.  
21 The argument that the owners have made that this is somehow  
22 a deprivation of rights, that the change in the laws have  
23 deprived them of rights is, A, not supported, for the  
24 reasons counsel has said, and second, is hypocritical.

25 Let's look back to various laws; Your Honor



1 pointed out some. In 1992, there were no luxury  
2 deregulation laws. Landlords bought buildings with rent-  
3 stabilized tenants, paid a price that reflected that fact,  
4 and then the next day or year they were able to deregulate,  
5 vacancy decontrol, and turn their buildings into something  
6 wildly more valuable.

7 And on the flip side of it, the tenants, who  
8 thought they were getting a stabilized apartment that they  
9 would keep, maybe forever and pass on, their rights changed  
10 drastically. But for neither - - -

11 JUDGE GARCIA: But forgive me if I'm wrong - - -

12 MR. VERNON: - - - one constitution - - - sorry.

13 JUDGE GARCIA: - - - on that, on your  
14 hypothetical. I'm in one of those buildings in '95, I have  
15 a two-year lease - - - and I just don't know the answer to  
16 this - - - am I entitled to have that lease renewed?

17 MR. VERNON: As a stabilized tenant?

18 JUDGE GARCIA: Yeah.

19 MR. VERNON: Of course.

20 JUDGE GARCIA: Under the old rules. I have a  
21 two-year lease.

22 MR. VERNON: You have a two-year rent-stabilized  
23 lease?

24 JUDGE GARCIA: Right.

25 MR. VERNON: You're entitled to have it renewed,



1 in all likelihood - - -

2 JUDGE GARCIA: You'd have to get - - -

3 MR. VERNON: - - - unless it's not your primary  
4 residence.

5 JUDGE GARCIA: So - - -

6 MR. VERNON: There are things that the landlord  
7 managed to get for twenty-five years of good legislation.

8 JUDGE GARCIA: Right, right. So in '97, when the  
9 new law comes into effect - - - the old new law - - -

10 MR. VERNON: Um-hum.

11 JUDGE GARCIA: - - - now they can deregulate when  
12 that lease is up in '97 - - - after the '97 effective date,  
13 now they can luxury - - -

14 MR. VERNON: The '93 - - -

15 JUDGE GARCIA: - - - deregulate.

16 MR. VERNON: '93, yes.

17 JUDGE GARCIA: I'm sorry, '93. So now that  
18 tenant who thought - - -

19 JUDGE FEINMAN: Assuming you had the income and -  
20 - -

21 MR. VERNON: Yes, yes, or - - -

22 JUDGE FEINMAN: - - - and all - - -

23 JUDGE GARCIA: Assuming - - -

24 JUDGE FEINMAN: - - - qualifications.

25 JUDGE GARCIA: Okay, thank you.



1 JUDGE FEINMAN: So it's not just any old lease  
2 that you can - - -

3 MR. VERNON: Understood. So let me - - -

4 JUDGE FEINMAN: Thank you.

5 MR. VERNON: Let me address, Judge Stein, your  
6 question about how far back could you go; is this just too  
7 unruly? The answer is no. And the reason is is that most  
8 all owners will have some reliable record, somewhere in the  
9 recent past, and if they don't, that means they never  
10 registered their building. Maybe they unlawfully  
11 deregulated apartments all over the place, but if that  
12 happened, then you don't always have to look back as far as  
13 you need to because this court, as far back as Thornton v.  
14 Baron, and in later cases, such as Grimm, held you have  
15 other formulas when you don't have a reliable record. And  
16 those formulas are fair. They give a stabilized rent based  
17 on what other stabilized rents are. You know, and in a  
18 case like this where you have J-51, where a lot of  
19 apartments were unlawfully deregulated, the tenants that  
20 left, relying on getting a lease that said they would  
21 deregulate - - -

