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HSTPA: NY's New Housing Laws and COVID-19 Related Matters

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The Housing Stability and Tenant Protection Act of 2019 (HSTPA)

I. History of Rent Regulation

a. Historically, there have been two mechanisms that regulate affordable housing under New York Law:
   i. (1) rent control; and
   ii. (2) rent stabilization.
      1. This regulatory scheme over the City's affordable housing stock can be traced back to before the end of World War II when the federal government imposed rent freezes.
      2. In 1942, to counterbalance inflationary pressures caused by the nation's war machine, President Franklin D. Roosevelt signed the Emergency Price Control Act ("EPCA") into law which froze New York City rents.
      3. Following the normalization of the economy after the end of World War II, the federal government allowed the EPCA to naturally expire, and enacted the Federal Housing and Rent Act of 1947 ("FHRA") to take its place.

II. Rent Control

a. Under the FHRA, the rents charged for apartments in New York City that were constructed prior to February 1, 1947, were made subject to rent control.
   i. This initial occupancy date of February 1, 1947, which was adopted by the City's Emergency Housing Rent Control Law of 1950, remains, to this day, the determinative factor in establishing rent-controlled housing accommodations in the City.

ii. Due to this ancient requirement, only about 1% of the City's housing accommodations are still presently subject to rent control.

III. Rent Stabilization

a. In 1969, because of a steep rise in inflation caused by the Vietnam War, which, in turn, led to a precipitous decline in local housing production, the City passed its first Rent Stabilization Law ("RSL").
   i. The RSL established limits on the rents that owners could legally charge tenants in buildings containing more than six apartments that were constructed after February 1, 1947, and before March 1969.
   ii. Upon enactment of the RSL, approximately 400,000 units became subject to rent stabilization.
   iii. In addition, the RSL created: (i) the Rent Guidelines Board ("RGB") to establish uniform applicable rental increases for renewal leases and new tenancies; (ii) the Conciliation and Appeals Board ("CAB") to handle tenant related complaints; and (iii) the Rent Stabilization Association ("RSA") to promulgate a rent regulation code.
   iv. Pursuant to the RSL, if owners failed to join the RSA and comply with its code, their units would be placed under the more stringent rent control regulation.
   v. Notably, the RSL adopted a Maximum Base Rent ("MBR") feature (Local Law 30 of 1970), which utilizes a mathematical formula – adjusted every two years to reflect market conditions – that computes a maximum base rent by taking into account the amounts required to operate the units while allowing for owners to realize a return of 8.5% on the assessed value of their units.
   vi. Rent increases under the MBR were capped annually at 7.5% and were applied until the MBR is reached.
   vii. In order to qualify for rental increases, owners had to provide essential services, keep the building free from major housing maintenance code violations, and invest required sums of rental income for operation and maintenance of their buildings.
      1. Thus, rent stabilization differs markedly from rent control in that rent stabilization provides a comprehensive rental adjustment framework governed by statutorily created bodies designed to readily adapt to fluctuations in the housing market.

b. *The Emergency Tenant Protection Act of 1974*
   i. As a result of continued mounting inflation from the Vietnam War, coupled with the deregulation of many units between 1971 and 1974 (approximately 300,000 rent controlled units and 88,000 rent stabilized

units), the New York City housing market in the early 1970s was rocked by sharp increases in rent.

ii. The State Legislature's response to rising public apprehensions caused by rapid rent increases and an inadequate supply of affordable housing was the enactment of the Emergency Tenant Protection Act of 1974 (ETPA).

iii. ETPA provided for a stabilization system in Nassau, Rockland and Westchester counties in municipalities which chose to adopt such regulations based on a housing emergency, meaning the vacancy rate was less than 5%.

iv. The Act also substantially amended the New York City Rent Stabilization Law, and ended the vacancy decontrol provisions of the 1971 legislation as they applied to rent stabilization.

    1. In New York City, the ETPA placed buildings with six or more units that were completed between March 11, 1969 and December 31, 1973 under rent stabilization for the first time.
    2. In addition, rent controlled units and rent stabilized units, in buildings with six or more units and deregulated by vacancy decontrol, were re-regulated and placed under stabilization. (The vacancy decontrol provisions for rent controlled apartments remain in effect and these units either become stabilized or decontrolled upon vacancy.)
        a. In 1984 the Omnibus Housing Act brought the whole system under state administration and significantly strengthened tenant protections through enforcement of rent registration with the Division of Housing and Community Renewal (DHCR).
        b. In 1993 the state legislature renewed rent regulation, but allowed landlords to deregulate vacant apartments that had a legal rent of over $2,000 if the apartment became vacant.
            i. Landlords used their ability to raise rents by making improvements to apartments to get the rent above the threshold after vacancy.
            ii. In 1997, new law made this even easier to deregulate by raising the "vacancy bonus" (the amount a landlord is allowed to raise rent on a vacant apartment) to 20%. (i.e., this means that if a tenant paying $1,000 vacates her apartment, the maximum rent automatically becomes $1,200, and the landlord just needs to do enough renovations to raise the rent to $2,000 to deregulate the apartment.

The apartment doesn't even need to actually rent for over $2,000 to qualify for deregulation).

1. In the subsequent years, hundreds of thousands of apartments were deregulated.
    a. In 2003, Legislature simply extended sunset provisions until 2011.
    b. The "preferential rent" loophole was created under this 2003 renewal.
    c. In 2011, Governor Cuomo extended the rent laws securing some minor pro-tenant amendments.

IV. HSTPA

a. The sunset provisions that extended affordable housing protections—which can be traced back to World War II—to the roughly one million apartments within New York City covered by the Rent Stabilization Law of 1969 and Emergency Tenant Protection Act of 1974 (collectively, the RSL), were set to expire on June 15, 2019.
    i. Therefore, it came as no surprise that Gov. Andrew Cuomo signed the Housing Stability and Tenant Protection Act of 2019 (HSTPA) into law on June 14, 2019, the day after it was passed by the Legislature, extending rent regulation statewide.[1]
    ii. However, the HSTPA, which also came on the heels of Mayor Bill de Blasio's recent pronouncements that New York City is in the midst of a major affordable "housing crisis," went radically beyond simply extending the prior protections afforded by the RSL.

V. HSTPA's Radical Changes to the Rent-Regulation Laws

a. The HSTPA totally abolished both high-rent and high-income and high-rent luxury deregulation, and repealed vacancy increases and longevity bonuses.
b. Beyond this, through the imposition of stringent caps, the HSTPA essentially eviscerated the rental increases from which owners previously benefited under the RSL for making Individual Apartment Improvements and Major Capital Improvements to their buildings.
    i. Effectively, the HSTPA allows owners to deregulate only under very narrow circumstances.
        1. Additionally, the HSTPA strictly limited the recovery of regulated apartments for the owner's own use to one unit insofar as the landlord can also show that it has an "immediate and compelling necessity." RSL §26-510(j).
        2. Previously, an owner could recapture their rent-regulated apartment if the owner or owner's immediate family member could

[1] See https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A08281&term=2019&Text=Y

demonstrate a good faith claim to occupy the unit as their primary residence.

a. What constitutes an "immediate and compelling necessity" under the HSTPA will be defined by future case law, but, for example, an owner's claim to be restored to possession to attend school in the City, which typically satisfied the prior law, will most likely not suffice under the current law.
    i. *See Zagorski v. Makarewicz*, 2019 WL 6109562 (Civ Ct Kings Co, Oct. 31, 2019), only reported case on this issue under HSTPA, and tenant prevailed, as the owner's mother and brother having a mental illness not found to be "immediate and compelling." (**See Exhibit 1**).

VI. Two Sides of the Same Coin

a. Given the seismic changes to New York's rent-regulated landscape produced by the HSTPA, tenants are now armed with much longer and sharper swords to combat landlord abuse, generally, in the form of strong-arming of buyouts and harassment.
    i. Tenant groups have championed the new law as leveling the playing field against their more powerful landlords who have much deeper pockets.
    ii. One of the main reasons for making it virtually impossible to deregulate under the HSTPA was to deter widespread illegal deregulation of rent-regulated housing, where owners simply falsified improvements that were made within their units and buildings in order to meet the required monetary deregulation thresholds.
        1. Invariably, this has led to the improper deregulation of thousands of rent-regulated units in the past few years alone, which has only worsened the affordable housing shortage crisis in the City.
        2. Conversely, landlord groups claim that the HSTPA will have disastrous financial consequences on New York's entire economy, and that the new law de-incentivizes apartment improvements by owners, which will predictably deter repairs, leading myriad units to fall into disrepair.
        3. By stripping owners with the ability to augment rents after making improvements in their units, many groups, including tenants, believe that owners will stop improving their apartments.
            a. Landlords allege that the private equity conglomerate, the Blackstone Group's, recent announcement that it is halting improvements on 11,000 units in the Stuyvesant Town and Peter Cooper Village housing complexes is a testament to this, and that more owners will be following suit.
            b. Further, landlords charge that rent-regulation does not assist affordable housing, but rather protects white, wealthy, older tenants, who acquired their units many years ago.

i. Notably, recent studies show that outside of Manhattan in areas where affordable housing is most needed, market rate rents closely mirror rent-regulated rents and therefore rent regulation does not actually protect affordable housing.
ii. In addition to finding the HSTPA wildly unpopular from a pecuniary standpoint, landlords believe that the law should be overturned on constitutional grounds.

VII. Rent Overcharge

a. In *Dugan v. London Terrace Gardens, L.P.*, 2019 NY Slip Op 06578 (1st Dept. 2019), which was decided by the Appellate Division, First Department in September 2019, a group of tenants brought a class action litigation against the landlord of a 10-building complex comprised of roughly 1,000 apartments in Manhattan, challenging the deregulation of hundreds of the complex's apartments. (**See Exhibit 2**).
    i. **Facts.** The London Terrace complex was originally constructed in 1931, and was thus subject to rent control, which generally applies to buildings built prior to Feb. 1, 1974, where the tenant took occupancy before July 1, 1971.
    ii. Under the 1974 Emergency Tenant Protection Act, upon vacancy, the rent controlled London Terrace apartments became subject to rent stabilization.
    iii. Therefore, since 1974, the London Terrace apartments constituted a blend of rent stabilized and rent controlled units.
    iv. However, in 1993, the landlord began deregulating apartments in the London Terrace complex pursuant to the Rent Regulation Reform Act of 1993, where the rents or the tenants' incomes exceeded the statutory thresholds allowable for deregulation.
    v. Subsequently, in 2009, the landlord's deregulation plan was shattered by the landmark decision by the Court of Appeals in *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270 (2009), holding that rent-regulated units could not be deregulated where the building owner received tax benefits for building rehabilitations under New York City's J-51 tax abatement and exemption program.
    vi. Further, the *Roberts* court ruled that apartments in buildings receiving J-51 benefits needed to be registered with the State Division of Housing and Community Renewal (DHCR), and were covered by rent stabilization for, at the very least, during the period that the owner continued to receive these tax-exempt benefits.

vii. On July 1, 2003, the London Terrace had already deregulated close to 100 apartments within the complex when it began receiving J-51 benefits in connection with qualifying improvements.

viii. Despite the receipt of such benefits, the owner failed to revert the myriad units that it had deregulated back to rent-regulated status, and in fact, continued to deregulate units during the period that the J-51 benefits were still being conferred, did not register the units with DHCR, and failed to adhere to the rent laws in calculating the legal rents for the units.

ix. Shortly after *Roberts* came down, a group of London Terrace tenants consolidated their cases into a certified class action lawsuit against the landlord seeking, *inter alia*, a declaration that their units were subject to rent regulation, and money damages for rental overcharges. See also *Maddicks v. Big City Properties*, 2019 NY Slip Op 07519 (2019) (holding that tenants' group suit seeking damages for illegal rent overcharges against landlord may be asserted as class action).

x. In defense, the landlord maintained that *Roberts* could not be applied retroactively to apartments that it deregulated pre-*Roberts* because it would offend notions of due process, as it in good faith relied on the interpretation of the relevant prior statutes permitting deregulation.

1. **Holding.** The *Dugan* court upheld the lower court's decision finding that *Roberts* is to be applied retroactively in rental overcharge cases in accordance with *Gersten v. 56 7th Ave.*, 88 A.D.3d 189 (1st Dept. 2011), and its progeny, because *Roberts* simply interpreted a statute that had been in effect for a number of years, and did not establish a new principle of law.
2. Since *Gersten*, the First Department has categorically rejected due process challenges to the retroactivity of *Roberts.* See *Gurnee v. Aetna Life & Cas. Co.*, 55 N.Y.2d 184, 192 (1982), cert. denied 459 U.S. 837 (1982) (where Court of Appeals retroactively applied a judicial decision rejecting the Insurance Department's interpretation of the statute, ruling that a judicial decision construing the words of a statute … does not constitute the creation of a new legal principle); see also *Barklee Realty Co. v. Pataki*, 309 A.D.2d 310, 311 (1st Dept. 2003) (internal quotation marks omitted), appeal dismissed 1 N.Y.3d 622 (2004), lv. denied 2 N.Y.3d 707 (2004); *Matter of St. Vincent's Hosp. & Med. Ctr. of N.Y. v. New York State Div. of Hous. & Community Renewal*, 109 A.D.2d 711, 712 (1st Dept. 1985), aff'd 66 N.Y.2d 959 (1985); *Matter of Kass v. Club Mart of Am.*, 160 A.D.2d 1148 (3d Dept.

1990); *Jonathan Woodner Co. v. Eimicke*, 160 A.D.2d 907 (2d Dept. 1990).

a. Under the prior law, the First Department frequently limited the review of the rental history to the four-year period preceding the filing of the overcharge complaint, while seldom permitting additional information that was necessary in deciding overcharge cases. *Grimm v. New York State Division of Housing and Community Renewal*, 15 N.Y.3d 358, 912 N.Y.S.2d 491 (2010); see also *Raden v. W 7879*, 164 A.D.3d 440 (1st Dept. 2018), lv. granted — N.Y.3d — (2018); *Matter of Regina Metro. Co. v. New York State Div. of Hous. & Community Renewal*, 164 A.D.3d 420, 424 (1st Dept. 2018), appeal dismissed 32 N.Y.3d 1085 (2018), lv. granted — N.Y.3d — (2019).

b. *Dugan* resolved this split, ruling that the HSTPA "now explicitly provides that a court 'shall consider all available rent history which is reasonably necessary' to investigate overcharges and determine the legal regulated rent." RSL §26-516[a] and [h].

c. In so ruling, the prior four-year lookback period was eviscerated and replaced with an *ad infinitum* lookback.

d. Specifically, the *Dugan* court highlighted the following comprehensive set of collective records that may be examined in determining legal rents and overcharges:

i. (i) rent registration and other records filed with DHCR or other government agencies, *regardless of the date to which the information refers*; (ii) orders issued by government agencies; (iii) records maintained by the owner or tenants; and (iv) public records kept in the regular course of business by any government agency. (emphasis added).

b. Accordingly, the *Dugan* court remanded the matter back to the lower court for purposes of determining the legal regulated apartment rents and the methodology for calculating the statutory damages from six years (CPLR 213-a) prior to the commencement of the suit.

i. **Impact.** Pursuant to *Dugan*, there was no limit on the examination of rent history to determine the legality of a rental amount charged or to prove that a registered rent is reliable under the HSTPA. RSL §26-516[h][i].[2]

[2] D'Angelo, Massimo. "Sweeping Reforms to Rent Overcharge Under New Rent Laws." *New York Law Journal* 13 Dec. 2019; https://www.law.com/newyorklawjournal/2019/12/13/sweeping-reforms-to-rent-overcharge-under-new-rent-laws/.

ii. Tenants were entitled to review DHCR rent registrations going back to 1984, as far back as DHCR maintains such registrations, along with all other available historical rent records without limitation.

iii. Moreover, any unexplained increases in the rent may render the registration unreliable.

1. This meant that even in instances where the landlord may have made the necessary improvements to hurdle, for example, the vacancy deregulation threshold under the prior laws, if the landlord is unable to produce the records substantiating those improvements, the rent will likely be deemed unreliable, exposing landlords to considerable statutory damages. See also *161 Realty Assoc., L.P. v. Tejada*, 2019 NY Slip Op 51864(U) (App. Term 1st Dept. 2019) (holding that apartments properly deregulated prior to HSTPA may not be subject to re-regulation).

a. Unfortunately, under *Dugan*, landlords that had actually properly increased their rents, but who did not maintain fastidious records regarding those increases, can be severely punished with giant penalties under the HSTPA.

VIII. *Regina*

a. On April 2, 2020, the New York State Court of Appeals issued a split decision (4-3) on a string of four rental overcharge cases in the *Matter of Regina Metro Co., LLC v. New York State Div. of Hous. & Community Renewal*, 2020 NY Slip Op 02127, holding that the retroactive application of the newly enacted rent overcharge provisions (Part F) of the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") offended traditional notions of substantial justice embodied in the Due Process Clause. (**See Exhibit 3**).

i. In particular, the *Regina* Court ruled that the HSTPA's mandate compelling owners to produce their *entire* rental history – from the beginning of time – in connection with defending against rental overcharge claims would be fundamentally unfair because owners only had a legal obligation to maintain such records for a period of four years under the prior law. *See* former Rent Stabilization Law ("RSL") § 26-516[g]; *see also* Rent Stabilization Code ("RSC") § 2523.7[b].

ii. Consequently, *Regina* has now lifted the chill that had been imposed over the purchase and sale of rent-regulated buildings under the HSTPA's radical expansion in opening the review of an apartment's entire rental history.[3]

IX. The Doctrine of Judicial Review

a. As Chief Justice of the Supreme Court of the United States, John Marshall enunciated over 200 years ago in the landmark case *Marbury v. Madison*, 1 Cranch 137 [1803], which established the doctrine of judicial review:

[3] D'Angelo, Massimo. "Regina Decision Nixes HSTPA's Rent Overcharge Retroactivity." New York Law Journal, 8 Apr. 2020. https://www.law.com/newyorklawjournal/2020/04/08/regina-decision-nixes-hstpas-rent-overcharge-retroactivity/.