22 JUDGE RIVERA: So under the new law, does DHCR  
23 have to construct an entirely new default formula?

24 MR. VERNON: No, I don't think they actually have  
25 to, but they - - - well, no, they won't - - -



1 JUDGE RIVERA: Why not?

2 MR. VERNON: They won't get to it as much. The  
3 reason I don't - - - first, I don't think they'll get to it  
4 because now the legislature has done what Justice Gische  
5 did in Taylor, and what courts were doing. So this isn't a  
6 sea change, the way I see it. And - - - and to some  
7 extent, the DHO was prescient in not using the rent lifted  
8 from an unlawfully deregulated lease. That should be a  
9 principle that is undoubtedly upheld through the courts,  
10 and now for sure with the HSTPA. But now you can look back  
11 for reliable record. So that's the most likely way of - -  
12 -

13 JUDGE RIVERA: The principle you're talking about  
14 is that you can't make it right if you depend on what is an  
15 unlawful base date.

16 MR. VERNON: That's right.

17 JUDGE RIVERA: That's your point. And that's, in  
18 essence, what - - - at least one of the things that the  
19 legislature was intending to make very clear, that one  
20 could no longer depend on what is an unlawful base date  
21 rent.

22 MR. VERNON: That's correct.

23 JUDGE RIVERA: Whether you can - - -

24 MR. VERNON: Yeah.

25 JUDGE RIVERA: - - - actually point to - - -



1 getting back to Judge Stein's question earlier, if you can  
2 actually point to, within the recent past, a reliable date,  
3 or as you're arguing, if you really can't do that, let DHCR  
4 develop their default formula, and you can work that way.

5 MR. VERNON: That is what I'm saying.

6 JUDGE RIVERA: Am I understanding you correctly?

7 MR. VERNON: That's exactly what I'm saying, yes.  
8 And - - - and that is a good solution. And in - - - and in  
9 cases where owners have proper records - - -

10 JUDGE RIVERA: Well, what are the limitations on  
11 DHCR for its default formula? Any?

12 MR. VERNON: The limit - - - yeah, there - - -  
13 they have a formula. They're - - - they're basic - - - the  
14 basic formula, which is similar to Thornton, is you take an  
15 average rent-stabilized rent of a comparable apartment on  
16 the base date. So that tenant gets a rent that is similar  
17 to other tenants.

18 Thornton formula is a little different; it was  
19 based on number of rooms and the lowest rent, but that's  
20 because in that case - - - we represented the tenants in  
21 Thornton - - - in that case there was more going on. There  
22 were a lot of unlawfully deregulated apartments.

23 But we say the same happens in J-51; there were a  
24 lot of tenants that did not know their rights. And those  
25 tenants that moved out, they're gone; they have no way to



1           come back. And the owners got tax benefits, got government  
2           benefits from this state for those apartments that they  
3           were supposed to regulate and didn't.

4                        JUDGE FEINMAN: I just want to understand  
5           something from your position. So do we, to reach the  
6           result that you want, have to in fact figure out whether  
7           the formula that was being used before the change in the  
8           law, whether by the DHCR or whether the formula, you know,  
9           that was articulated by Justice Gische and some members of  
10          the Appellate Division, do we have to figure out whether  
11          that pre-2019 change in the law is the correct formula in  
12          order to do a substantive due-process analysis?

13                      MR. VERNON: No. No, I don't think you do at all  
14          because regulations change - - -

15                      JUDGE FEINMAN: Why not?

16                      MR. VERNON: - - - all the time. Landlords got  
17          twenty-five years of regulations that got better and better  
18          for them, with MCIs and the like. And now it changed.  
19          They have no right to rely, just like the tenant - - -

20                      JUDGE FEINMAN: Well, elections have consequences  
21          - - -

22                      MR. VERNON: - - - in '93 didn't rely - - -

23                      JUDGE FEINMAN: - - - and certainly the law has  
24          changed. But the - - - the question is, when you change  
25          the law, have you done something that is particularly so



1 unfair to one side or the other?

2 MR. VERNON: I don't think that if you call it  
3 unfair to one side or another that's sufficient to mount a  
4 constitutional challenge to the law or say there's no due  
5 process. And that claim isn't before this court, quite  
6 simply. The issue here is just does the HSTPA apply. And  
7 the statutory language is the first thing you look to, and  
8 it says it clear as day. All of the case law from this  
9 court says you apply all sorts of amendments retroactively,  
10 clearly when they say they should be applied.