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

b. Therefore, although the Legislature is charged with making new laws and modifying existing laws, it is equally axiomatic that it is within the sole province of the judiciary to void laws when they are found to be repugnant to the Constitution. *People v LaValle*, 3 NY3d 88, 128 (2004).

   i. *Contemporary Framework for Due Process Challenges*

      1. In *Landgraf v USI Film Products*, 511 U.S. 244 [1994], the Supreme Court molded a modern framework for analyzing retroactivity in the context of a due process challenge.
      2. Procedurally, while Landgraf's appeal dismissing her sexual harassment claims under Title VII of the Civil Rights Act of 1964 ("Title VII") was pending, the Legislature passed the Civil Rights Act of 1991 (the "Act"), which provided an additional avenue to recover compensatory and punitive damages not otherwise available under Title VII.
      3. However, the *Landgraf* Court ruled that in the absence of explicit congressional intent, the Act could not be applied retroactively because it would offend fundamental elements of "fair notice and repose" that are specifically protected under the Due Process Clause. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 [1976].
         a. Conversely, where the Legislature makes its intention clear, it aids in ensuring that the Legislature itself has determined that the benefits of retroactivity outweigh the potential for disruption and unfairness. *Landgraf, supra*, 511 U.S. at 268.

c. There are certain actionable retroactive claims which do not offend notions of due process such as those of sick plaintiffs who were unable to diagnose their personal injuries due to latency between exposure and the manifestation of their condition and child sex abuse victims. *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377 (2017) (**See Exhibit 4**); *see also Hymowitz v. Eli Lilly and Co*., 73 N.Y.2d 487 (1989); the New York Child Victims Act (NY State Senate Bill S2440).

A. ***Rational Basis Scrutiny***

a. It is well-settled that in order to comply with the requirements of due process, retroactive application of newly enacted legislation must be buttressed by "a legitimate legislative purpose furthered by rational means." *General Motors*

Corp. v Romein, 503 US 181, 191 [1992]; *see also Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717 [1984].

i. What is also well established is that legislative guidance regarding the scope of a statute carries a presumption of constitutional validity, and the party challenging that imprimatur bears the burden of showing the absence of a rational basis justifying application of the statute retroactively. *Ferguson v. Skrupa*, 372 U.S. 726 [1963]; *see also Williamson v. Lee Optical Co*., 348 U.S. 483 [1955].

1. Notably, the United States Supreme Court has made it crystal clear that it is much easier to satisfy the rational basis test over a statute's constitutional validity for prospective, as opposed to retroactive application because the elements of notice and surprise are naturally dispensed with. See *Pension Benefit Guaranty Corporation, supra, 467 U.S. at 730.*

d. The Court of Appeals in the *Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 70 N.Y.2d 451 (1987), denoted specific factors to be utilized when it analyzed a taxpayer's due process challenge seeking retroactive eligibility for a § J-51 tax exemption based upon an amendment to the tax code.

i. Specifically, the *Replan* Court noted that when evaluating the legislation under rational basis scrutiny, the court needed to determine whether retroactive application was "harsh and oppressive," utilizing a balancing of the equities test. *People ex rel. Beck v Graves*, 280 N.Y. 405 (1939); *Holly S. Clarendon Trust v State Tax Commn.*, 43 N.Y.2d 933 (1978).

1. The most important factors in this balancing test are the forewarning as to the change in the legislation, the reasonableness of reliance on the old law, and the length of the retroactive period, the more excessive of which will help tip the scales towards securing repose. *U.S. v. Hudson*, 299 U.S. 498 [1937]; *Matter of Lacidem Realty Corp. v Graves*, 288 N.Y. 354 (1942); *Matter of Chrysler Props. v. Morris*, 23 N.Y.2d 515 (1969).

B. ***Regina*'s Procedural History**

a. At the time when the Court of Appeals granted leave in the four rental overcharge cases consolidated under *Regina*, the RSL required that absent a showing a fraud, an overcharge claim would be calculated through utilization of the rent charged on the date four years prior to the filing of the overcharge complaint. *Grimm v. New York State Division of Housing and Community Renewal*, 15 N.Y.3d 358 (2010).

i. This four-year period over which the "base rent," together with applicable legal increases set by the Rent Guidelines Board was

calculated became known as the "lookback period," and the difference between the rent that an owner was legally permitted to charge and the rent actually charged established the overcharge. Under the previous law, review of the rental history prior to the four-year lookback period was prohibited unless a tenant showed fraudulent conduct on the part of the owner.

1. While the appeals on the *Regina* cases were pending at the Court of Appeals, the New York State Legislature enacted the HSTPA which implemented sweeping changes to the RSL, especially with regard to Part F, *inter alia*, extending the statute of limitations for rental overcharge cases from four to six years, altering the method for establishing the legal regulated rent for overcharge purposes, and radically expanding the nature and scope of owner liability in rent overcharge cases. *See* L 2019, ch 36, Part F.
2. In particular, the HSTPA permitted tenants to review the *entire* rental history for an apartment since the dawn of time when suing an owner for rental overcharge even though owners were only legally mandated to keep such records for four years under the prior statutory framework.

C. **Holding in *Regina***

a. It is undisputed that the Legislature's purpose in enacting the HSTPA was to mitigate the affordable housing shortage that it deemed rationally related to meeting that objective, but the Court of Appeals in *Regina* found a critical distinction in the due process analysis of prospective versus retroactive legislation.
    i. Despite the blistering dissent penned by the minority, the majority opinion in *Regina* ruled that to hold owners liable for conduct which occurred years prior to the enactment of the HSTPA would violate fundamental notions of substantial justice espoused in the Due Process Clause.
    ii. Specifically, such retroactive application of the overcharge calculation pursuant to the HSTPA rental overcharge amendments would substantially expand owners' financial liability for conduct that in certain instances occurred decades before or even earlier, well prior to the enactment of the HSTPA, for which the previous statutory scheme provided owners with clear repose.
        1. Thus, since this application to past conduct contravened the longstanding prevailing authority on retroactivity, the *Regina*

Court decided that the retroactive application of the HSTPA's rental overcharge amendments violated due process.

2. However, the Court of Appeals did not find that the prospective application of HSTPA's rental overcharge amendments were unconstitutional, meaning that prospectively, tenants' rental overcharge claims will be guided by the relevant amendments contained in Part F of the HSTPA.

D. **Post-*Regina***

a. The *Regina* decision will have significant reverberations for the real estate market going forward, as it will unfreeze the chill over the purchase and sale of rent-regulated buildings.

b. Since the ruling dispensed with a substantial universe of damages flowing from retroactive rental overcharge claims, purchasers can now buy rent-regulated buildings with some peace of mind and comfort in understanding the possible extent of their exposure.

i. Although the ongoing COVID-19 pandemic, which has killed hundreds of thousands of people and decimated global economies will surely have a deleterious impact on New York City's real estate market (some real estate experts opine that City's real property will be devalued by at least 30-40%) once the dust settles, the purchase and sale of rent-regulated buildings will resume.

1. Note that the Legislature may step in to impose some form of stopgap on the review of prior rental history records so that the retroactive review period passes constitutional muster, but at least for now, owners and purchasers of rent-regulated buildings can transact without fear of the unknown.

a. Some landlord groups believe that *Regina* is the first by the Court of Appeals in overturning the HSTPA, but this is likely wishful thinking.[4]

X. Practice Tips – Overcharge

a. Although *Regina* provided some much needed respite to owners, it's not all good news.

i. *Regina* has no prospective impact with respect to post-HSTPA rental overcharge claims.

1. As an owner, it is highly advisable to ensure that you immediately have a fastidious electronic recordkeeping system in place where all relevant renal history is saved *forever.*

[4] For the reasons articulated in my October 2, 2019 New York Law Journal article entitled "Can New Rent Laws Pass Constitutional Muster": https://www.law.com/newyorklawjournal/2019/10/02/can-new-rent-laws-pass-constitutional-muster/

a. If you don't, you are exposing yourself to potential significant damages in overcharge and statutory penalties in the future.
    i. Additionally, an owner that keeps bad records may also be creating a toxic asset that may be difficult, if not impossible, to sell later.
        1. If there are missing or incomplete records in the rent history, the riskier the asset becomes.

XI. HSTPA's Abrogation of No-Mitigation Rule

a. In 1995, the Court of Appeals in *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc*., 87 N.Y.2d 130 [1995], threw landlord tenant law into a tailspin when it held that landlords had no duty to mitigate their damages by re-letting the premises where the tenant abandons prior to the expiration of the lease (**See Exhibit 5**).
    i. Although *Holy Properties* dealt with a commercial lease, courts widely extended the application of this rule to residential leases as well.
        1. However, the recently enacted Housing Stability and Tenant Protection Act of 2019 (the "2019 Tenant Act"), which Governor Cuomo signed into law on June 14, 2019, has now completely abrogated the no-mitigation rule in the context of residential leases.

XII. Rationale Behind the No-Mitigation Rule

a. Generally, the law imposes upon a party who suffers an injury, as the result of a breach of contract, the duty to make reasonable efforts to minimize the injury. *Wilmot v. State of New York,* 32 N.Y.2d 164 [1973]; *Losei Realty Corp. v. City of New York,* 254 N.Y. 41 [1930].
    i. Notwithstanding this general principle of law, the *Holy Properties* Court ruled that where a tenant breaches a lease by vacating the space prior to termination and the lease entitles landlord to recoup rent following an eviction, the law allows the landlord to do absolutely nothing to re-let the space.
    ii. Moreover, while the landlord sticks its head in the sand, it can then still sue the tenant for all of the future rent becoming due under the lease through and including the termination date, along with attorney fees and costs to boot.
        1. Therefore, there is no surprise that New York's no-mitigation rule absolving landlords from mitigating their damages following a tenant abandonment of its leasehold before a lease's expiry – places it in the minority when compared to other jurisdictions – particularly since the rule promotes laziness, which the law abhors.

a. Although the rule appears, at least, on its face to be counterintuitive, the *Holy Properties* Court rationalized that it serves to impart stability and certainty into business transactions, especially in the context of real property, which is *sui generis*, thus requiring adherence to established precedents more so than in any other area of the law. *159 MP Corp. v. Redbridge Bedford, LLC*, — N.E.3d —, 2019 WL 1995526 (N.Y.), 2019 N.Y. Slip Op. 03526. (**See Exhibit 6**).

i. In other words, parties, who are free to contract as they please, will be held to the benefit of their bargain, with the language of their contracts being enforced in accordance with their plain language and meaning. *Vermont Teddy Bear Company Co, Inc. v. 538 Madison Realty Company*, 1 N.Y.3d 470 [2004].

XIII. Abrogation of Rule in Residential Arena

a. In promulgating the HSTPA, whose main purpose was to afford better protections to tenants in order to halt their increased displacement, the Legislature decided to completely nullify the no-mitigation rule espoused under *Holy Properties* in the residential setting.

i. The plight to minimize tenant evictions and their consequent widespread dispossession from their homes is presently at the forefront for the City given the current affordable housing crisis, so abrogation of the rule in residential leases is concomitant with the underlying purpose of the newly enacted legislation.

1. Section 4 of the 2019 Tenant Act amended the Real Property Law ("RPL") by adding a new section 227-e, which explicitly imposes upon landlords a duty to mitigate damages if a tenant vacates the premises in violation of the terms of the lease.

a. In particular, Section 227-e applies to any lease or rental agreement covering premises occupied for *dwelling* purposes.

i. Hence, while the statute applies across the board to all residential leases, inclusive of free market leases, it clearly does not apply to the ambit of the commercial universe, meaning that *Holy Properties* has only been provisionally repudiated by the 2019 Tenant Act, at least for the present.

1. Beyond this, the statute places the burden of proof to show that the landlord properly mitigated upon the landlord.
2. Further, section 227-e explicitly exempts any contractual lease provision in which landlord's duty to mitigate is absolved, as void for being contrary to public policy.
3. Critically, the statute provides that a landlord mitigating its damages must, "in good faith and according to the landlord's resources and abilities, take reasonable and customary actions to rent the premises at fair market value or at the rate agreed to during the term of the tenancy, whichever is lower."
    a. Under this statutory framework, the onus rests squarely on a residential landlord to take affirmative steps to re-let the abandoned space by, *inter alia*, engaging professional residential real estate brokers, marketing and advertising the space.

XIV. Practice Tips – Mitigation

a. The HSTPA gives broad deference to the factfinder to determine whether the landlord acted in good faith, and took reasonable steps commensurate with its subjective "resources and abilities" in mitigating.
    i. This leaves a vast gray area in the law which will be further developed as residential landlords and tenants fight over whether a landlord aptly mitigated.
        1. More importantly, however, the landlord will need to document all of its mitigation efforts since the statute has shifted the burden of proof to prove mitigation upon the landlord.
        2. Contrarily, the statute arms tenants, who vacate their leases before expiration, with a powerful weapon to combat against the landlord's claims for recovery in any subsequent collection cases in all instances where tenants vacate before their leases terminate.
        3. Much to their chagrin, the HSTPA also bars landlords from charging for residential application fees, limits the fees that can be charged for background checks to $20, and extends by five days a

tenant's time within which to pay rent before the landlord may serve a default notice (see RPL 238-a).

a. In light of the Legislature's penchant for progressive policy changes to the real property law for the purpose of further augmenting tenant protections, it will be interesting to see whether the no-mitigation rule is similarly voided in the commercial context through subsequent legislation.

XV. Broker Fees

a. § 238-a. Limitation on fees. In relation to a residential dwelling unit:

1. (a) Except in instances where statutes or regulations provide for a payment, fee or charge, *no landlord, lessor, sub-lessor or grantor may demand any payment, fee, or charge for the processing, review or acceptance of an application, or demand any other payment, fee or charge before or at the beginning of the tenancy, except background checks and credit checks as provided by paragraph* (b) of this subdivision, provided that this subdivision shall not apply to entrance fees charged by continuing care retirement communities licensed pursuant to article forty-six or forty-six-A of the public health law, assisted living providers licensed pursuant to article forty-six-B of the public health law, adult care facilities licensed pursuant to article seven of the social services law, senior residential communities that have submitted an offering plan to the attorney general, or not-for-profit independent retirement communities that offer personal emergency response, house-keeping, transportation and meals to their residents.

(b) A landlord, lessor, sub-lessor or grantor may charge a fee or fees to reimburse costs associated with conducting a background check and credit check, provided the cumulative fee or fees for such checks is no more than the actual cost of the background check and credit check or twenty dollars, whichever is less, and the landlord, lessor, sub-lessor or grantor shall waive the fee or fees if the potential tenant provides a copy of a background check or credit check conducted within the past thirty days. The landlord, lessor, sub-lessor or grantor may not collect the fee or fees unless the landlord, lessor, sub-lessor or grantor provides the potential tenant with a copy of the background check or credit check and the receipt or invoice from the entity conducting the background check or credit check.

2. No landlord, lessor, sub-lessor or grantor may demand any payment, fee, or charge for the late payment of rent unless the payment of rent has not been made within five days of the date it was due, and such payment, fee, or charge shall not exceed fifty dollars or five percent of the monthly rent, whichever is less.

3. Any provision of a lease or contract waiving or limiting the provisions of this section shall be void as against public policy.

b. **Application**: This law became effective on the date that the law was signed, June 14, 2019.

c. *See* attached New York State Department of State Guidance Opinion

d. City Councilmembers, led by Keith Powers and Carlina Rivera, introduced a package of bills in February 2019 to limit upfront rental costs.

e. One measure, sponsored by Powers, would cap at one month's rent the amount that renters can be obligated to pay in broker fees.

f. So far, this law has met vociferous opposition from the broker community and has not yet been passed.

g. There is a pending case regarding this broker fee issue which should be closely monitored.

XVI. Security Deposits

a. Under the HSTPA, which apply to current leases in effect and to both rent-regulated and free market units, landlords are not allowed to charge more than 1 month's rent as and for security in any lease.

i. The statute further provides that the entire security is to be paid (less any sums contained on an itemized statement detailing the deposit sums retained) returned to the tenant within 14 days *after* tenant vacates. (emphasis supplied).

1. There is a specific procedure under the new law for inspecting units (within reasonable time of notification by tenant to terminate, landlord to notify tenant in writing of tenant's right to inspect and tenant's right to be present during inspection) which should be followed in all cases because landlord bears burden that amount retained from security was reasonable.

a. There are statutory damages per the new law, and punitive penalties if the landlord is found to have willfully violated these security deposit provisions.

i. This new security deposit provision became effective on 7/14/19 (30 days after law passed), and applies "to any lease or rental agreement or renewal of a lease or rental agreement entered into on or *after* such date."

1. **Practice tip:** you're allowed to legally hold more than one month's security so long as the lease was entered into prior to 7/14/19.

1-a. Except in dwelling units subject to the city rent and rehabilitation law or the emergency housing rent control law, continuing care retirement communities licensed pursuant to article forty-six or forty-six-A of the public health law, assisted living providers licensed pursuant to article forty-six-B of the public health law, adult care facilities licensed pursuant to article seven of the social services law, senior

residential communities that have submitted an offering plan to the attorney general, or not-for-profit independent retirement communities that offer personal emergency response, housekeeping, transportation and meals to their residents:

(a) No deposit or advance shall exceed the amount of one month's rent under such contract.