11 And the one thing I'd say about this case, this  
12 court does not have to get into the weeds of - - - which is  
13 where I thought Your Honor was going with calculating what  
14 our rent should be. I do think that the DHCR did see it  
15 correctly in many ways, but not completely, because they  
16 didn't do it under the HSTPA. Had they done it under the  
17 HSTPA, which I asked this court to remand, to have it done  
18 under the HSTPA, they would have done the part that says  
19 we're not going to use an unlawfully deregulated rent,  
20 we're not going to let a landlord get what they shouldn't  
21 have gotten with their J-51 tax benefits; we're going to go  
22 back and find a reliable record. All that was just what  
23 the HSTPA would say.

24 But there's more to the HSTPA. We, on appeal,  
25 have a claim pending. We are the ones with the overcharge



1 claim, not the DHCR. Since we have a claim pending, the  
2 HSTPA applies to us, and on a remand, our claim gets the  
3 HSTPA. And that means it gets a reliable record, fair  
4 enough, but there are some things we also get that we  
5 didn't get before.

6 Now, as part of an overcharge claim, we don't  
7 just pick out pieces of the HSTPA that we get; the  
8 mandatory legal fees apply. The lack of a longevity  
9 increase applies. There's different rules - - -

10 JUDGE WILSON: Yeah, but isn't that an argument  
11 for a different court and not for us? That's not here  
12 right now.

13 MR. VERNON: I think it's an argument for remand.  
14 Yeah, I - - - well, I would say this, Your Honor. I think  
15 a - - - a remand saying the HSTPA applies, we're not a  
16 court of first instance, we're not going to tell you how to  
17 apply it at the DHCR in this case, go ahead and apply it,  
18 that's what we have to live with. But I am - - -

19 JUDGE STEIN: What about treble damages?

20 MR. VERNON: - - - pointing out that I think it  
21 would give us certain other rights, and it would give us a  
22 right to mandatory fees, which are crucial in these cases.  
23 I know all the - - - sorry.

24 JUDGE STEIN: You didn't mention treble damages.

25 MR. VERNON: No.



1 JUDGE STEIN: Do you see any distinction between  
2 that and - - - and attorneys' fees, for example?

3 MR. VERNON: Oh, enormous distinction, and the  
4 main one is is that legal fees are now mandatory, and  
5 that's a big deal. They weren't before, and that also was  
6 a big deal.

7 JUDGE STEIN: Right, but before, right, let's  
8 just assume, and you may disagree with this, a tenant had  
9 to prove fraud in order to - - -

10 MR. VERNON: For treble?

11 JUDGE STEIN: Yes, right?

12 MR. VERNON: No, no, they didn't. They just - -  
13 -

14 JUDGE STEIN: Well, I'm sorry - - -

15 MR. VERNON: The landlord had to prove - - -

16 JUDGE STEIN: Willful.

17 MR. VERNON: - - - it wasn't willful.

18 JUDGE STEIN: Willfulness, right.

19 MR. VERNON: The landlord had to prove it wasn't  
20 willful.

21 JUDGE STEIN: The landlord - - -

22 MR. VERNON: On the landlord's burden. We  
23 actually think we did it. DHCR disagreed. I understand.

24 JUDGE STEIN: But my point is is that doesn't  
25 that - - - and going back to Judge Feinman's point, doesn't



1 that inter-relate with the retention of records and this  
2 new - - -

3 MR. VERNON: Oh.

4 JUDGE STEIN: Yes, and this new requirement that  
5 basically you have to retain your records - - -

6 MR. VERNON: No. No, I don't think it does - - -

7 JUDGE STEIN: - - - indefinitely.

8 MR. VERNON: - - - at all, because as the DHCR  
9 pointed out very well in their brief, there was a lot of  
10 case law, before the HSTPA, that would require the keeping  
11 of records, and one was the East West case; you need  
12 records to show that you really were regulated. The  
13 Cintron case; you would need records to prove that you did  
14 comply with an ongoing order. So no, I don't think it was  
15 a change at all. Before this court - - -

16 JUDGE FEINMAN: So I mean - - -

17 MR. VERNON: - - - there's no claim of lack of -  
18 - -

19 JUDGE FEINMAN: - - - I just want to be clear  
20 about this. So it's your position that it doesn't really  
21 matter what the legislature says about retaining records;  
22 landlords really need to keep their records forever and  
23 ever?