(b) The entire amount of the deposit or advance shall be refundable to the tenant upon the tenant's vacating of the premises except for an amount lawfully retained for the reasonable and itemized costs due to non-payment of rent, damage caused by the tenant beyond normal wear and tear, non-payment of utility charges payable directly to the landlord under the terms of the lease or tenancy, and moving and storage of the tenant's belongings. The landlord may not retain any amount of the deposit for costs relating to ordinary wear and tear of occupancy or damage caused by a prior tenant.

(c) After initial lease signing but before the tenant begins occupancy, the landlord shall offer the tenant the opportunity to inspect the premises with the landlord or the landlord's agent to determine the condition of the property. If the tenant requests such inspection, the parties shall execute a written agreement before the tenant begins occupancy of the unit attesting to the condition of the property and specifically noting any existing defects or damages. Upon the tenant's vacating of the premises, the landlord may not retain any amount of the deposit or advance due to any condition, defect, or damage noted in such agreement. The agreement shall be admissible as evidence of the condition of the premises at the beginning of occupancy only in proceedings related to the return or amount of the security deposit.

(d) Within a reasonable time after notification of either party's intention to terminate the tenancy, unless the tenant terminates the tenancy with less than two weeks' notice, the landlord shall notify the tenant in writing of the tenant's right to request an inspection before vacating the premises and of the tenant's right to be present at the inspection. If the tenant requests such an inspection, the inspection shall be made no earlier than two weeks and no later than one week before the end of the tenancy. The landlord shall provide at least forty-eight hours written notice of the date and time of the inspection.

After the inspection, the landlord shall provide the tenant with an itemized statement specifying repairs or cleaning that are proposed to be the basis of any deductions from the tenant's deposit. The tenant shall have the opportunity to cure any such condition before the end of the tenancy. Any statement produced pursuant to this paragraph shall only be admissible in proceedings related to the return or amount of the security deposit.

(e) Within fourteen days after the tenant has vacated the premises, the landlord shall provide the tenant with an itemized statement indicating the basis for the amount of the deposit retained, if any, and shall return any remaining portion of the deposit to the tenant. If a landlord fails to provide the tenant with the statement and deposit within fourteen days, the landlord shall forfeit any right to retain any portion of the deposit.

(f) In any action or proceeding disputing the amount of any amount of the deposit retained, the landlord shall bear the burden of proof as to the reasonableness of the amount retained.

(g) Any person who violates the provisions of this subdivision shall be liable for actual damages, provided a person found to have willfully violated this subdivision shall be liable for punitive damages of up to twice the amount of the deposit or advance.

XVII. Legal Screening of Tenant Applicants

a. Under HSTPA, landlords can no longer refuse to rent to you if they find out you have a complicated tenant-landlord history, or are on a blacklist.
    i. This means that landlords can't base a tenant's rejection on a review of the L&T housing court records.
        1. **Practice Tips:** Utilize the following non-pretextual parameters
            a. Unsatisfactory references;
            b. Bad Credit;
            c. Bleak financial picture;
            d. Out-of-State evictions (nothing in the law says that you can't pull these records from outside of the State of New York; the same holds true with respect to finances)
            e. No verifiable source of income; and
            f. Criminal convictions/drug convictions/general illegal activity.

XVIII. The COVID-19 Pandemic: An Unmitigated Disaster

a. *Destruction in the Wake of COVID-19*
    i. On the scale of pandemics, the novel coronavirus, commonly referred to as COVID-19[5] – which is currently ravaging the globe – is unprecedented, and ranks among one of the worst in human history, not only in terms of its virulence, but in economic destruction as well.
        1. While investigations are still ongoing, there are conflicting theories regarding COVID-19's creation: (i) some reports indicate that the virus allegedly emerged from a seafood and poultry market in Wuhan, China, as was first reported in December 2019, or, alternatively (ii) that the pathogen was man-made in a Chinese lab in Wuhan, China.
            a. Since its discovery, the contagion has quickly spread throughout the world like a wildfire, over 365,000[6] people in its path. These figures are increasing prospectively around the world on a daily basis.
                i. According to recent reports from the U.S. National Institute of Allergy and Infectious Diseases, over

[5]On March 12, 2020, the World Health Organization ("WHO") announced the COVID-19 outbreak as a pandemic; http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic

[6]https://www.google.com/search?q=coronavirus+deaths&oq=coronavirus+deaths&aqs=chrome..69i57j0l4j69i60l3.3304j0j9&sourceid=chrome&ie=UTF-8 (Figures current through May 30, 2020).

200,000-240,000 Americans may be killed by the virus with millions being infected.

1. To date, 100,000 Americans have already died with approximately 30% of those deaths (23,282 deaths) occurring in NYC.[7]
    a. Clearly, NYC is, and continues to be, the epicenter of the COVID-19 Pandemic.

ii. While scientists hastily work towards developing a vaccine and antiviral drugs to combat COVID-19, world leaders in the countries afflicted by the virus have imposed strict governmental lockdowns, barred travel, closed courts,[8] blocked tourism, and employed social distancing measures in an effort to stop the rapid spread of the pathogen.

iii. As a result, in addition to the major human death toll, COVID-19 has crippled economies around the globe, as world leaders have enacted strictly mandated lockdowns and social distancing policies in an effort to slow down its transmission.

b. *Economic Disaster*

i. In the State of New York, Governor Andrew M. Cuomo issued a string of Executive Orders[9] shuttering schools, courts, and nearly all businesses, with only a select few "essential" businesses being permitted to remain open, such as grocery stores and pharmacies.

1. Most other states have issued similar governmental orders transcending all business sectors, deleteriously impacting the U.S. economy on all levels.[10]
    a. Presently, various states are beginning to slowly reopen businesses in phases so long as certain life safety metrics are satisfied.
2. This is the first time in our history where every single state in the Union has declared a State of Emergency.
    a. Per Executive Order 202.10: "Non-essential gatherings of individuals of any size for any reason (e.g. parties,

[7] https://www.nytimes.com/interactive/2020/05/24/us/us-coronavirus-deaths-100000.html

[8] On March 12, 2020, the Supreme Court of the United States announced its indefinite closure amidst the COVID-19 pandemic, its first disease-related closure since the 1918 H1N1 Virus; https://www.supremecourt.gov/

[9] https://www.governor.ny.gov/keywords/executive-order

[10] *See, inter alia,* https://www.gov.ca.gov/category/executive-orders/; https://www.flgov.com/covid-19/; https://gov.texas.gov/coronavirus; https://web.csg.org/covid19/executive-orders/

celebrations or other social events) are canceled or postponed at this time."

i. On Friday, May 22, 2020, Governor Cuomo issued Executive Order 202.33, which enlarged Executive Order 202.10's gathering ban by explicitly permitting gatherings of less than 10 people or more insofar as "social distancing protocols and cleaning and disinfection protocols required by the Department of Health ("DOH") are adhered to."

3. Similar business closures were adopted by other states across the country resulting in, among other things, a massive loss of jobs, an implosion of the healthcare system, and a precipitous debasing of the stock market, with a likely recession looming on the horizon.

a. Consequently, on Friday, March 27, 2020, President Donald J. Trump signed into a law the Coronavirus Aid, Relief and Economic Security Act ("CARES"),[11] a $2 trillion emergency relief bill seeking to stimulate the devastation of the United States economy in the wake of COVID-19.

c. *Comparisons with the 1918 H1N1 Virus*[12]

i. The last time that our planet has witnessed a contagion of this magnitude was a century ago during the influenza of 1918 (the "1918 H1N1 Virus"), often mischaracterized as the Spanish Flu.[13]

1. Like the 1918 H1N1 Virus, COVID-19 has brought New York City, the epicenter of global commerce, to a screeching halt, with eerily similar quarantining regulations being implemented.[14]

a. Although only time will tell, experts believe that many New York City industries will be destroyed forever, particularly the brick and mortar establishments that are unable to adapt their businesses to virtual platforms, including the City's midmarket restaurants,[15] and that

[11] https://www.congress.gov/bill/116th-congress/senate-bill/3548/text

[12] https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/pdfs/1918-pandemic-webinar.pdf; see page 19.

[13] "There was nothing Spanish about the supremely contagious disease; it was rampant among all Europe's combatant armies and countries, but under reported, due to military censorship, except in neutral Spain, where coverage was unchecked;" https://www.nytimes.com/2020/03/20/opinion/coronavirus-1918-flu-pandemic-new-york.html; *see also* https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/1918-pandemic-history.htm

[14] Wallace, Michael. *Greater Gotham: A History of New York City From 1989 to 1919*. Oxford UP, 2017.

[15] https://www.nytimes.com/interactive/2020/03/27/magazine/david-chang-restaurants-covid19.html

business interruption claims, along with bankruptcies, will continue to rise exponentially in the near term.[16]

XIX. Drafting COVID-19 Protocols for Residential Buildings

a. Invariably, the coronavirus disease has led NYC residential buildings to adopt rules and regulations regarding social distancing protocols and disinfecting and cleaning protocols in accordance with the Governor's Orders.[17]
    i. In fact, many policies enacted by buildings throughout the City have been equated to draconian rules that have turned buildings into prisons and fortresses.[18]
        1. Some buildings have introduced tougher rules than others, obsessively sanitizing everything – including doormen themselves – effectively creating moats to protect themselves from outsiders.
            a. But how much is too much when it comes protecting the life and safety of the building's residents?
                i. The answer is still unknown as scientists and researchers race to determine how the disease is transmitted and for long it can remain on surfaces.
                    1. Therefore, the more stringent policies that buildings employ, the better, until more definitive research on the transmission and life of the microbials that spread the virus are definitively determined.
                        a. Practice tip: When drafting your building's protocols, bear in mind that whatever policies are adopted, they should closely resemble, if not mirror, the effective extant governmental orders with regard to social distancing, disinfecting, cleaning, etc., and apply to *everyone equally* without exception.
    ii. The single most important guideline when drafting any governing documents – whether in times of emergencies or not – for buildings is to ensure that they are universally applied to all residents in the exact same

[16] https://www.economy.com/economicview/analysis/378872/Global-COVID19-Tracker-An-Economic-Counterpunch

[17] https://www.wsj.com/articles/new-york-residential-building-managers-scramble-as-everyone-shelters-at-home-11584362099

[18] https://nypost.com/2020/04/15/lockdown-rules-turn-co-op-buildings-into-fortresses-dorms/

manner in order to deflect against future claims of discriminatory treatment.

XX. Privacy Considerations

i. Privacy and Confidentiality Considerations During COVID-19

1. May a building legally notify its shareholders or unit owners that a resident has tested positive for COVID-19?

a. The simple answer is **no**.

i. Pursuant to the Americans with Disability Act ("ADA"), typically, flus and similar conditions that last for less than six (6) months do not fall under the definition of a disability. (*See* 42 U.S.C. § 12102(1)).

1. There might be certain complications related to COVID-19 that may qualify as a disability under the ADA, but out of an abundance of caution, due to medical privacy and confidentiality concerns, it is strongly advisable not to release positive test results.

a. This does not mean that the building should not notify the DOH, as well as the Centers for Disease Control and Prevention ("CDC").

b. What about disclosure of positive COVID-19 test results for a building's employees such as doormen, supers, and porters?

i. Despite the unknowns surrounding the disease and the research and data that seems to be changing daily, the private medical details of the building's employees should similarly be protected.

1. Obviously, to the extent that an employee does test positive for COVID-19, they must be quarantined and cannot return to the building until they no longer have the disease, and any areas that they came into contact with should be cleaned and disinfected in accordance with DOH guidelines.

XXI. Moving for Emergency Injunctive Relief Against Renegade Residents

a. There are some buildings that have a bad apple – the renegade resident who doesn't like to follow rules and who persistently engages in nuisance type conduct – and who in the process, endangers the life and safety of other fellow neighbors.

b. In order for buildings to ensure the life safety of their residents and employees during the COVID-19 pandemic, they may need to seek emergency injunctive relief against renegade residents.
    i. I obtained the first reported emergency injunction in NYC temporarily and preliminarily enjoining a renegade resident from continuing to violate the building's COVID-19 protocols, as well as the Governor's Orders against public gatherings, and made international news in the process. [19]
        1. *Drafting*
            a. First, all residential buildings should have formal written COVID-19 protocols and if not, they should have them drafted (preferably by counsel), as soon as possible.
                i. See sample COVID-19 building protocol (**See Exhibit 7**).
                    1. Once the protocols are completed, they should be distributed to all building residents by management, and posted in conspicuous places within the common areas (elevators, bulletin boards in lobby, etc.).
                        a. Practice tip: Now, while everyone is still quarantined at home due to the shelter-in-place orders, it is a great time to update a building's archaic governing documents to bring them current by allowing for virtual board meetings, annual meetings, etc.
            b. In the event that a shareholder or unit owner violates the building's COVID-19 protocols, it may become necessary to commence an emergency action to curb such violations in the interests of protecting the health and welfare of the community.
                i. See sample Summons, Complaint, together with emergency Order to Show Cause application with supporting papers seeking a temporary restraining order to preliminarily and temporarily enjoin a shareholder from violating a building's COVID-19 protocols. (**See Exhibit 8**).

[19] https://nypost.com/2020/04/10/musician-michael-seltzer-entertaining-guests-despite-nyc-lockdown-suit/; *see also* https://newyork.cbslocal.com/2020/04/15/coronavirus-social-distancing-violations-property-managers-court/; https://www.dailymail.co.uk/news/article-8229769/Trombonist-stars-accused-New-York-op-hosting-drug-fueled-parties-pandemic.html.

c. *Relevant Standard for Obtaining Injunctive Relief*

i. CPLR § 6301, states in full:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

d. *Nobu Next Door, LLC v. Fine Arts Housing, In*c., 4 N.Y.3d 839 (2005), is one of the most-oft cited cases on the standards for the grant of injunctive relief.

i. It is well-settled that in order to obtain preliminary injunctive relief: The party seeking a preliminary injunction must demonstrate a *probability of success on the merits*, *danger of irreparable injury in the absence of an injunction* and a *balance of equities in its favor* (*see* CPLR 6301; *see generally Doe,* 73 N.Y.2d at 750, 536 N.Y.S.2d 44, 532 N.E.2d 1272). (Emphasis supplied). (**See Exhibit 9**).

XXII. Conclusion

a. Although COVID-19 is still relatively nascent, the destruction that it has caused to human life and our economy is unprecedented.

i. Moreover, it has already begun to open the floodgates of litigation with regard to residential buildings.

1. Throughout our history, catastrophic events have led to litigation which has ultimately helped shaped new laws and legal doctrines as will COVID-19.

a. These catastrophic events will no doubt lead to legal significant modifications within the residential housing stock in NYC, as well as to the operation and management of residential housing.

66 Misc.3d 296
Civil Court, City of New York.

Michael ZAGORSKI, Petitioner,
v.
Bozena MAKAREWICZ, Respondents.

L & T 58268/2019
|
Decided October 31, 2019

Synopsis
Background: Landlord commenced holdover proceeding for possession of apartment for personal use. Tenant moved for discovery and for dismissal for failure to state a cause of action.

[Holding:] The Civil Court of the City of New York, Kings County, Zhuo Wang, J., held that failure of landlord to state in his notice of nonrenewal that there was an immediate and compelling necessity, as required by the Housing Stability and Tenant Protection Act (HSTPA), precluded landlord from maintaining holdover proceeding.

Proceeding dismissed; motion for discovery denied as moot.

West Headnotes (2)

[1] **Landlord and Tenant**🔑Sufficiency

Failure of landlord to state in his notice of nonrenewal that there was an immediate and compelling necessity, as required by the Housing Stability and Tenant Protection Act (HSTPA), precluded landlord from maintaining holdover proceeding for possession of apartment for personal use; although landlord argued that the notice was served before enactment of the HSTPA, landlord failed to specify which rights had been violated, landlord failed to cite any legal authority in support of his constitutional argument, and a predicate notice could not be amended. New York City Administrative Code, § 26-511(c)(9)(b).

1 Cases that cite this headnote

[2] **Landlord and Tenant**🔑Landlord's Notice of Termination

A predicate notice of nonrenewal cannot be amended.

Attorneys and Law Firms

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Communities Resist, Attorneys for Respondents Bozena and Krystyna Makarewicz, 109 South 5th Street, Brooklyn, New York 11249

Opinion

Zhuo Wang, J.

*****1 *297** Petitioner commenced this holdover proceeding in March 2019 seeking possession ****893** of 183 Guernsey Street, Apartment 4R ("the subject apartment") for personal use. In his notice of nonrenewal, Petitioner alleges in relevant part that he and his wife, who presently occupy unit 2R in the subject premises, wish to create a "larger contiguous space to better enjoy their life together" utilizing units 1L, 2L, 2R, 3L, 3R, and the subject apartment 4R. Petitioner intends to utilize 4R and 1L as a "foyer, bedroom, home office, and recreational space." Petitioner states that if the other units cannot be recovered, he still intends to recover unit 4R, a fourth-floor apartment, to enlarge their current living space in unit 2R, on the second-floor. Respondent answered and then moved for disclosure (Mot. Seq. 1), which is still pending before this Court and is unopposed by Petitioner.

On the dismissal motion, Respondent argues that dismissal of this proceeding is warranted based on the

requirement that a landlord show an "immediate or compelling necessity" to recover possession of a housing accommodation for personal or a family member's use pursuant to § 26-511(c)(9)(b) of the New York City Administrative Code (Administrative Code), as amended by the Housing Stability and Tenant Protection Act of 2019 ("HSTPA").