24 MR. VERNON: No. No, I'm not saying at that  
25 extreme. I'm saying that they needed to keep it for those



1 reasons is all I'm saying. And the other key thing is that  
2 no one in this case is complaining that they didn't have  
3 records. That's just not an issue here or in several other  
4 cases - - -

5 JUDGE FAHEY: Or Regina - - -

6 MR. VERNON: Sorry.

7 JUDGE FEINMAN: It's going to be specific to each  
8 case.

9 CHIEF JUDGE DIFIORE: I think - - -

10 JUDGE FAHEY: I'm sorry, Judge, I didn't mean to  
11 interrupt you. I had thought in this case that, in Regina,  
12 that - - - that they did present records that were beyond  
13 the four years.

14 MR. VERNON: Yeah, what I meant - - -

15 JUDGE FAHEY: So that wasn't really a problem  
16 here, though the broader problem, I see what Judge Feinman  
17 was saying in terms of - - -

18 MR. VERNON: That's exactly what I was saying.  
19 There's no problem here nor, I think, in many of the other  
20 cases.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. VERNON: Thank you for giving me extra time.

23 CHIEF JUDGE DIFIORE: Counsel?

24 MR. WELIKSON: Good afternoon, Your Honors. May  
25 it please the court. Niles Welikson for Regina



1 Metropolitan.

2 As Judge Difiore said, this is a major - - - and  
3 you asked, is this a sea change; this is a major sea  
4 change. It's not an evidentiary case. What it is is it  
5 changes the definition of the base date rent. The base  
6 date rent that was - - - definition that was in effect when  
7 this case was originally decided was the rent that's  
8 charged on the base date, which is four years prior to the  
9 filing of the complaint. And - - -

10 JUDGE FAHEY: However, let me ask this. The way  
11 I understand it is that what we're talking about is a rent  
12 - - - a base date rent that may be illegally or  
13 artificially inflated base date rent, and that was - - - as  
14 I had read the legislation, that was the rationale behind  
15 the push for this change in date. Would you agree that  
16 that's the rationale?

17 MR. WELIKSON: I honestly don't know what the  
18 rationale was for how they did it. They didn't talk about  
19 it.

20 JUDGE FAHEY: How about the argument that it's an  
21 artificially inflated base date rent and that you're not  
22 entitled - - - entitled to an illegal rent or an illegal  
23 market-based rent and the overcharge that results?

24 MR. WELIKSON: It wasn't an artificially or  
25 illegal rent because it was done in accordance with the law



1 that was in effect.

2 JUDGE FAHEY: Well, it's post-Roberts; I think  
3 that's - - - it's post-Roberts. So - - -

4 MR. WELIKSON: It's post-Roberts, so everything  
5 is - - -

6 JUDGE FAHEY: So let me finish the thought. So  
7 because it's a post-Roberts rent, it is therefore - - - if  
8 it's not illegal, it's an - - - an inflated market-based  
9 rent. I don't think - - - the facts seem to bear that out  
10 pretty consistently, and I think that's what you have to  
11 address before us here today.

12 MR. WELIKSON: Well, I think we also - - - we get  
13 into revisionist history. My client could have gotten the  
14 rent up to where it was by putting in more individual  
15 apartment improvements and things like that, but there was  
16 no need to do that because you were able to get the rent to  
17 a fair market rent just by reaching the 2,000-dollar  
18 threshold, which is what they did.

19 DHCR's brief talks about the unlawful  
20 deregulation and all that. It's - - - it's kind of ironic  
21 that they talk about unlawful deregulation when the  
22 deregulation was done pursuant to the Code that they in  
23 fact enacted, that went through the state Administrative  
24 Procedure Act. So there was nothing unlawful about  
25 anything that - - - that my client did.