[1]Petitioner concedes in his opposition that the notice of nonrenewal in this proceeding fails to include any assertion of an "immediate and compelling necessity," but argues that the new requirements under the HSTPA should not be applied *ex post facto* because the "immediate and compelling necessity" requirement was not in existence at the time the notice of nonrenewal was served. For this Court to dismiss the proceeding because of the failure to meet a standard that did not exist at the time the predicate notice was served, Petitioner argues, would be "unfair" and a "flagrant breach of his constitutional rights." Alternatively, Petitioner seeks an opportunity to "meet the new standard as set out in the HSTPA," as he now claims by way of an attorney affirmation that he seeks the subject premises for his mother and brother, both of whom suffer from some unspecified mental illness.

Prior to the enactment of the HSTPA, Section 26-511(c)(9)(b) of the NYC Administrative Code provided that "an owner shall not refuse to renew a lease except ***298** where he or she seeks to recover possession of one or more dwelling units for his or her own personal use and occupancy as his or her primary residence or for the use and occupancy of a member of his or her immediate family as his or her primary residence " Part I of the HSTPA amended § 26-511(c)(9)(b) to require the landlord to show an "immediate or compelling necessity" to recover possession on the same basis. Pursuant to § 5 of Part I, the amendment to § 26-511(c)(9)(b) "shall take effect immediately and shall apply to any tenant in possession at or after the time it takes effect."

Petitioner fails to demonstrate that the new requirement in Section 26-511(c)(9)(b) that he allege an immediate and compelling necessity should not be applied to the case at bar. To the extent he contends that the change in the law amounts to a "flagrant breach" of his constitutional rights, Petitioner fails to specify which rights have been violated, and he fails to cite any legal authority in support of his constitutional argument. Indeed, an appellate court has recently held that another provision of the HSTPA materially affecting pending claims withstood constitutional scrutiny because the legislature's enactments carry an 'exceedingly strong presumption of constitutionality' " (*see e.g. Dugan v. London Terrace Gardens, L.P.*, 177 A.D.3d 1, 110 N.Y.S.3d 3 [1st Dept. 2019] citing ****894** *Barklee Realty Co. v. Pataki*, 309 A.D.2d 310, 311, 765 N.Y.S.2d 599 [1st Dept. 2003]).

*****2** [2]Since, as here, a predicate notice cannot be amended (*see Chinatown Apartments, Inc. v. Chu Cho Lam*, 51 N.Y.2d 786, 433 N.Y.S.2d 86, 412 N.E.2d 1312 [1980]), Petitioner's conceded failure to state an "immediate and compelling necessity" in the instant notice of nonrenewal is not reasonable under the attendant circumstances (*see 323 3rd St. LLC v. Ortiz*, 13 Misc 3d 141(A), 831 N.Y.S.2d 363 [App. Term, 2d Dept. 2006]). As such, the petition fails to state a cause of action pursuant to CPLR 3211 (a) (7).

This Court has considered the arguments in support of the part of Respondent's motion for summary judgment and finds them unpersuasive. Accordingly, it is

Ordered that Respondent's motion (Seq. 2) is granted in part and this proceeding is dismissed; and it is further

Ordered that Respondent's motion (Seq. 2) is otherwise denied; and it is further

Ordered that the Respondent motion (Seq. 1) for discovery is denied as moot.

All Citations

66 Misc.3d 296, 112 N.Y.S.3d 892, 2019 WL 6109562, 2019 N.Y. Slip Op. 29346

End of Document

New York Official Reports

177 A.D.3d 1, 110 N.Y.S.3d 3, 2019 N.Y. Slip Op. 06578

**1 William Dugan et al., Respondents-Appellants,
v
London Terrace Gardens, L.P.,
Appellant-Respondent.
William Dugan et al., Respondents,
v
London Terrace Gardens, L.P., Appellant, and
David Blech et al., Respondents.

Supreme Court, Appellate Division, First Department, New York
603468/09, 8716, 8717, 8718, 8719
September 17, 2019

CITE TITLE AS: Dugan v London Terrace Gardens, L.P.

SUMMARY

Cross appeals from an order of the Supreme Court, New York County (Lucy Billings, J.), entered November 22, 2017. The order, to the extent appealed from, denied defendant's motion for summary judgment, and granted in part and denied in part plaintiffs' motion for summary judgment.

Appeals from orders of that court, entered September 11, 2017, November 24, 2017, and August 30, 2017. The order entered September 11, 2017, to the extent appealed from, expanded the originally certified definition of the class. The order entered November 24, 2017, granted defendant's motion for payments for interim past and ongoing use and occupancy by respondents David Blech and Margie Chassman, but declined to set the amount, and granted Blech and Chassman's cross motion for summary judgment on their claim for rent overcharge to the same extent as that granted to the class action**2** plaintiffs in the order entered November 22, 2017. The order entered August 30, 2017, denied defendant's motion to make certain interim payments to plaintiffs.

Dugan v London Terrace Gardens, L.P., 59 Misc 3d 1221(A), 2017 NY Slip Op 51998(U), modified.

HEADNOTES

Landlord and Tenant
Rent Regulation

Rent Stabilization Law—J-51 Tax Abatement and Exemption Program—Retroactive Application

([1]) In consolidated class actions challenging defendant's deregulation of apartments in its 10-building housing complex, defendant's due process argument against retroactive application of *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) was barred by collateral estoppel and failed on the merits. Defendant's claim that when it deregulated the affected units it was relying in good faith on the Division of Housing and Community Renewal's pre-*Roberts* interpretation of the relevant statutes, and that applying *Roberts* under those circumstances would offend due process, was identical to one that the Appellate Division, First Department had previously rejected in a suit where defendant unsuccessfully tried to withdraw from the J-51 program, and defendant had a full and fair opportunity to litigate the issue in the prior decision. Defendant's argument also failed on the merits since the First Department had held that *Roberts* should be applied retroactively because the decision simply interpreted a statute that had been in effect for a number of years, and did not establish a new principle of law. The First Department has consistently adhered to that holding, and specifically rejected due process challenges to the retroactivity of *Roberts*.

Limitation of Actions
What Statute Governs

Housing Stability and Tenant Protection Act—Rent Stabilized Tenant Overcharges—Recovery Limited to Six Years Preceding Commencement

([2]) Plaintiff's complaints in consolidated class actions challenging defendant's deregulation of apartments in its 10-building housing complex were not time-barred as the

Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) (HSTPA) amendments to Rent Stabilization Law of 1969 (Administrative Code of City of NY) § 26-516 and CPLR 213-a provide that an overcharge complaint can be brought at any time. Part F of the HSTPA amended Rent Stabilization Law § 26-516 and CPLR 213-a, which govern claims of rent overcharge and the statute of limitations for bringing such claims. It provides that the statutory amendments contained in part F "shall take effect immediately and shall apply to any claims pending or filed on and after such date" (L 2019, ch 36, § 1, part F, § 7). Because plaintiffs' overcharge claims were pending on the effective date of part F of the HSTPA, the changes made therein were applicable. Newly enacted CPLR 213-a provides that "an overcharge claim may be filed at any time," however "[n]o overcharge penalties or damages may be awarded for a period more than six years before the action is commenced." Likewise, the amended version of Rent Stabilization Law § 26-516 (a) (2) provides that an overcharge complaint "may be filed with [DHCR] or in a court of competent jurisdiction at any time, however any recovery of overcharge penalties shall be limited to the six years preceding the complaint." Because both statutes provide that an overcharge ***3** complaint can be brought "at any time," plaintiffs' claims were timely. However, they could recover overcharges only as far back as six years before the commencement date of the actions.

Landlord and Tenant
Rent

Rent Stabilization Law—Housing Stability and Tenant Protection Act—Calculation of Legal Rents and Overcharges

([3]) Pursuant to the comprehensive changes made by the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) (HSTPA), in determining how rents and overcharges should be determined, a court "shall consider all available rent history which is reasonably necessary" to investigate overcharges and determine the legal regulated rent (Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516 [a], [h]). In addition, the legal regulated rent for purposes of determining most overcharges "shall be the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases and adjustments" (Rent Stabilization Law § 26-516 [a]). Accordingly, in consolidated class actions challenging defendant's deregulation of apartments in its 10-building housing complex, where Supreme Court based its methodology for calculating the legal rents and the amount of any rent overcharges on the law that was in effect at the time, a remand was appropriate so the motion court could, in the first instance, set forth a methodology consistent with the HSTPA.

Landlord and Tenant
Rent Regulation

Housing Stability and Tenant Protection Act Amendment—Retroactive Application to Pending Claims—Due Process Rights Not Impaired

([4]) In consolidated class actions challenging defendant's deregulation of apartments in its 10-building housing complex, defendant's due process rights were not impaired by applying new amendments to Rent Stabilization Law of 1969 (Administrative Code of City of NY) § 26-516 and CPLR 213-a, which govern claims of rent overcharge and the statute of limitations for bringing such claims, to plaintiffs' pending overcharge claims (*see* Housing Stability and Tenant Protection Act of 2019 [L 2019, ch 36] [HSTPA]). Legislative enactments carry an exceedingly strong presumption of constitutionality and, absent deliberate or negligent delay, where a statute has been amended during the pendency of a proceeding, the application of that amended statute to the pending proceeding is appropriate and poses no constitutional problem. Here, the legislature expressly made the HSTPA amendments applicable to pending claims (*see* L 2019, ch 36, § 1, part F, § 7). Because plaintiffs' overcharge claims were pending on the effective date of part F of the HSTPA, the changes made therein were applicable. Moreover, to the extent defendant may have asserted a procedural due process claim, it was obviated by remanding the matter for presentation of evidence as to how to calculate rents and overcharges under the HSTPA.

Actions
Class Actions

Rent Stabilized Tenant Overcharges—Expansion of

Class—Improvident Exercise of Discretion

([5]) In consolidated class actions challenging defendant's deregulation of apartments in its 10-building housing complex, Supreme Court improvidently exercised its discretion in expanding the originally certified definition of the class. CPLR 902 provides that a class action "may be altered or amended before the decision on the merits." However, that provision also states that ***4** "[an] action may be maintained as a class action only if the court finds that the prerequisites under [CPLR] 901 have been satisfied." Here, the initial certification order defined the class as "all past and current tenants of London Terrace Gardens who have been charged or continue to be charged deregulated rents during defendant's receipt of J-51 tax benefits." The class expansion order redefined it as "all past and current tenants of London Terrace Gardens who have resided in units that were deregulated during defendant's receipt of J-51 tax benefits." Thus, whereas the original class included only tenants who were charged deregulated rents during the J-51 period, the proposed new class encompassed tenants who moved in after the J-51 benefits period ended and resided in apartments that, at some point in the past, had been wrongfully treated as deregulated but who received regulated leases for their tenancies. Thus, the legal issues for the expanded group of tenants were separate and distinct from those of the original class. Moreover, the litigation had been commenced over nine years earlier, it spawned expansive motion practice, and expanding the class to add members whose tenancies involved different legal issues from the original class would be inefficient and unduly prejudice defendant (*see* CPLR 902 [3]). Thus, the class would remain as originally certified.

RESEARCH REFERENCES

Am Jur 2d Constitutional Law §§ 735–737; Am Jur 2d Judgments § 466; Am Jur 2d Landlord and Tenant §§ 879, 881, 884; Am Jur 2d Parties §§ 72, 79, 84, 90, 93.

Carmody-Wait 2d Limitation of Actions § 13:152; Carmody-Wait 2d Parties §§ 19:284, 19:288, 19:324.

Dolan, Rasch's New York Landlord and Tenant including Summary Proceedings (5th ed) § 2:40.

McKinney's, CPLR 213-a, 901, 902.

NY Jur 2d Constitutional Law § 306; NY Jur 2d Judgments §§ 343ndash; 345; NY Jur 2d Landlord and Tenant §§ 446, 448, 457, 524, 525, 527, 530; NY Jur 2d Limitations and Laches § 155; NY Jur 2d Parties §§ 253, 258.

Siegel, NY Prac §§ 35, 141, 142.

ANNOTATION REFERENCE

See ALR Index under Class Actions; Collateral Estoppel; Due Process; Landlord and Tenant; Rent.

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APPEARANCES OF COUNSEL

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OPINION OF THE COURT

Richter, J.P.

These four appeals arise from consolidated class action litigations challenging the deregulation of hundreds of apartments at London Terrace Gardens (London Terrace), a 10-building housing complex in Manhattan. Plaintiffs are current and former London Terrace tenants, and defendant London Terrace Gardens, L.P. is the owner of the complex. London Terrace, which consists of approximately 1,000 units, was constructed in 1931, and was originally subject to rent control laws. Pursuant to the 1974 Emergency Tenant Protection Act, upon vacancy,

rent controlled apartments in London Terrace became subject to rent stabilization. Since 1974, there has been a mix of rent stabilized and rent controlled apartments in the complex.

Beginning in 1993, defendant began to deregulate apartments in London Terrace. The Rent Regulation Reform Act of 1993 allowed building owners to deregulate rent-regulated apartments where rents and/or occupants' incomes exceeded certain statutory thresholds. However, in 2009, the Court of Appeals made it clear that building owners were not entitled to deregulate units while they were simultaneously receiving tax benefits under New York City's J-51 tax abatement and exemption program (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 279-280 [2009]).[1] Further, apartments in buildings receiving these tax benefits "must be registered with the State Division of Housing and Community Renewal (DHCR), and are generally subject to rent stabilization for at least as long as the J-51 benefits are in force (*see* 28 RCNY 5-03 [f])" (*id.* at 280; *see* Rent Stabilization Law of 1969 [RSL] [Administrative Code of ***6** City of NY] § 26-504 [c] [RSL shall apply to dwelling units in a building receiving J-51 benefits]).

On July 1, 2003, after performing qualifying improvements to the property, defendant began receiving J-51 tax benefits.[2] Prior to that date, defendant had already deregulated approximately 95 apartments in the complex. However, defendant did not, as required by law, return these previously deregulated units to rent regulation. Further, after the J-51 benefits were conferred, defendant continued to deregulate additional apartments, despite the fact that the complex was receiving J-51 benefits. Defendant charged market rents for the deregulated units, did not treat tenants in those units as rent regulated, did not register the apartments with DHCR, and did not follow the rent laws in calculating the proper rents to be charged.

On November 13, 2009, shortly after *Roberts* was decided, plaintiff William Dugan and nine other London Terrace tenants brought this class action alleging that defendant wrongfully deregulated apartments while receiving J-51 tax benefits, and failed to return previously deregulated apartments to rent stabilization when the J-51 benefits commenced. On December 8, 2009, plaintiff James Doerr brought a separate class action against defendant making similar allegations. In both complaints, plaintiffs alleged that, as a result of defendant's wrongful acts, they were denied rent-regulated status and were charged amounts in excess of the legal rents for their units. Plaintiffs sought, inter alia, a declaration that their apartments are subject to rent regulation, and monetary damages for rent overcharges. Defendant answered and asserted various counterclaims and affirmative defenses, including that the action was barred by the statute of limitations, and that *Roberts* should not be applied retroactively.

The two actions were subsequently consolidated and a class was certified. Plaintiffs then moved to dismiss defendant's counterclaims and affirmative defenses, and sought partial summary judgment seeking, inter alia, a determination of the proper methodology for calculating the legal rents and the amount of any rent overcharges. Defendant cross-moved for summary judgment seeking, inter alia, dismissal of the complaint on the ground that *Roberts* is not retroactive, dismissal of the complaint as time-barred, and a declaration on ***7** the proper methodology to calculate rents. Both plaintiffs and defendant submitted their own proposed method for calculating rents and overcharges. In a decision entered November 22, 2017, the motion court rejected defendant's statute of limitations defense, and concluded that *Roberts* may be applied retroactively (59 Misc 3d 1221[A], 2017 NY Slip Op 51998[U] [2017]). The court also set forth a methodology for calculating the legal rents and the amount of any overcharges. Both plaintiffs and defendant appeal from the motion court's order.

([1]) Defendant maintains that when it deregulated the affected units, it was relying in good faith on DHCR's pre-*Roberts* interpretation of the relevant statutes, and that applying *Roberts* under those circumstances would offend due process. At the outset, defendant is collaterally estopped from advancing its due process argument. We rejected this claim in *Matter of London Terrace Gardens, L.P. v City of New York* (101 AD3d 27, 31-32 [1st Dept 2012], *lv denied* 21 NY3d 855 [2013]), a suit where defendant unsuccessfully tried to withdraw from the J-51 program. Although the *London Terrace Gardens* action arose in a different context, the due process issue decided by the Court there was identical to the one before us now, and defendant had a full and fair opportunity to litigate the issue.

In any event, defendant's argument fails on the merits. In *Gersten v 56 7th Ave. LLC* (88 AD3d 189, 198 [1st Dept 2011]), this Court held that *Roberts* should be applied retroactively because the decision simply interpreted a statute that had been in effect for a number of years, and did not establish a new principle of law. Since then, we have consistently adhered to *Gersten*, and have specifically rejected due process challenges to the retroactivity of *Roberts* (*see Matter of London Terrace Gardens*, 101 AD3d at 31-32; *Roberts v Tishman Speyer Props., L.P.*, 89 AD3d 444, 445-446 [1st Dept 2011]

[*Roberts II*]).

Defendant attempts to distinguish *Gersten* and *Roberts II*, on the ground that, unlike the building owners in those cases, defendant explicitly relied on DHCR's interpretation of the decontrol statutes at the time it decided to enter the J-51 program. However, we rejected this very same argument in *Matter of London Terrace Gardens* (101 AD3d at 31-32), and defendant fails to persuasively distinguish that case (*see also Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184, 192 [1982], *cert denied* 459 US 837 [1982] [where Court of Appeals retroactively applied a judicial decision rejecting the Insurance Department's ***8** interpretation of the statute, stating that "(a) judicial decision construing the words of a statute . . . does not constitute the creation of a new legal principle"]). Thus, defendant's challenge to the retroactivity of *Roberts* is unavailing.

On June 14, 2019, New York State enacted the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) (HSTPA), landmark legislation making sweeping changes to the rent laws and adding greater protections for tenants throughout the state.[3] Of relevance to this appeal is part F of the HSTPA, which amended RSL § 26-516 and CPLR 213-a, which govern claims of rent overcharge and the statute of limitations for bringing such claims. The legislation directed that the statutory amendments contained in part F "shall take effect immediately and shall apply to any claims pending or filed on and after such date" (HSTPA, § 1, part F, § 7). Because plaintiffs' overcharge claims were pending on the effective date of part F of the HSTPA, the changes made therein are applicable here (*see Matter of Kandemir v New York State Div of Hous. & Community Renewal*, 4 AD3d 122 [1st Dept 2004]; *Matter of Pechock v New York State Div. of Hous. & Community Renewal*, 253 AD2d 655 [1st Dept 1998]; *Zafra v Pilkes*, 245 AD2d 218 [1st Dept 1997]).

([2]) We reject defendant's contention that the complaint should be dismissed as time-barred. The newly-enacted CPLR 213-a provides that "an overcharge claim may be filed at any time," however "[n]o overcharge penalties or damages may be awarded for a period more than six years before the action is commenced." Likewise, the amended version of RSL § 26-516 (a) (2) provides that an overcharge complaint "may be filed with [DHCR] or in a court of competent jurisdiction at any time, however any recovery of overcharge penalties shall be limited to the six years preceding the complaint." Because both of these statutes provide that an overcharge complaint can be brought "at any time," plaintiffs' claims are timely. However, they may recover for overcharges only as far back as November 13, 2003, six years before the commencement date.

([3]) Both plaintiffs and defendant raise various challenges to the motion court's methodology for calculating the legal rents and the amount of any overcharges. The HSTPA made significant changes in how rents and overcharges should be determined.***9** RSL § 26-516 now explicitly provides that a court "shall consider all available rent history which is reasonably necessary" to investigate overcharges and determine the legal regulated rent (RSL § 26-516 [a], [h]). Thus, with respect to overcharge claims subject to the HSTPA, these provisions resolve a split in this Department as to what rent records can be reviewed to determine rents and overcharges in *Roberts* cases. In *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95 [1st Dept 2017], *lv granted* 2018 NY Slip Op 90758[U] [2018]), the Court unanimously concluded that a court is permitted to examine the entire rental history of an apartment to ensure that landlords do not benefit from having collected an illegal market rent. Other panels of this Court, by split benches, reached a different conclusion, limiting review of the rental history to the four-year period preceding the filing of the overcharge complaint (*see Raden v W 7879, LLC*, 164 AD3d 440 [1st Dept 2018], *lv granted* 2018 NY Slip Op 89000[U] [2018]; *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 164 AD3d 420, 424 [1st Dept 2018], *appeal dismissed* 32 NY3d 1085 [2018], *lv granted* 2018 NY Slip Op 89914[U] [2018]). The new statute resolves this conflict, and makes clear that courts must examine all available rent history necessary to determine the legal regulated rent.

The newly-amended RSL § 26-516 (a) also provides that the legal regulated rent for purposes of determining most overcharges "shall be the rent indicated in the *most recent reliable* annual registration statement filed *and served upon the tenant six or more* years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases and adjustments" (RSL § 26-516 [a] [emphasis showing the added language]).[4] Unlike the previous version, the new statute requires examination of the "most recent reliable" registration statement that was not only filed but also "served upon the tenant" "six or more years" before the most recent statement.

The newly-enacted RSL § 26-516 (h) sets forth a comprehensive set of nonexclusive records that a court shall consider in determining legal rents and overcharges. Among the documents a court must examine are: (i) rent registration and other records filed with DHCR or other government agencies, regardless ***10** of the date to which

the information refers; (ii) orders issued by government agencies; (iii) records maintained by the owner or tenants; and (iv) public records kept in the regular course of business by any government agency. The new statute further provides that "[n]othing [therein] shall limit the examination of rent history relevant to a determination as to . . . whether the legality of a rental amount charged or registered is reliable in light of all available evidence" (RSL § 26-516 [h] [i]).

The motion court based its methodology for calculating the legal rents and the amount of any rent overcharges on the law in effect at the time. That law has changed, and significantly so. In view of the comprehensive changes made by the HSTPA with respect to the proper method of calculating legal rents and overcharges, we must remand the matter to the motion court so that it can, in the first instance, set forth a methodology consistent with the HSTPA. We recognize that this action has been pending for an extended period of time, and that our decision may involve further motion practice. Nevertheless, because the legislature has made changes to the law that directly impact this case, and has made those changes applicable to this pending litigation, a remand is appropriate. The motion court shall give the parties an opportunity to present additional evidence on their respective summary judgment motions with respect to the calculation of rents and any overcharges under the HSTPA.[5]

([4]) We find no merit to defendant's claim that applying the amendments to RSL § 26-516 and CPLR 213-a to this pending litigation violates due process. To begin, the legislature expressly made the amendments applicable to pending claims, and legislative enactments carry "an exceedingly strong presumption of constitutionality" (*Barklee Realty Co. v Pataki*, 309 AD2d 310, 311 [1st Dept 2003] [internal quotation marks omitted], *appeal dismissed* 1 NY3d 622 [2004], *lv denied* 2 NY3d 707 [2004]). Further, it is well settled that absent deliberate or negligent delay, "[w]here a statute has been amended during the pendency of a proceeding, the application of that amended statute to the pending proceeding is appropriate and poses no constitutional problem" (*Matter of St. Vincent's Hosp. & Med. Ctr. of N.Y. v New York State Div. of Hous. & Community* ***11** *Renewal*, 109 AD2d 711, 712 [1st Dept 1985], *affd* 66 NY2d 959 [1985]; *accord Matter of Kass v Club Mart of Am.*, 160 AD2d 1148 [3d Dept 1990]; *Jonathan Woodner Co. v Eimicke*, 160 AD2d 907 [2d Dept 1990]).

In *Matter of Schutt v New York State Div. of Hous. & Community Renewal* (278 AD2d 58 [1st Dept 2000], *lv denied* 96 NY2d 715 [2001]), this Court found the petitioners' fair market rent appeal untimely based on the four-year statute of limitations in the newly-enacted Rent Regulation Reform Act of 1997 (RRRA). The petitioners argued that applying the RRRA's limitations period to pending cases violated due process because it "depriv[ed] them of the benefit of pre-RRRA rent regulation provisions law more favorable to their claims" (*id*. at 58). The Court found no due process infirmity because "rent regulation does not confer vested rights" (*id*., citing *I. L. F. Y. Co. v City Rent & Rehabilitation Admin.*, 11 NY2d 480 [1962]).

Likewise, in *Matter of Brinckerhoff v New York State Div. of Hous. & Community Renewal* (275 AD2d 622 [1st Dept 2000], *lv dismissed* 96 NY2d 729 [2001], *lv denied* 96 NY2d 712 [2001]), this Court applied the newly-enacted four-year limitations period to the petitioners' pending rent overcharge complaints, rejecting their claim that the retroactive application of the amendments denied them due process. The same result should apply here, and we find that defendant's due process rights are not impaired by applying the new amendments to plaintiffs' pending overcharge claims (*see American Economy Ins. Co. v State of New York*, 30 NY3d 136 [2017], *cert denied* blank—N/A. Finally, to the extent defendant may be asserting a procedural due process claim, our decision to remand this matter for presentation of evidence as to how to calculate rents and overcharges under the HSTPA would obviate such a claim.

([5]) Defendant separately appeals from three other orders issued by the motion court. First, defendant challenges a September 11, 2017 order that expanded the originally certified definition of the class. In the initial certification order, the class was defined as "all past and current tenants of London Terrace Gardens who have been charged or continue to be charged deregulated rents during defendant's receipt of J-51 tax benefits." In the class expansion order, the class was redefined as "all past and current tenants of London Terrace ***12** Gardens who have resided in units that were deregulated during defendant's receipt of J-51 tax benefits." Thus, whereas the original class included only tenants who were charged deregulated rents *during the J-51 period*, the proposed new class would encompass tenants who moved in after the J-51 benefits period ended and reside in apartments that, at some point in the past, had been wrongfully treated as deregulated.

CPLR 902 provides that a class action "may be altered or amended before the decision on the merits." However, that provision also states that "[an] action may be maintained as a class action only if the court finds that the prerequisites under [CPLR] 901 have been satisfied."

Those requirements are generally referred to as "numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). CPLR 902 further requires the court to consider a range of factors before certifying a class.

Here, the motion court improvidently exercised its discretion in expanding the class. The court's order failed to analyze whether class action status was warranted based on the criteria set forth in CPLR 901 and 902. Conducting that analysis ourselves, we find that the redefined class represents such a fundamental change in the theory of plaintiffs' case that expansion of the class would be improper. When the class was originally certified, plaintiffs maintained, and the court agreed, that its members were tenants who received deregulated leases while the complex was receiving J-51 benefits. The expanded class, however, would include tenants who never lived in the complex during defendant's receipt of J-51 benefits, and who received regulated leases for their tenancies. Thus, the legal issues for this group of tenants are separate and distinct from those of the original class.

In determining whether an action should proceed as a class action, the court must consider the "extent and nature of any litigation concerning the controversy already commenced by . . . members of the class" (CPLR 902 [3]). This class action litigation was commenced over nine years ago, and has spawned expansive motion practice. Expanding the class to add members whose tenancies involve different legal issues from the original class would be inefficient at this late stage of the litigation and would unduly prejudice defendant. Thus, the ***13** court's order expanding the class should be reversed, and the class shall remain as originally certified.[6]

Next, defendant appeals from a November 24, 2017 order wherein the motion court ordered the payment of interim past and ongoing use and occupancy by the tenants residing in apartment 16ABEF, but failed to set the amount.[7] This apartment was created in 2005 by combining apartments 16AB and 16EF, both of which were exempt from rent stabilization at the time defendant began receiving J-51 benefits in July 2003. We modify the court's order to the extent of requiring payment of interim past and ongoing use and occupancy in the amount of $11,075 per month. This amount represents the sum of the respective rents for apartments 16AB and 16EF at or around the time the J-51 benefits began.[8] Although it is undisputed that apartment 16ABEF, and the two apartments that were combined to form it, were all improperly treated as deregulated while the building was receiving J-51 benefits, for the reasons discussed above, we vacate that part of the motion court's order setting forth the methodology for calculating the legal rents and the amount of any overcharges. The matter is remanded for the court to set forth a methodology for calculating rents and overcharges for apartment 16ABEF consistent with the HSTPA.

Finally, defendant appeals from an August 30, 2017 order wherein the motion court denied its motion to make certain interim payments to plaintiffs in an effort to mitigate any ultimate award of prejudgment interest. Defendant sought to condition its payments on the requirement that plaintiffs repay some or all of those amounts if the court ultimately found in defendant's favor on the issues of liability or the amounts of any overcharges owed to a particular plaintiff. The motion court properly denied the relief requested by defendant. The court was not required to fashion a remedy outside of the ***14** CPLR, or grant a motion that addressed only defendant's concerns. To the extent this conclusion may be inequitable, defendant's remedy lies not with this Court, but with the legislature.

Accordingly, the order of the Supreme Court, New York County (Lucy Billings, J.), entered November 22, 2017, which, to the extent appealed from, denied defendant's motion for summary judgment, and granted in part and denied in part plaintiffs' motion for summary judgment, should be modified, on the law, to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and otherwise affirmed, without costs, and the matter remanded for the court, after further submissions from the parties, to set forth a methodology for calculating rents and overcharges consistent with the HSTPA; the order of the same court and Justice, entered September 11, 2017, which, to the extent appealed from, expanded the originally certified definition of the class, should be reversed, on the law, without costs, and the class should remain as originally certified; the order of the same court and Justice, entered November 24, 2017, which granted defendant's motion for payments for interim past and ongoing use and occupancy by respondents David Blech and Margie Chassman, but declined to set the amount, and granted Blech and Chassman's cross motion for summary judgment on their claim for rent overcharge to the same extent as that granted to the class action plaintiffs in the order entered November 22, 2017, should be modified, on the law and the facts, to set the amount of interim past and ongoing use and occupancy at $11,075 per month, and to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and otherwise affirmed, without costs, and the matter remanded for the court, after

further submissions from the parties, to set forth a methodology for calculating rents and overcharges consistent with the HSTPA; and the order of the same court and Justice, entered August 30, 2017, which denied defendant's motion to make certain interim payments to plaintiffs, should be affirmed, without costs.

Gische, Kern, Oing and Moulton, JJ., concur.

Order, Supreme Court, New York County, entered November 22, 2017, modified, on the law, to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and otherwise affirmed, ***15** without costs, and the matter remanded for the court, after further submissions from the parties, to set forth a methodology for calculating rents and overcharges consistent with the HSTPA; order, same court and Justice, entered September 11, 2017, reversed, on the law, without costs, and the class should remain as originally certified; order, same court and Justice, entered November 24, 2017, modified, on the law and the facts, to set the amount of interim past and ongoing use and occupancy at $11,075 per month, and to vacate that part of the order setting forth the methodology for calculating the legal rents and the amount of any overcharges, and otherwise affirmed, without costs, and the matter remanded for the court, after further submissions from the parties, to set forth a methodology for calculating rents and overcharges consistent with the HSTPA; and order, same court and Justice, entered August 30, 2017, affirmed, without costs.

Footnotes

1 Under the J-51 program, a building owner who makes qualifying improvements to its property is eligible to receive tax abatements and exemptions.

2 The J-51 benefits ended on June 30, 2014.

3 At the request of this Court, the parties submitted letter briefs on how the HSTPA affects the issues in this appeal.

4 Ordinarily, a landlord must file annual registration statements which state the current rent for each rent stabilized apartment, and provide each tenant then in occupancy with a copy of that statement (RSL § 26-517 [f]).

5 Although some of the motion court's conclusions on the proper methodology were correct under the old law, the HSTPA contains broader language, and the motion court must determine whether those prior rulings are impacted by the new law.

6 Although the number of class members in the originally certified class may be impacted as a result of the statutory amendments, the definition of the class should remain the same.

7 Defendant had previously commenced a summary nonpayment proceeding against these tenants, and the tenants answered and alleged rent overcharges. The summary proceeding was then consolidated with the class action.

8 Defendant submitted a January 31, 2004 security deposit report indicating that the monthly rent for apartment 16AB was $5,575, and a lease dated June 17, 2003, showing the monthly rent for apartment 16EF was $5,500.

New York Official Reports

--- N.E.3d ----, 2020 WL 1557900 (N.Y.), 2020 N.Y. Slip Op. 02127

This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

***1** In the Matter of Regina Metropolitan Co., LLC, Respondent,
v.
New York State Division of Housing and Community Renewal, Appellant, Leslie E. Carr et al., Intervenors-Respondents.(And Another Proceeding).
Joel Raden et al., Appellants,
v.
W7879, LLC, et al., Respondents.
James Taylor et al., Respondents,
v.
72A Realty Associates, L.P., Appellant, et al., Defendant.
Elizabeth Reich, et al., Appellants,
v.
Belnord Partners, LLC, et al., Respondents.

Court of Appeals of New York
No. 1, No. 2, No. 3, No. 4
Decided on April 2, 2020

Case No. 1:
Ester Murdukhayeva, for appellant.
***2** Niles C. Welikson, for respondent.
Darryl M. Vernon, for intervenor-respondents.
Community Housing Improvement Program, Inc. et al.; Stephenie Futch, et al., amici curiae.
Case No. 2:
Seth A. Miller, for appellants.
Nativ Winiarsky, for respondents.
Jacobus Gomes, et al., amici curiae.
Case No. 3:
Joel M. Zinberg, for appellant.
Robert E. Sokolski, for respondents.
Stuart Davidson-Tribbs, et al., amici curiae.
Case No. 4:
Darryl M. Vernon, for appellants.
Deborah E. Riegel, for respondents.
Peter Gunther, et al., amicus curiae.

OPINION OF THE COURT

PER CURIAM

:

In our tripartite form of government, the Legislature determines the public policy of this State, recalibrating rights and changing course when it deems such alteration appropriate as it grapples with enduring problems and rises to meet new challenges facing our communities. It is the distinct role of the courts to interpret the laws to give effect to legislative intent while safeguarding the constitutional rights of impacted individuals. We fulfill both core functions in these four appeals, which present a common issue under the Rent Stabilization Law (RSL): what is the proper method for calculating the recoverable rent overcharge for New York City apartments that were improperly removed from rent stabilization during receipt of J-51 benefits prior to our 2009 decision in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]).

As explained below, when leave was granted in these cases, the RSL mandated that, absent fraud, an overcharge was to be calculated by using the rent charged on the date four years prior to filing of the overcharge complaint (the "lookback period") as the "base date rent," adding any legal increases applicable during the four-year lookback period and computing the difference between that legal regulated rent and the rent actually charged to determine if the tenant was overcharged during the recovery period. In such cases, consideration of rental history predating the four-year lookback and statute of limitations period was prohibited. While the appeals to this Court were pending, the Legislature -- as is its prerogative -- enacted the Housing Stability and Tenant Protection Act of 2019 (HSTPA), making sweeping changes to the RSL, the majority of which are not at issue in these appeals. As relevant here, Part F of the HSTPA includes amendments that, among other things, extend the statute of limitations, alter the method for determining legal regulated rent for overcharge purposes and substantially expand the nature and scope of owner liability in rent overcharge cases (*see* L 2019, ch 36, Part F). The tenants in these cases urge us to apply the new overcharge calculation provisions to these appeals that were pending at the time of the HSTPA's enactment, some of which seek recovery of overcharges incurred more than a decade before the new legislation.