1 I also want to get into the - - - the retroactive  
2 - - -

3 JUDGE RIVERA: Yes, but then Roberts corrects  
4 DHCR's error, by making clear what the proper plain  
5 interpretation is of the law, and so now the legislature  
6 says, well, given that that would have been an  
7 inappropriate, as Judge Fahey says, inflated rent, we're  
8 making it clear that, given - - - given the purpose of rent  
9 regulation, only the correct lawful rent, right, should be  
10 the base rent from which you work. You cannot work from  
11 something that is an error to begin with.

12 MR. WELIKSON: There are - - -

13 JUDGE RIVERA: How does that harm you in a way  
14 that would render a decision favorable to you from this  
15 court?

16 MR. WELIKSON: The way that harms me, that - - -  
17 that entire situation - - -

18 JUDGE RIVERA: Well, not you, your client.

19 MR. WELIKSON: Well, my client.

20 JUDGE RIVERA: Yes. Yes.

21 MR. WELIKSON: And it harms me too. I don't like  
22 to lose.

23 JUDGE FAHEY: He takes it personally; we  
24 understand.

25 JUDGE RIVERA: You're getting paid either way.



1 So how - - -

2 MR. WELIKSON: But I hate losing, so - - -

3 JUDGE FAHEY: Can't blame him for that.

4 JUDGE RIVERA: Don't we all?

5 MR. WELIKSON: Okay. So in any event, the - - -  
6 the Rent Stabilization Code was amended - - - Roberts was  
7 in 2009; the rent stabilization law was amended in 2010.  
8 It was amended in 2015. It had been amended six times  
9 prior to this new sea change of the law, and never did it  
10 touch on any kind of a Roberts situation.

11 In 2015, that would have been a pretty logical  
12 time to do it. They also could have done it in 2010.  
13 There was a bill before the legislature in 2010 - - -

14 JUDGE RIVERA: You mean it's just because it took  
15 time?

16 MR. WELIKSON: No, it's not because it just took  
17 time.

18 JUDGE RIVERA: Because it took time, you're - - -

19 MR. WELIKSON: I don't think that - - -

20 JUDGE RIVERA: - - - injured - - - injured?

21 MR. WELIKSON: No, I don't think - - -

22 JUDGE RIVERA: They should have done it within  
23 the first - - -

24 MR. WELIKSON: Well, we're injured - - -

25 JUDGE RIVERA: - - - legislative cycle?



1 MR. WELIKSON: Well, we're injured because you're  
2 talking about not following a law that was in effect that  
3 we relied upon. We - - - I don't know how - - -

4 JUDGE FAHEY: I thought that - - -

5 MR. WELIKSON: - - - anybody - - - sorry.

6 JUDGE FAHEY: You can correct me if I'm wrong but  
7 - - -

8 MR. WELIKSON: Um-hum.

9 JUDGE FAHEY: - - - I - - - I thought that the  
10 law changed because the politics changed. And when the  
11 politics changed, there was a legislative, a policy  
12 decision, and that's what changed the law, right? That's  
13 kind of one of those situations where before you had people  
14 that agreed with your point of view more, and now you have  
15 people that agree with the other point of view.

16 It's like Paul Simon said, one man's ceiling is  
17 another man's floor. And it seems to be that situation  
18 here where a policy choice was made as a result of election  
19 results. It's not the kind of thing that we get involved  
20 in. It's usually something that we're very reluctant to  
21 get involved in because those policy choices are a product,  
22 in a democratic society, of legislative action, not - - -  
23 not of court action.

24 MR. WELIKSON: I'm not talking - - -

25 CHIEF JUDGE DIFIORE: Well, to - - - to Judge



1 Fahey's point, prospectively, that's one thing. Talk about  
2 the retroactive application - - -

3 MR. WELIKSON: That's the problem.

4 CHIEF JUDGE DIFIORE: - - - and the effect of  
5 this.

6 MR. WELIKSON: I have no problem with what Judge  
7 Fahey said as far as prospectively is concerned. But when  
8 you get into changing the definition of the base date rent  
9 and going retroactively, there is a presumption against  
10 retroactivity as far as statutes are concerned. And they  
11 have to show that there is some kind of rational reason or  
12 basis for the statute to be applied.

13 JUDGE FAHEY: That's true where there's a taking,  
14 and - - -

15 MR. WELIKSON: I'm not saying taking; I'm saying  
16 it's more a due-process argument. I'm not really arguing -  
17 - -

18 JUDGE FAHEY: Go ahead.

19 MR. WELIKSON: - - - taking.

20 JUDGE RIVERA: Again - - -

21 MR. WELIKSON: Um-hum.

22 JUDGE RIVERA: - - - what is your injury, based  
23 on what the legislature did? I will differ slightly from  
24 Judge Fahey, in this view, which I think is closer to where  
25 you're trying to analyze this. I view Roberts as a



1           corrective of a misinterpretation of the law. The law is  
2           clear that these rents were not lawful, so the question is  
3           what do you do when you're moving from an erroneous rent to  
4           begin with?

5                     MR. WELIKSON: But there would be - - -

6                     JUDGE RIVERA: That's the corrective action we're  
7           talking about. But again, how are you injured when the  
8           legislature simply says we mean to correct this error?

9                     MR. WELIKSON: The legislature didn't say  
10          anything about Roberts. We don't know that the - - - I  
11          don't think the legislature was going after Roberts in  
12          particular. As Judge Fahey said, the big change here is  
13          the democrats took over. That's all that happened. And so  
14          they changed all the rules. Thirty-five years we've had  
15          the same rules. We've had a four-year rule and all that.  
16          And all of a sudden, we have this new rule.

17                    JUDGE WILSON: Well, we altered - - -

18                    MR. WELIKSON: Now - - -

19                    JUDGE WILSON: We altered the four-year rule in a  
20          series of cases like Thornton and Conason and Cintron,  
21          right?

22                    MR. WELIKSON: Correct.

23                    JUDGE WILSON: And couldn't you make the same  
24          argument, that is, that our decisions there violated the  
25          due-process clause of the federal constitution because you



1 had settled expectations in the four-year rule that we  
2 upended?

3 MR. WELIKSON: No, I don't think so. In those  
4 particular hearing cases, if you take Cintron, there's an  
5 order - - - there's a rent reduction order; it was still in  
6 effect. So if you - - - there you'd have - - - the tenant  
7 would have a right without a remedy if you didn't look  
8 back. It's the same thing with longevity increases that  
9 landlords were entitled to under the statute. The only way  
10 to do that would be to look back - - - there'd have to be  
11 the lookback.

12 Thornton is a fraud case. I'm never arguing that  
13 the - - - the court should not, you know, turn a blind eye  
14 to a fraud. But it's - - -

15 JUDGE WILSON: But you're then sort of making a  
16 distinction, on due-process grounds, between, let's say, a  
17 fraud case or an existing order and an illegal rent under  
18 Roberts.

19 MR. WELIKSON: I'm saying that Roberts - - -

20 JUDGE WILSON: Why are those different?

21 MR. WELIKSON: - - - is interpreted the statute a  
22 certain way, and it's unique - - -

23 JUDGE WILSON: Conclusive, a determinative way,  
24 not a certain way. That's the law.

25 MR. WELIKSON: Well, what it did is it said this



1 particular section of the Rent Stabilization Code is wrong.  
2 So there's going to be inequities either way. If you use  
3 the base date - - -

4 JUDGE RIVERA: Based on the plaintiff language of  
5 the statute, it's a corrective interpretation. And now  
6 you're - - -