The validity of Part F is not in question here -- but

significant issues are raised concerning whether the presumption against retroactive application of statutes has been rebutted and, if so, whether application of certain amendments relating to overcharge calculation in Part F to these appeals involving conduct that occurred years prior to its enactment comports with fundamental notions of substantial justice embodied in the Due Process Clause. ***3** Retroactive application of the overcharge calculation amendments would create or considerably enlarge owners' financial liability for conduct that occurred, in some cases, many years or even decades before the HSTPA was enacted and for which the prior statutory scheme conferred on owners clear repose. Because such application of these amendments to past conduct would not comport with our retroactivity jurisprudence or the requirements of due process, we resolve these claims pursuant to the law in effect when the purported overcharges occurred. Notwithstanding the hyperbole employed by our dissenting colleagues, our analysis of the narrow legal issue presented by application of the overcharge calculation amendments to these appeals turns entirely on conventional and time-honored principles of judicial review. "We are, of course, mindful . . . of the responsibility . . . to defer to the Legislature in matters of policymaking," but it is the role of the judicial branch "to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government -- not in order to make policy but in order to assure the protection of constitutional rights" (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893, 925, 931 [2003]). As to the HSTPA, today we fulfill this quintessential judicial function in holding that a limited suite of enforcement provisions may not be applied retroactively and opine in no way on the vast majority of that legislation or its prospective application.

These rent overcharge cases arose in the wake of our 2009 decision in *Roberts*, interpreting RSL provisions relating to New York City's J-51 program, which offered tax benefits to building owners who made capital improvements to their residential properties. Buildings electing to receive J-51 benefits become subject to the rent stabilization scheme (RSL [Administrative Code of City of NY] § 11-243[b], [i][1], [t]). From 1993 until the enactment of the HSTPA in 2019, the RSL contained "luxury deregulation" provisions, permitting an owner of a stabilized unit to deregulate if the rent exceeded a statutory threshold and (1) the tenant vacated or (2) the tenants' combined income exceeded a statutory threshold (former RSL §§ 26-504.1, 26-504.2). As early as 1996, first in an opinion letter and later promulgated as an agency regulation, the Division of Housing and Community Renewal (DHCR)[1] took the position that statutory language precluding luxury deregulation of apartments during receipt of J-51 benefits did not apply to buildings that were already subject to the RSL prior to receipt of those benefits (*see Roberts*, 13 NY3d at 281-282; former Rent Stabilization Code [RSC] [9 NYCRR] § 2520.11[r][5], [s][2]). In *Roberts*, this Court rejected DHCR's long-standing statutory interpretation and concluded that luxury deregulation was unavailable in any building during receipt of J-51 benefits (13 NY3d at 285-287). In 2011, the Appellate Division held that *Roberts* applied retroactively (*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 198 [1st Dept 2011], *appeal withdrawn* 18 NY3d 954 [2012]).

Each of these cases involves an apartment that was treated as deregulated consistent with then-prevailing DHCR regulations and guidance before this Court rejected that guidance in *Roberts*. Indeed, the tenants took occupancy years prior to *Roberts* following a deregulation later revealed by that decision to have been improper, believing they were renting non-stabilized apartments at market rents. None of these tenants promptly challenged the deregulated status of their apartments and years -- in some cases, over a decade -- passed during which the tenants and their landlords renewed and renegotiated free-market leases[2]. After we decided *Roberts*, these tenants commenced overcharge claims under the RSL. In *Regina Metro.*, the tenants filed an administrative complaint with DHCR and, in the remaining three cases, the tenants commenced actions in Supreme Court. The central issue below in each of these cases -- sent to this Court by leave of the Appellate Division before enactment of the HSTPA -- was how to calculate ***4** the "legal regulated rent" in order to determine whether a recoverable overcharge occurred and its amount[3]. Before we address the tenants' request that we resolve these appeals under the new law, we must determine the parties' rights under the statutory scheme in effect when the overcharges occurred.

I.

In an overcharge claim, the tenant seeks monetary damages for excessive rent paid during the recovery period[4]. The method for calculating the amount of recoverable damages -- i.e., the overcharge -- is governed by the RSL. We therefore examine the text of the relevant statutes, as the best indicator of legislative intent (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]), mindful that legislative history may also be considered as an aid to interpretation (*Altman v 285 W. Fourth LLC*, 31 NY3d 178, 185 [2018]; *see Riley v County of Broome*, 95 NY2d 455, 463-464

[2000]). When a statute is part of a broader legislative scheme, we construe its language "in context and in a manner that harmonizes the related provisions and renders them compatible" (*Matter of M.B.*, 6 NY3d 437, 447 [2006] [internal punctuation and citation omitted]).

The rules governing calculation of an overcharge are found in the provisions of the RSL addressing enforcement and the statute of limitations for overcharge claims (RSL § 26-516; CPLR 213-a). Before the enactment of the HSTPA, overcharge claims were subject to a four-year statute of limitations that precluded the recovery of overcharges incurred more than four years preceding the imposition of a claim (former RSL § 26-516[a][2]; former CPLR 213-a; *see Conason v Megan Holding LLC*, 25 NY3d 1 [2015]). The statutes further directed that "no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based ***5** upon an overcharge having occurred more than four years before" initiation of the claim (former RSL § 26-516[a][2]; *see* former CPLR 213-a)[5].

A provision added as part of the Rent Regulation Reform Act of 1997 (1997 RRRA) expressly "preclude[d] examination of the rental history of the housing accommodation prior to the four-year period preceding" commencement of the overcharge action (former RSL § 26-516[a][2], as amended by L 1997, ch 116; *see* former CPLR 213-a, as amended by L 1997, ch 116) -- language that "clarified and reinforced the four-year statute of limitations" (*Thornton v Baron*, 5 NY3d 175, 180 [2005]). This categorical temporal limitation on reviewable records -- the "lookback" rule -- was complemented by a record retention provision directing that certain owners "shall not be required to maintain or produce any records relating to rentals of such accommodation for more than four years prior to the most recent registration or annual statement for such accommodation" (former RSL § 26-516[g]; *see* RSC § 2523.7[b] ["An owner shall not be required to produce any rent records in connection with (overcharge) proceedings . . . relating to a period that is prior to the base date"]). The record retention provision permitted owners to dispose of records outside the four-year period (former RSL § 26-516[g]; *see Matter of Cintron v Calogero*, 15 NY3d 347, 354 [2010]; *Thornton*, 5 NY3d at 181), further evincing the Legislature's intent that records predating the recovery period not be used to calculate overcharges. Together, the statute of limitations, lookback provision and record retention rules formed an integrated scheme for calculating overcharges based on a closed universe of records pertaining only to the apartment's rental history in the four years preceding the filing of the complaint.

Consistent with the lookback rule, the enforcement provisions provided that, except for certain claims filed shortly after initial registration of a unit, "the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement," i.e., the base date rent, plus "any subsequent lawful increases and adjustments" (former RSL § 26-516[a][i]). Owners of rent-stabilized apartments are generally required to file annual rent registration statements with DHCR (RSL § 26-517[f]), and where registration statements were filed during the lookback period, the base date rent was discerned from those statements. But owners are no longer required to file such statements once the apartment has been deregulated. Thus, where the apartment had been deregulated more than four years prior to the filing of an overcharge complaint, and the tenant failed to promptly challenge the deregulated status of the apartment, there might be no rent registration on file for the base date or, indeed, any time within the four-year lookback period.

This scenario is addressed in DHCR's regulations, which harmonized RSL § 26-516(a)(i) with the four-year lookback restriction. With exceptions not relevant here, the regulations provided that "[t]he legal regulated rent for purposes of determining an overcharge shall be deemed to be the rent *charged on the base date*, plus in each case any subsequent lawful increases and adjustments" (RSC § 2526.1[a][3][i] [emphasis added]; *see also id.* § 2520.6[e]). Under the pre-HSTPA law, the base date rent was therefore the rent actually charged on the base date -- i.e., four years prior to the overcharge complaint -- even if no registration statement had been filed reflecting that rent.

In a series of cases, we confirmed that reviewing rental history outside the four-year lookback period was inappropriate for purposes of calculating an overcharge, but we recognized a limited common-law exception to the otherwise-categorical evidentiary bar, permitting tenants to use such evidence only to prove that the owner engaged in a fraudulent scheme to deregulate the apartment. In *Thornton*, the owner engaged in an egregious, fraudulent scheme to remove apartments from stabilization by conspiring with tenants, who shared in the illegal profits, by falsely agreeing the apartment was not being used as a primary residence (and utilizing the courts as a tool to obtain false declarations to that effect) to rent at market rates and then sublease at even higher rates (5 NY3d at 178-179). For overcharge calculation purposes, the Court acknowledged the preclusive effect of the four-year

lookback rule, deeming the last regulated rent charged before that period to be "of no relevance" (*id.* at 180). We held that the legal rent should be based on a "default formula," otherwise reserved for cases where there are no reliable rent records, setting the base date rent as "the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date" (*id.* at 179-181 and n 1).

We elaborated on this fraud exception to the lookback rule in *Matter of Grimm v New York State Div. of Hous. & Community Renewal*, holding that where a tenant had made a "colorable claim of fraud" by identifying "substantial indicia," i.e., "evidence," of "a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization," that apartment's "rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date" (15 NY3d 358, 366-367 [2010]). Consistent with *Thornton*, we directed that, if review of the rental history revealed such a fraudulent scheme, the default formula should be used to calculate any resulting overcharge (*id.* at 367). We confirmed this procedure in *Conason*, where the owner created a fictitious tenant and fictitious renovation to justify a rent increase (25 NY3d at 9, 16-17). Our holding in *Matter of Boyd v New York State Div. of Hous. & Community Renewal* (23 NY3d 999 [2014]), rejecting a challenge to DHCR's use of the rent actually charged four years prior to filing of the claim to calculate an overcharge in the absence of fraud, provided further clarification that the four-year lookback rule generally precluded review of rental history outside that period.

The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred -- not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations (*Grimm*, 15 NY3d at 367)[6]. In fraud cases, this Court sanctioned use of the default formula to set the base date rent. Otherwise, for overcharge calculation purposes, the base date rent was the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period. Tenants were therefore entitled to damages reflecting only the increases collected during that period that exceeded legal limits.

In the wake of *Roberts*, courts and DHCR grappled with a surge of claims filed by tenants alleging overcharges arising from the improper deregulation of their apartments years (in some cases more than a decade) before -- claims like those now before this Court. For example, the plaintiffs in *Raden*, who took occupancy of their apartment in 1995 at a market rent, commenced this action in 2010 seeking recovery of overcharges based on a reconstruction of the rent they should have been charged had the apartment never been deregulated. Likewise, in *Taylor*, similar relief was sought in an overcharge claim filed in 2014 brought by a tenant who took occupancy in 2000. In stark contrast to *Thornton*, *Grimm* and *Conason*, in which tenants came forward with evidence of fraud,[7] in these *Roberts* cases, the owners removed apartments from stabilization consistent with agency guidance. Deregulation of the apartments during receipt of J-51 benefits was not based on a fraudulent misstatement of fact but on a misinterpretation of the law -- significantly, one that DHCR itself adopted and included in its regulations. As we observed in *Borden v 400 E. 55th St. Assoc., L.P.*, a finding of willfulness "is generally not applicable to cases arising from the aftermath of *Roberts*" (24 NY3d 382, 389 [2014]). Because conduct cannot be fraudulent without being ***6** willful, it follows that the fraud exception to the lookback rule is generally inapplicable to *Roberts* overcharge claims.[8]

After *Roberts* there was understandable confusion regarding how the decision should be implemented, including whether *Roberts* should be given retroactive effect and, if so, how that should be accomplished. In overcharge cases where tenants had not challenged the status of their apartments within four years of deregulation, including these appeals, the improper deregulation predated the lookback period and, thus, the rent charged on the "base date" was a free market rent that had not been registered. Tenants who challenged an improper deregulation and initiated an overcharge claim within four years would be entitled to monetary damages encompassing the rent increase that occurred when the apartment was moved to the free market. But tenants who commenced a claim more than four years later and could not show fraud would be entitled, by virtue of the interrelated four-year statute of limitations and lookback rule, to recover only the increases added to the market base date rent that were over the legal limits during the recovery period. This rule was applied properly in many cases (*see Reich*, 168 AD3d 482; *Raden*, 164 AD3d at 441; *Stultz v 305 Riverside Corp.*, 150 AD3d 558 [1st Dept 2017], *lv denied* 30 NY3d 909 [2018]; *see also Todres v W7879, LLC*, 137 AD3d 597 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016]). Yet, in some *Roberts* cases,

DHCR and the lower courts deviated from the four-year limitations period and lookback rule in the absence of fraud.

The decision in *72A Realty Assoc. v Lucas* (101 AD3d 401, 402 [1st Dept 2012]), which preceded our analysis in *Boyd*, represents such a deviation. In *Lucas*, the Appellate Division held that the four-year lookback rule should not be applied, even though the court did not find a colorable claim of fraud, in part because the rent charged four years prior to the complaint was a free market rent following improper deregulation. Citing *Lucas*, DHCR (in *Regina Metro.*) and the Appellate Division (in *Taylor*) determined that, even in the absence of fraud, an overcharge in a *Roberts* case should not be calculated in accordance with the four-year lookback rule but, instead, by reconstructing what the legal regulated rent would have been on the base date if the apartment had not been improperly deregulated. DHCR and the *Taylor* court determined that this reconstruction should be conducted by identifying the last legal regulated rent before improper deregulation -- even though the apartment was deregulated more than four years prior to imposition of the claim -- and applying all permissible rent increases between the date of that regulated rent and the base date (*Regina Metro.*, 164 AD3d at 422-423; *Taylor*, 151 AD3d at 105-106).

The reconstruction method, applied by DHCR in *Regina Metro.* and approved by the *Taylor* court, violated the pre-HSTPA law by requiring review of rental history outside the four-year limitations and lookback period in the absence of fraud[9]. The tenants' theory that *Thornton*, *Grimm* and *Conason* preclude adoption of a market base date ***7** rent is mistaken. Although in those cases we characterized base date rents resulting from fraud as "illegal" or "unreliable," we never suggested that an alternative method of setting the base date rent could apply to a less blameworthy owner where not authorized by the statutory scheme. Indeed, use of the reconstruction method violated the legislative mandate that "no award or calculation of an award of the amount of an overcharge may be based on an overcharge having occurred more than four years before" (former RSL § 26-516[a][2]; *see* former CPLR 213-a). Moreover, it utilized rental history in a manner that this Court refused to sanction even in fraud cases, in which we authorized consideration of rental history outside the lookback period only for the "limited purpose" of determining whether a fraudulent scheme existed (*Grimm*, 15 NY3d at 367).

We are also unpersuaded by the tenants' arguments that use of a default formula or the other alternative approaches to determining base date rent[10] would comply with pre-HSTPA law if applied to these cases. Even if employed in a manner compatible with the lookback rule, nothing in the RSL indicates that such methods apply here. While the alternative methods proposed by the tenants are reflected in the regulations, they are available only "[w]here the rent charged on the base date cannot be established" (RSC § 2526.1 [a][3][ii]) -- a situation not present in any of these *Roberts* cases[11].

The tenants and DHCR urge several bases for creating an exception to the standard pre-HSTPA overcharge calculation method that would enable courts to use these alternative approaches, but their arguments do not withstand scrutiny. First, an exception predicated on the fact that the base date rent was higher than what would have been permitted under the RSL for a stabilized apartment would swallow the four-year lookback rule. In every overcharge case, the rent charged was, by definition, illegally inflated -- otherwise there would be no overcharge. Prior to the HSTPA, nothing in the rent stabilization scheme suggested that where an unrecoverable overcharge occurred before the base date, thus resulting in a higher base date rent, the four-year lookback rule operated differently. To the contrary, the limitations provisions -- in order to promote repose -- precluded consideration of overcharges prior to the recovery period (former RSL § 26-516[a][2]; former CPLR 213-a), and it is clear from *Boyd* that use of a potentially inflated base date rent, flowing from an overcharge predating the limitations and lookback period, was proper in the absence of fraud. Likewise, no exception is justified by the fact that the inflated base date rent in *Roberts* cases resulted from improper deregulation, as opposed to an improperly high increase to a stabilized rent. The RSL makes no such distinction, and there is no indication that, under the pre-HSTPA law, an overcharge resulting from improper (but non-fraudulent) luxury deregulation warranted anything but the application of the standard lookback provisions.

Nor is it necessary to recognize an additional common law exception that would create or increase the amount of overcharge damages in order to give proper effect to *Roberts*. Civil liability is always bounded by the public policy of repose embodied in statutes of limitations (*see Ajdler v Province of Mendoza*, 33 NY3d 120, 130 n 6 [2019] ["(T)he (s)tatute of (l)imitations . . . expresses a societal interest or public policy of giving repose to human affairs"], quoting *John. J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979]). Overcharge liability under the RSL is no different. That *Roberts* revealed particular conduct to be illegal does not mean that tenants must be able to recover a certain measure of monetary damages for associated rent increases despite their failure to seek recovery within the limitations and

lookback periods. Critically, our decision in *Roberts* has led to the return of many apartments to the rent stabilization scheme, including those at issue in these appeals; one amicus estimates the number of *Roberts* apartments at upwards of 50,000. While the statute of limitations and lookback period preclude tenants in those apartments from recovering certain damages they could have recovered if their claims had been initiated earlier, as a result of *Roberts* they may now enjoy rent stabilization protection.