7 MR. WELIKSON: Well - - -

8 JUDGE RIVERA: - - - trying to correct all the  
9 errors that flow from it.

10 MR. WELIKSON: It's - - - it's not going to be  
11 perfect. What I'm basically saying is you can have lots of  
12 situations. If you - - - if you're going to ignore the  
13 definition of the base date rent, which is rent charged on  
14 - - - on - - - on the base date, and if you're going to  
15 say, well, every single time a new case comes out that  
16 interprets the law a different way, then you're going to go  
17 beyond the four years; that's not the law. It's - - - you  
18 shouldn't have a situation - - - it just seems to me it  
19 doesn't - - - not - - - it doesn't make any sense that,  
20 time and again, that you're just going to go ahead and say,  
21 oh, here's another thing that happened - - -

22 JUDGE RIVERA: Could the legislature - - -

23 MR. WELIKSON: - - - let's go beyond.

24 JUDGE RIVERA: Could the legislature have chosen  
25 another way to take corrective action, or is your position



1 that you can never correct - - -

2 MR. WELIKSON: No, they can.

3 JUDGE RIVERA: - - - the erroneous base rent?

4 MR. WELIKSON: No, I think that they can, but I  
5 think they can prospectively. The only problem I have, and  
6 my only argument here - - -

7 JUDGE RIVERA: So explain to me - - -

8 MR. WELIKSON: - - - is a retroactive application  
9 of it.

10 JUDGE RIVERA: Explain to me how that would work.

11 MR. WELIKSON: If somebody files a complaint on  
12 or after June 14th, 2019, then you use the HSTPA, whatever  
13 happens happens. But that's not what happened. This is a  
14 complaint that was filed in 2009, two weeks after Roberts.  
15 We're litigating it for - - - for ten years now. This case  
16 should have been over years ago.

17 JUDGE WILSON: But you're really arguing, I  
18 think, is that Roberts shouldn't have retroactive  
19 application, Roberts.

20 MR. WELIKSON: No, I'm not arguing because - - -  
21 well, the Appellate Division has held that it is  
22 retroactive. I don't agree with that, but that's not  
23 really - - - I - - - I didn't make that argument here  
24 because it's not part of the record below.

25 I would love you to say Roberts is not



1 retroactive, but you know, I'll be pretty surprised if that  
2 happens. My main argument is, though, it's bad enough,  
3 from my perspective, that Roberts was made retroactive,  
4 because it did change the rules in the middle of the game.

5 Now here we have another situation where, ten  
6 years after this complaint is filed, again we're going to  
7 change the rules in the middle of the game. The due-  
8 process problem we have here is the fact that there was no  
9 way to know that this was going to happen. We would have  
10 litigated this differently, maybe we would have settled  
11 this case.

12 JUDGE FAHEY: So how do you respond - - -

13 MR. WELIKSON: A lot might have happened.

14 JUDGE FAHEY: Slow down; just one - - - let me  
15 get this out.

16 MR. WELIKSON: I'm sorry.

17 JUDGE FAHEY: How do you respond to the argument  
18 we brought up before to DHCR that in '97 there was pending  
19 litigation that was effected by the '97 changes? And why  
20 is this any different?

21 MR. WELIKSON: I'm glad you brought that up,  
22 Judge Fahey. There's - - -

23 JUDGE FAHEY: I can't remember the name of the  
24 case. I'm drawing a blank.

25 MR. WELIKSON: Mengoni, and Mengoni is favorable



1 to me.

2 JUDGE FAHEY: Um-hum.

3 MR. WELIKSON: Mengoni was a situation - - -  
4 that's what I wanted to get to. Mengoni, the - - - the  
5 1997 Regulation Reform Act said it applied to all pending  
6 cases, yet in Mengoni they said that it would not apply to  
7 a case that was brought prior to 1984, which is when the  
8 Rent Regulation Reform Act became effective. So - - -

9 JUDGE FAHEY: So - - -

10 MR. WELIKSON: - - - that doesn't make any - - -

11 JUDGE FAHEY: Do you want us to give you - - -

12 MR. WELIKSON: That, to me - - -

13 JUDGE FAHEY: Do you want us to go back fourteen  
14 years then?

15 MR. WELIKSON: No, I don't want you to go back at  
16 all. No, what I'm saying - - - no, I don't want you to do  
17 anything different, and that's not my argument. But what  
18 I'm saying is: how come in - - - in the Mengoni case,  
19 where the Rent Regulation Reform Act of 1997 says it  
20 applies to all pending cases, however, this court said no,  
21 it's not going to apply to cases that are pre-1984.