Indeed, in *Taylor*, regardless of any entitlement to monetary damages, the tenants' request for a declaration that the apartment was rent-stabilized at the time of their complaint was properly granted. RSL § 26-504(c) provides pathways by which an apartment in a building receiving J-51 benefits may be deregulated at the conclusion of the benefit period[12]. Particularly relevant here, section 26-504(c) states that "if such dwelling unit would have been subject to [the RSL or the Emergency Tenant Protection Act (ETPA)] in the absence of [J-51 benefits or certain other programs], such dwelling unit shall, upon the expiration of such benefits, continue to be subject to [the RSL or ETPA] to the same extent and in the same manner as if [section 26-504(c)] had never applied thereto." Thus, in buildings affected by *Roberts*, all of which were subject to the RSL regardless of J-51 benefits, apartments revert to their original rent-stabilized status after expiration of J-51 benefits.[13]

We therefore decline to create a new exception to the lookback rule and instead clarify that, under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud. Applying the correct interpretation of the pre-HSTPA law to the present cases, in *Regina Metro.* the Appellate Division properly annulled DHCR's overcharge determination, which violated the lookback rule by relying on a reconstructed rent, despite finding that the overcharge was not willful (and there was no colorable fraud claim). In *Raden*, the de minimis overcharge was properly calculated using the standard method, accepting the rent charged on the base date as the base date rent and adding legal increases. In *Reich*, the complaint was properly dismissed based on the tenants' failure to allege a colorable claim of fraud and the absence of allegations indicating that, applying the standard overcharge calculation method, there was an overcharge during the recovery period. And ***8** in *Taylor*, modification of the Appellate Division order is necessary to grant summary judgment dismissing the overcharge claim based on the owner's unrebutted evidence that there were no overcharges using the standard calculation method.

II.

Normally, our analysis would end here. But the HSTPA, enacted in June 2019 and consisting of 15 parts, substantially revised New York's rent stabilization scheme by, among other things, eliminating luxury deregulation, amending mechanisms for rent increases and providing for the expansion of regulation to new geographic areas (L 2019, ch 36). Here, although the alleged overcharges occurred years in the past, well before the HSTPA was enacted, the tenants ask us to apply certain amendments revising the enforcement provisions of the RSL with respect to overcharge claims, all contained in Part F of the legislation[14]. Although we generally do not review issues raised for the first time on appeal, we may consider the applicability of this new legislation enacted while these appeals were pending in this Court, "which could not have been raised below as those proceedings predated the amendment" (*Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117, 121 n [2001])[15]. In the context of legislation as significant as the HSTPA, the question we address here is relatively narrow -- we have no occasion to address the prospective application of any portion of the HSTPA, including Part F. We address the new legislation only to determine whether ***9** certain Part F amendments discussed below must be applied retroactively to past conduct -- and therefore govern these appeals, as urged by the tenants. We conclude that the overcharge calculation amendments cannot be applied retroactively to overcharges that occurred prior to their enactment.

Part F extended the four-year limitations period for overcharge claims to six years, provided that an overcharge complaint "may be filed . . . at any time" and eliminated the provision -- present, in substance, since 1983 -- stating that "no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed" (RSL § 26-516[a][2]; *see* CPLR 213-a). It also entirely abolished the lookback rule in favor of new requirements: the base date rent is no longer defined as the rent charged or reflected in a registration statement on the base date but that reflected in the "most recent reliable" registration statement filed six "or more" years before the most recent registration (RSL § 26-516[a][i]). Examination of rent history that predates the period covered by the former lookback rule is no longer precluded. Instead, DHCR and courts are now required to "consider all available rent history which is reasonably

necessary" to investigate overcharge claims and determine legal regulated rent, regardless of the vintage of that history and including records kept by owners, tenants and agencies (*id.* § 26-516[a][i], [h]). Part F likewise lengthened the four-year record retention period to six years and provides that an owner's "election not to maintain records" does not limit the authority of DHCR or a court to examine the rental history further (*id.* § 26-516[g]). Whereas the RSL previously provided for only two years of treble damages for willful overcharges, treble damages are now recoverable for the entire six-year limitations period (*id.* § 26-516[a][2]).[16]

The tenants argue that these amendments should be applied to these appeals based on the provision stating that Part F "shall take effect immediately and shall apply to any claims pending or filed on and after such date" (*see* L 2019, ch 36, Part F, § 7). The owners argue that the effective date language does not evince a clear legislative intent to apply the new overcharge calculation provisions retroactively, particularly to cases no longer pending in DHCR or the trial court and further contend, in any event, that retroactive application of the new overcharge calculation methodology to these appeals would violate due process protections in the State and Federal Constitutions. We must first assess whether applying these amendments to overcharges that occurred before the HSTPA's enactment truly implicates the concerns historically associated with retroactive application of new legislation.

In *Landgraf v USI Film Prods.*, the Supreme Court articulated a contemporary framework for analyzing retroactivity -- adopted by this Court -- which recognized that application of a new statute to conduct that has already occurred may, but does not necessarily, have "retroactive" effect upsetting reliance interests and triggering fundamental concerns about fairness (511 US 244 [1994]; *see also American Economy Ins. Co. v State of New York*, 30 NY3d 136, 149 [2017], *cert denied*, 138 S Ct 2601 [2018]). *Landgraf* harmonized the "apparent tension" between the presumption against retroactive application of statutes and statutory construction canons applied in prior cases to discern a statute's temporal scope, which concerned statutes with no truly retroactive effect (511 US at 263-280; *see e.g. Bradley v Sch. Bd. of City of Richmond*, 416 US 696 [1974] [holding a newly enacted statute authorizing the award of a reasonable attorney's fee to a prevailing party in a school desegregation case could be relied on in a pending action to support a claim for such a fee for legal services rendered before the statute was enacted]; *Thorpe v Hous. Auth. of City of Durham*, 393 US 268, 278-279 [1969] [holding that a new agency policy imposing "a very simple notification procedure" that a housing authority had to follow prior to evicting a tenant, which did not alter the lease terms or take away the housing authority's legal ability to evict, was applicable to an eviction proceeding commenced before the policy was issued but not yet completed]; *see also Landgraf*, 511 US at 285 n 37 [likewise limiting the continued utility of the tenet that new "remedial" statutes apply presumptively to pending cases]).

A statute has retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," thus impacting "substantive" rights (*Landgraf*, 511 US at 278-280; *see also American Economy*, 30 NY3d at 147). On the other hand, a statute that affects only "the propriety of prospective relief" or the nonsubstantive provisions governing the ***10** procedure for adjudication of a claim going forward has no potentially problematic retroactive effect even when the liability arises from past conduct (*Landgraf*, 511 US at 273; *see e.g. Ex parte Collett*, 337 US 55, 71 [1949] [transfer of a civil action])[17]. For example, in *Matter of Raynor v Landmark Chrysler*, this Court held that a legislative amendment revising the "time and manner" of insurers' payments for future workers' compensation awards arising from prior injuries did not have retroactive effects because "the statute neither altered the carrier's preexisting liability nor imposed a wholly unexpected new procedure" (18 NY3d 48, 57 [2011]).[18]

Landgraf illustrates this distinction. There, the Supreme Court addressed whether 1991 amendments to Title VII of the Civil Rights Act of 1964 applied to pending litigation. Prior to 1991, the primary monetary relief available under Title VII was back pay for lost wages, recoverable only if unlawful discrimination had a concrete effect on the plaintiff's employment (511 US at 252-254). The 1991 act "significantly expand[ed] the monetary relief potentially available to plaintiffs" -- and "allow[ed] monetary relief for some [cases] that would not previously have justified *any* relief under Title VII" -- by providing for compensatory damages (including for future pecuniary losses and nonpecuniary losses) and punitive damages and making monetary damages recoverable even absent a concrete effect on employment, as well as created a right to a jury trial in certain damages cases (*id.*). The Court deemed the jury trial provision purely procedural with no retroactive effect if applied to cases that had been commenced but had not yet proceeded to trial before the statute was enacted (*id.* at 280-281 and n 34). On the other hand, the punitive damages provision was "clearly" retroactive if applied to conduct occurring

before the statute's enactment, as it reflected a punishment for past acts (*id.* at 281). The compensatory damages provision -- which was "quintessentially backward looking" -- also would have had a retroactive effect because, in cases where money damages were previously unrecoverable, it would "attach an important new legal burden" and could "be seen as creating a new cause of action" (*id.* at 282-283). The Court noted that, even in cases where monetary damages were previously available, the new provision "resemble[d] a statute increasing the amount of damages available under a preestablished cause of action" that would, if applied to pending cases, "undoubtedly impose . . . a new disability' in respect to past events," explaining that the "*extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence" in determining retroactivity (*id.* at 283-284 [citation omitted]).

Here, if applied to past conduct, the amendments to the statute of limitations, overcharge calculation and damages provisions in Part F of the HSTPA would impose new liability and thus have a "retroactive effect" -- altering substantive rights in multiple ways. The statute of limitations with respect to overcharge claims has been treated as running backward from the date of initiation of the claim, previously permitting recovery of overcharges occurring only in each of the four years preceding the complaint. Thus, the relevant illegal conduct for which a tenant can recover is the overcharge committed in any given year during the recovery period. Expansion of the limitations period from four to six years clearly has a retroactive effect because it permits recovery for nonfraudulent conduct occurring during an additional two years preceding the former recovery period -- conduct that was beyond challenge ***11** under the prior law. Likewise, the imposition of treble damages for four additional years of overcharges -- conduct not previously subject to treble damages -- clearly increases the scope of liability for past wrongs if applied retroactively, as the Supreme Court indicated in *Landgraf* (*id.* at 281).

Critically, for purposes of calculating the amount owed for any overcharge, Part F now renders reviewable rent increases that were shielded by the prior lookback rule, permitting reconstruction of the legal regulated rent based on any relevant records in the apartment's entire rental history. Although the tenant can directly recover only for overcharges occurring during the six years preceding the complaint, the damages calculations for those years may now effectively incorporate conduct -- illegal increases -- preceding that period and occurring at any point in the rental history. This amendment is not merely, as the dissent contends, a procedural change regarding what evidence can be considered (dissenting op at 19-20); it expands the scope of owner liability significantly based on conduct that was inoculated by the old law[19]. In the same way that the compensatory damages provision in *Landgraf* would have provided monetary relief for conduct that, while illegal, previously did not provide a right to such relief, the effect here would be to permit recovery, previously barred by the lookback rule and limitations period, for past conduct that violated the RSL. Even if the amendments could be viewed in some cases as merely increasing damages for conduct that already gave rise to monetary relief, the dissent is wrong that such "tinker[ing] with the recoverable amount" has no retroactive effect (dissenting op at 20, 25-26). Under *Landgraf*, statutes that expand "[t]he *extent* of a party's liability" under the same cause of action have retroactive effect (511 US at 283-284 [observing that in no case "in which Congress had not clearly spoken, ha(d) (the Court) read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment"]).

This retroactive effect becomes even more pronounced when considered in tandem with the HSTPA amendments to the record retention requirements. Those amendments expand the retention period by two years and, although the provision still nominally permits an owner to destroy some records -- now after six years -- the new law states that "an owner's election not to maintain records shall not limit the authority of [DHCR] and the courts to examine the rental history and determine legal regulated rents" (RSL § 26-516[g]). Thus, the HSTPA effectively provides that an owner can be penalized indirectly for a disposal of records that was legal under the prior law but will now hinder the owner's ability to establish the legality of (and non-willfulness of any illegal) rent increases outside the lookback period, which -- under the new legislation -- impact recovery even in the absence of fraud.[20]

Retroactive application of the overcharge calculation provisions in Part F implicates all three *Landgraf* retroactivity criteria by impairing rights owners possessed in the past, increasing their liability for past conduct and imposing new duties with respect to transactions already completed. This is true even though rent stabilization is a highly regulated area. As we explained in *American Economy* when addressing the rights of employers' insurers under another highly regulated regime -- workers' compensation -- this is an area designed with "flexibility," in which "[t]he allocation of economic benefits and burdens has always been subject to adjustment" (*id.* at 148-149, quoting ***12** *Becker v Huss Co.*, 43 NY2d 527, 541 [1978]). "The Constitution merely mandates that a landlord earn a reasonable return," and no

party doing business in a regulated environment like the New York City rental market can expect the RSL to remain static, as we have repeatedly made clear in cases challenging prospective legislation altering the formula for rent increases under prior schemes (*see I.L.F.Y. Co. v City Rent & Rehabilitation Admin.*, 11 NY2d 480, 492 [1962]; *Bucho Holding Co. v Temporary State Hous. Rent Commn.*, 11 NY2d 469 [1962]). But applying these amendments to past conduct is not related to legislative decisions about proper division of economic burdens going forward, and it does not simply upset expectations about the continuing future availability of a favorable regulatory mechanism. Rather, by increasing overcharge exposure relating to owners' past acts, retroactive application of the provisions would undermine considerable reliance interests concerning income owners already derived from rents collected on real property years -- if not decades -- before.

Because the overcharge calculation provisions, if applied to past conduct, would impact substantive rights and have retroactive effect, the presumption against retroactivity is triggered. As opposed to a decisional change in the common law -- which typically but not invariably applies "to all cases still in the normal litigating process" (*Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184, 191 [1982] [citation omitted] [permitting retroactive application of interpretation of insurance law "to all claims not barred by the Statute of Limitations"]) -- generally, a statute is presumed to apply only prospectively (*Majewski*, 91 NY2d at 584). Retroactive legislation is viewed with "great suspicion" (*Matter of Chrysler Props. v Morris*, 23 NY2d 515, 521 [1969]). This "deeply rooted" presumption against retroactivity is based on "[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly" (*Landgraf*, 511 US at 265). As the Supreme Court has cautioned, careful consideration of retroactive statutes is warranted because "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration" and "[i]ts responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals" (*id.* at 266).

In light of these concerns, "[i]t takes a clear expression of the legislative purpose . . . to justify a retroactive application" of a statute (*Gleason v Gleason*, 26 NY2d 28, 36 [1970] [internal quotation marks and citation omitted]), which "assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits" (*Landgraf*, 511 US at 272-273). The ultimate question here, therefore, is one of statutory interpretation: whether the Legislature has expressed a sufficiently clear intent to apply the overcharge calculation amendments retroactively to these pending appeals. There is certainly no requirement that particular words be used -- and, in some instances retroactive intent can be discerned from the nature of the legislation (*see e.g. Eastern Enters. v Apfel*, 524 US 498 [1998]; *Usery v Turner Elkhorn Min. Co.*, 428 US 1 [1976]). But the expression of intent must be sufficient to show that the Legislature contemplated the retroactive impact on substantive rights and intended that extraordinary result. Even within the same legislation, language may be sufficiently clear to effectuate application of some amendments to cases arising from past conduct but not others with more severe retroactive effect (*see Landgraf*, 511 US at 280-281; *Matter of Beary v City of Rye*, 44 NY2d 398, 410-411 [1978]).

If retroactive application would not only impose new liability on past conduct but also revive claims that were time-barred at the time of the new legislation, we require an even clearer expression of legislative intent than that needed to effect other retroactive statutes -- the statute's text must unequivocally convey the aim of reviving claims. For nearly a century, this Court has recognized that "[r]evival is an extreme exercise of legislative power. The will to work it is not deduced from words of doubtful meaning. Uncertainties are resolved against consequences so drastic" (*Hopkins v Lincoln Trust Co.*, 233 NY 213, 215 [1922] [Cardozo, J.]). Indeed, it is a bedrock rule of law that, absent an unambiguous statement of legislative intent, statutes that revive time-barred claims if applied retroactively will not be construed to have that effect (*see e.g. Thomas v Bethlehem Steel Corp.*, 63 NY2d 150, 155 [1984]; *Beary*, 44 NY2d at 412-413). For example, in *35 Park Ave. Corp. v Campagna*, plaintiff contended that a newly enacted statute permitting a court to grant relief from an unconscionable lease or clause -- which the Legislature deemed "applicable to all leases, regardless of when executed" -- revived a time-barred claim to rescind a lease (48 NY2d 813, 814-815 [1979]). Citing the need for clear and unequivocal language "to effect so drastic a consequence," the Court reasoned that the language rendering the statute "applicable to all leases" was "ambiguous," failing to convey a sufficiently clear intention to resurrect time-barred claims (*id.* at 815).