22 So you have, sort of, the same situation here.  
23 Even though the statute says it applies to pending cases,  
24 this isn't a case that was brought pursuant to this new  
25 statute, and therefore it should not be treated



1 retroactively. I think - - -

2 JUDGE FAHEY: Okay. The - - -

3 MR. WELIKSON: - - - to be consistent with  
4 Mengoni - - -

5 JUDGE FAHEY: - - - the case I'm referring to is  
6 Partnership 92 LP v. New York State DHCR; it's 11 N.Y. 3d  
7 859 (N.Y. 2008). And that specifically applied to 1997  
8 amendments, retroactively, to a complaint that had been  
9 pending for ten years. That's right on point. It directly  
10 addresses the issue that's, I think, at the core of this,  
11 which is that, if it was done in 1997, no one complained  
12 then, why is it any - - - legally any different now? So  
13 look at that anyway. And that - - - I don't expect you to  
14 answer it. I - - -

15 MR. WELIKSON: Well, I'm pushing Mengoni because  
16 I do think Mengoni is very much on point with the  
17 situation, because Mengoni was - - - was a situation where,  
18 when that statute came out, just like this, it says it  
19 applies to pending matters, but yet the court said no, it's  
20 not going to apply; even though this case is pending, this  
21 case was - - - was filed prior to 1984, and the statute  
22 changed after that, so we're going to - - - we - - - we - -  
23 - this court basically said, well, it wasn't brought  
24 pursuant to this amended statute, and therefore we're not  
25 going to apply the - - - the new law to that.



1           So it's the same thing, and I think it's very  
2           analogous. And, you know, again, we have the presumption -  
3           - - they have to show some rational basis for  
4           retroactivity. I'm not arguing unconstitutionality.  
5           They've not shown any reason whatsoever, Your Honors.

6           CHIEF JUDGE DIFIORE: Thank you, counsel.

7           MR. WELIKSON: Thank you.

8           CHIEF JUDGE DIFIORE: Counsel, would you address  
9           the issue of the failure to demonstrate a rational basis  
10          for the retroactive application?

11          MS. MURDUKHAYEVA: Certainly, Your Honor.

12          CHIEF JUDGE DIFIORE: Thank you.

13          MS. MURDUKHAYEVA: I think the - - - what the  
14          legislature did in the HSTPA is really confirm the  
15          methodology that DHCR had used here.

16                 I'd like to go back to something Judge Wilson  
17          said. He referenced the cases of Thornton, Cintron, Grimm.  
18          I think all of those cases stand for the proposition that  
19          the evidentiary four-year rule was never intended to  
20          eviscerate the substance of protections of the rent  
21          stabilization law. The only vested right that I heard  
22          Regina Metropolitan refer to is, I think, what they call a  
23          right to charge the date - - - to - - - to collect rents  
24          based on the base date rent, no matter whether that base  
25          date rent was a product of illegality. And it certainly



1 was the product of illegality here pursuant to Roberts.

2 I'd also like to address Mengoni because I think  
3 that case squarely does not apply here. The reason why  
4 1984 is an important year is that that was the year DHCR  
5 was created. And that was the year that 26-516 was first  
6 promulgated. It is true that complaints brought prior to  
7 that year were not brought prior to 26-516 because that  
8 statute did not exist. Mengoni said nothing about the  
9 application of the 1997 amendments to cases brought between  
10 1984 and 1997, where all - - - all that the 1997 amendments  
11 did was just amend a pre-existing statute like they did  
12 here.

13 The last thing I would like to address is just to  
14 clarify the scope of the relief that DHCR seeks here. We  
15 think that this court can affirm DHCR's order or, in the  
16 alternative, issue a limited remand for purposes of  
17 recalculating the extended damages period. We think the  
18 methodology complies with the HSTPA fully.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MS. MURDUKHAYEVA: Thank you.

21 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal and Leslie E. Carr and Harry A. Levy, No. 1, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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