When the Legislature has intended to revive time-barred claims, it has typically said so unambiguously, providing a limited window when stale claims may be pursued. For example, Jimmy Nolan's Law, which we ***13** addressed in

Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig. (30 NY3d 377 [2017]), expressly "revived" certain time-barred claims related to World Trade Center cleanup and rescue work, permitting suit during a discrete one-year window period (*see* General Municipal Law § 50-i[4][a], as added by L 2009, ch 440, § 2). Similar unequivocal "revival" language accompanied by a limited period for commencement of time-barred claims appears in the statute reviving toxic tort cases, including those arising from exposure to the drug diethylstilbestrol ingested by pregnant women (L 1986, ch 682 § 4), addressed in *Hymowitz v Eli Lilly & Co.* (73 NY2d 487 [1989]). The Legislature has historically acted with deliberation and clarity when upsetting the strong public policy favoring finality, predictability, fairness and repose served by statutes of limitations.[21]

The "claims pending" language in the Part F effective date provision is insufficient to indicate that the Legislature intended retroactive application in a manner that revives time-barred claims, such as by extending the statute of limitations to permit recovery of two annual overcharge claims that were time-barred under the prior law. This language bears no resemblance to the express claim revival language in the statutes addressed by *World Trade Ctr.* and *Hymowitz* -- yet the claim revival effect if the relevant amendments to the HSTPA were to be applied retroactively is substantially more far-reaching than that of the orderly and even-handed claim revival method used in those statutes, which created a narrow window for commencement of time-barred suits. If applied to past conduct, the relevant HSTPA amendments would not only revive claims for two additional years but, by changing the overcharge calculation methodology to enable review of any illegal rent increase in the history of the apartment, would also substantially alter the nature of the liability by resurrecting nonfraudulent overcharges that initially occurred more than four years prior to the complaint but continue to impact the calculation of the current rent. Just as the statutory language in *35 Park Ave. Corp.*, rendering the new legislation "applicable to all leases, regardless of when executed" (48 NY2d at 814-815), fell short of our standard, here the generic reference to "any claims pending" upon enactment does not provide the requisite textual assurance that the Legislature considered the significant impact of reviving barred claims, upsetting the strong public policy favoring repose, and that it desired that result.

This does not entirely resolve the statutory interpretation question, however, because as we have explained, retroactive application of Part F would have significant impacts beyond claim revival, specifically on the scope and nature of damages recoverable with respect to timely claims. While the presumption against claim revival effect may only be overcome by the Legislature's unequivocal textual expression that the statute was intended, not only to apply to past conduct, but specifically to revive time-barred claims (*see 35 Park Ave. Corp.*, 48 NY2d at 815), the general presumption against retroactive effect may be overcome by either an express prescription of the statute's temporal reach or a less explicit but "comparably firm conclusion" -- applying "normal rules of construction" -- of legislative intent to apply the enactment to conduct that occurred previously (*Fernandez-Vargas v Gonzales*, 548 US 30, 37 [2006] [citation omitted]; *see also Majewski*, 91 NY2d at 584). Although the HSTPA Part F effective date provision does not express an intent to revive time-barred claims under our heightened claim revival standard, read in the specific context of this legislation, the "claims pending" language is sufficiently clear to evince legislative intent to apply the amendments to at least some timely overcharge claims that were commenced prior to enactment.

Each of the HSTPA's fifteen parts contains its own effective date provision, indicating the Legislature considered the issue of temporal scope for each. The legislation is almost entirely forward-looking -- only Part F's effective date provision contains language referring to prior claims. In contrast, many of the HSTPA's other effective date provisions, such as that applicable to the amendments eliminating vacancy and longevity bonuses, state only that the parts of the legislation to which they apply "shall take effect immediately" (*see* L 2019, ch 36, Part A § 7, Part B § 8, Part C § 5, Part D § 8, Part G § 7, Part J § 2, Part L § 3), in some cases indicating when the amendments contained therein expire (*id.* Part E § 3, Part H § 5, Part K § 18). Others expressly provide that the relevant part applies prospectively only, such as by indicating that it takes effect immediately but applies to actions "commenced on or after such effective date" or that certain amendments take effect at some point in the future, such as "on the thirtieth day after this act shall have become a law" (*id.* Part M § 29; *see also id.* Part N § 2 [Part N "shall take effect immediately and shall only apply to plans (for conversion of an apartment to a condominium or cooperative) ***14** submitted . . . after the effective date"], Part O § 14 [Part O "shall take effect on the thirtieth day after it shall have become law"]). Therefore, this is not a case where the Legislature passed comprehensive legislation, including general "claims pending" language, without differentiating between the parts it intended to apply retroactively and those that could reasonably be given only prospective effect. Moreover, Part F relates almost entirely to the calculation of overcharge claims, and any such claim that was pending at the time the HSTPA was enacted necessarily

involved conduct that occurred prior to the statute's enactment.

Read in context, and because some of the Part F provisions have effects beyond reviving time-barred claims, the "claims pending" language must be construed as evincing a retroactive intent[22]. At the very least, "claims pending" indicates the Part F provisions were intended to apply to overcharge claims where the calculation issue remained unresolved as of the June 2019 effective date. Indeed, in *Landgraf*, the Supreme Court indicated that similar language referencing "pending" cases would have been sufficient in that case to reflect a retroactive intent (*see Landgraf*, 511 US at 259-260 [referencing language in a prior version of the statute stating the provisions "shall apply to all proceedings pending on or commenced after the date of enactment"]). Therefore, although there was no clear directive to revive time-barred claims, we conclude that the Legislature evinced a sufficiently clear intent to apply Part F to timely pending claims, such as *Regina Metro*. and *Taylor*, where the overcharge calculation issue was unresolved at the time the HSTPA was enacted[23]. It is therefore necessary to reach the constitutional challenge.

III.

To comport with the requirements of due process, retroactive application of a newly enacted provision must be supported by "a legitimate legislative purpose furthered by rational means" (*American Economy*, 30 NY3d at 157-158, citing *General Motors Corp. v Romein*, 503 US 181, 191 [1992]). Of course, as with prospective elements of legislation, legislative direction concerning the scope of a statute carries a presumption of constitutionality, and the party challenging that direction bears the burden of showing the absence of a rational basis justifying retroactive application of the statute (*Turner Elkhorn*, 428 US at 15). Nevertheless, the Supreme Court has made clear that "retroactive legislation does have to meet a burden not faced by [purely prospective] legislation," which is satisfied when "the retroactive application of the legislation is *itself* justified by a rational legislative purpose" (*Pension Benefit Guar. Corp. v R.A. Gray & Co.*, 467 US 717, 730 [1984] [emphasis added]).

Because "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation" (*Romein*, 503 US at 191), "the justifications for [prospective legislation] may not suffice for [the retroactive aspects]" (*R.A. Gray & Co.*, 467 US at 730). We have suggested that, in order to comport with due process, there must be a "persuasive reason" for the "potentially harsh" impacts of retroactivity (*Holly S. Clarendon Trust v State Tax Commn.*, 43 NY2d 933, 935 [1978]; *see Chrysler Props.*, 23 NY2d at 522 [there was no "persuasive case" supporting retroactive application]). Our acknowledgement that retroactive legislation must be supported by a rational basis commensurate with the degree of retroactive effect does not represent a "bifurcation" between the rational basis analyses for prospective and retroactive legislation (*see* dissenting op at 36). Consideration of the scope of legislation is critical to a rational basis analysis, regardless of whether it is solely prospective or also involves retroactive effects.

In tax cases, an area where retroactive application of statutes is more highly tolerated, if for a short time (*James Sq. Assoc. LP v Mullen*, 21 NY3d 233, 246 [2013], citing *Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 70 NY2d 451, 455 [1987] and *Welch v Henry*, 305 US 134, 146 [1938]), we have highlighted particular factors relevant to the due process analysis for retroactive legislation. In *Replan*, we explained that whether a retroactive statute comports with due process principles is a "question of degree" that turns on the length of the retroactivity period, the taxpayer's forewarning of a change in legislation as relevant to reliance interests and the public purpose for retroactive application (70 NY2d at 456). Our consideration of these factors -- derived from Supreme Court precedent -- "does not differ from the prohibition against arbitrary and irrational legislation that applies generally to enactments in the sphere of economic policy" (*Caprio v New York State Dept. of Taxation & Fin.*, 25 NY3d 744, 752 [2015], quoting *United States v Carlton*, 512 US 26, 30 [1994]). Instead, in requiring that there be a non-arbitrary justification for retroactive application of a statute, the rational basis test incorporates the equitable considerations that *Replan* highlights more directly. Likewise, the Supreme Court has indicated that it applies the same due process analysis in the tax context that applies to any other economic legislation (*Carlton*, 512 US at 30), albeit recognizing that retroactivity is more tolerable in tax legislation (*see United States v Darusmont*, 449 US 292, 296-298 [1981]; *Welch*, 305 US at 146, 149-150).[24]

In determining whether retroactive application of a statute is supported by a rational basis, the relationship between the length of the retroactivity period and its purpose is critical. Generally, there are two types of retroactive statutes that courts have found to be constitutional: those employing brief, defined periods that function in an administrative manner to assist in effectuating the

legislation, and statutory retroactivity that -- even if more substantial -- is integral to the fundamental aim of the legislation. For example, in the first category, courts have rejected challenges to the legislative practice of incorporating a clear, limited retroactivity period intended to prevent parties from taking advantage of a lengthy legislative process to circumvent a statute. In *R.A. Gray & Co.*, the Supreme Court rejected a due process challenge to retroactive application of a statute that required employers that withdrew from a multiemployer pension plan to pay a fixed debt to the plan and expressly extended that penalty to those who withdrew within the five months prior to enactment (467 US at 720, 725). After observing that Congress had been "quite explicit" that the statute was made retroactive in order to "prevent employers from taking advantage of a lengthy legislative process and withdrawing while Congress debated," the Court emphasized that the retroactivity period was limited in scope to achieve its aim, noting, "as the amendments progressed through the legislative process, Congress advanced the effective date chosen so that it would encompass only that retroactive time period that Congress believed would be necessary to accomplish its purposes" (467 US at 730-731).

Falling within the latter category -- instances where retroactive application was central to the statutes' purpose -- in *Turner Elkhorn* the Supreme Court upheld legislation requiring coal operators to compensate miners who had already left the industry for the disability caused by the latent effects of exposure to coal dust, resulting in black lung disease, or pneumoconiosis (428 US at 15, 18-20). The Supreme Court reasoned that the retroactive imposition of liability on the coal operator that previously employed the miner was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor" (*id.* at 18; *but see Eastern Enters. v Apfel*, 524 US 498 [1998] [deeming retroactive application of a coal miner health care benefit scheme, requiring participation by a company that ceased coal mining operations in 1965, unconstitutional]). Similarly, in *American Economy* -- where we assumed without deciding that a statute closing a fund that previously benefitted workers' compensation insurance carriers liable for "reopened" claims had a retroactive impact -- we concluded application of the statute to injuries incurred under workers' compensation insurance policies finalized prior to the effective date was necessary to achieve its purpose (30 NY3d at 158-159). There, the workers' compensation fund ***15** was closed to relieve the burden on employers supporting its costs, which had increased dramatically in the six years preceding the legislation due to skyrocketing medical costs and an unexpected surge in reopened cases (*id.* at 143). If that closure was not applied to claims arising from past injuries, the fund "would have incurred substantial new liabilities for many years, given the duration of many workers' compensation cases," and "the relief to businesses sought by the legislature would have been indefinitely delayed" (*id.* at 158). In cases where retroactivity is integral to full achievement of the fundamental purpose of the legislation, a rational basis for the retroactive effect may be readily identifiable.[25]

On the other hand, even short periods of retroactivity will be invalidated absent the requisite rational basis. In *Chrysler Properties*, we sustained a constitutional challenge to retroactive application of a statute providing New York City a new right to seek judicial review of adverse determinations of the State Tax Commission, despite the relatively brief, four-month period of retroactivity set forth in the effective-date provision (23 NY2d at 518-519). Because there previously was no right to challenge such determinations, we concluded that a taxpayer who was issued a refund order only one month before the new law was entitled to payment because the taxpayer "had obtained a sufficiently certain right to the money" and the Legislature made the amendment retroactive "without any discernable reason" (*id.* at 517-519). Likewise, in *James Square*, we invalidated the retroactive application of amendments to the Empire Zones Program Act that changed the criteria for receipt of tax benefits, noting businesses had no forewarning of the change, and that a 16-month period of retroactivity was excessive because businesses had "gained a reasonable expectation that they would secure repose in the existing tax scheme" (21 NY3d at 248-250 [internal quotation marks omitted]). We emphasized that retroactively denying tax credits did not further any aim of the statute -- by spurring investment or preventing abuses of the program -- but "simply punished . . . participants more harshly for behavior that already occurred and that they could not alter" (*id.* at 250). Unlike the statutes at issue in *R.A. Gray & Co.*, *Turner Elkhorn* or *American Economy*, where the retroactive scope was directly related or integral to furtherance of the legislative goals, in *Chrysler Properties* and *James Square* we concluded retroactive application would be irrational given the extent of settled interests, degree of repose and lack of a permissible basis for unsettling those interests.

Those same concerns are amplified here. The HSTPA's overcharge calculation and treble damages provisions, if applied retroactively, would more severely impact substantive rights than the provision in *James Square*, which involved a tax statute, an area where courts are generally *more* tolerant of retroactivity. Before the HSTPA, the combined effect of the statute of limitations

and lookback rule provided owners substantial repose relating to rent increases collected more than four years prior to the filing of the complaint. In sharp contrast, the HSTPA amendments directing review of all available rental history to reconstruct the legal regulated rent on the base date may be applied to incorporate increases (whether fraudulent, erroneous or simply lacking in adequate documentation many years after the fact) in the apartment's distant rental history, thereby expanding a tenant's total overcharge recovery well beyond what was provided under the prior law.

This retroactivity period cannot be characterized as brief; rather, the Legislature appears to have intended that the retroactive period be bounded only by the length of the apartment's rental history. Such a vast period of retroactivity upends owners' expectations of repose relating to conduct that may have occurred many years prior to the recovery period. Having reasonably relied on pre-HSTPA statutory and regulatory provisions to destroy records (*see* former RSL 26-516[g]; *Cintron*, 15 NY3d at 354; *Thornton*, 5 NY3d at 181; *Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]) -- records that are now needed under the HSTPA to establish the legality of prior rent increases and a lack of willfulness -- owners may be held liable under the HSTPA for purported historical overcharges that were once supported by documentation. Turning to the treble damages ***16** provisions, where owners are unable to meet their burden to prove a negative -- lack of past willfulness -- the HSTPA makes treble damages mandatory for all six years of the new recovery period, rather than the two years preceding filing of the complaint. These provisions either increase the penalty or impose a new penalty for damages that previously were not trebled.

There can be no doubt here that the HSTPA Part F amendments represent a clear rejection of prior rent stabilization enforcement policy and effectuate a significant readjustment of substantive rights relating to overcharge recovery, distinguishing this legislation in critical ways from that applied to past conduct in *Romein*, which clarified the Michigan legislature's original intent that was expressed in a legislative resolution but disregarded by employers and courts. As explained further below, "judicial confusion" regarding how to calculate overcharges in *Roberts* cases (dissenting op at 32) cannot alone transform the substantive amendments made in Part F as to *all* overcharge cases into mere clarifying amendments like those in *Romein*. In the same way, the Part F amendments are quite different from the 1997 RRRA amendment adding the lookback rule to the RSL's enforcement provisions, which this Court applied to a pending case in *Partnership 92* (11 NY3d at 860) (*see* n 22, *supra*). As we explained in *Thornton*, that lookback rule amendment merely clarified past legislative intent and reinforced existing statutory language which, since 1983, made clear that damages could not be calculated based on an overcharge that occurred more than four years prior to the filing of the claim (5 NY3d at 180)[26]. No *Landgraf* analysis was necessary with respect to application of the 1997 lookback rule to pending cases because, unlike the sea change created by the HSTPA Part F amendments, it did not have a truly retroactive effect on liability. Moreover, although we applied the lookback rule amendment to past conduct in *Partnership 92*, we were more circumspect with regard to other amendments in the 1997 RRRA. In *Gilman*, we held that DHCR acted irrationally when it applied an amendment relaxing evidentiary requirements for admission of owner records to permit an owner to reopen the record, nearly a decade after the tenant commenced the proceeding and during the administrative appeal, expressing concern that "the rules were changed in midstream" (99 NY2d at 147, 149-152). This Court's precedent regarding the 1997 RRRA is more nuanced than the ***17** dissent acknowledges and is compatible with our analysis identifying the significant retroactive effects that would arise if Part F is applied to pending cases.

Indeed, the effects of the HSTPA amendments expanding overcharge liability implicate the concerns that the Supreme Court expressed in *Eastern Enterprises* in striking down retroactive application of a statute that required former mine operators to fund the health benefits of retired miners who worked for the operator before it left the industry (524 US 498). Even though the statute reflected similar policy goals as the scheme upheld in *Turner Elkhorn*, it was invalidated (by the plurality on Takings Clause grounds, with a concurrence on due process principles) based on the extreme degree and arbitrary nature of the retroactive effect (524 US at 530-537, 547-550)[27]. It is clear from *Eastern Enterprises* that there are limits on retroactive imposition of liability even when it is related to a rational statutory goal.

Moreover, retroactivity concerns are further heightened where, as here, the new statutory provisions "affect[] contractual or property rights, matters in which predictability and stability are of prime importance" (*Landgraf*, 511 US at 271). While the lease agreements between the owners and tenants were necessarily subject to the requirements of the RSL, curtailing the parties' freedom of contract in significant degree, when the governing law (essentially incorporated in the annual leases) is altered retroactively years later, long after the expired contracts have been performed, the impact on

contract rights is unusually significant. Such alteration -- if applied retroactively -- impairs real property rights by diminishing or possibly eliminating the constitutionally protected return on investment owners realized in the past related to the use of their properties (*see generally I.L.Y.F. Co.*, 11 NY2d at 492). The HSTPA does much more than require a party to shoulder a new payment obligation going forward -- and its destabilizing effect is especially severe.

That potential effect is demonstrated by the cases before us. In *Regina Metro.*, for example, as noted by the Appellate Division dissent, application of the standard calculation methodology under the former rule resulted in overcharge damages of $10,271.40, while the reconstruction method erroneously utilized by DHCR -- which appears consistent with the HSTPA's new approach -- resulted in damages of $285,390.39 (*Regina Metro.*, 164 AD3d at 433 [Gische, J., dissenting]). In *Reich*, proper application of the pre-HSTPA statutes resulted in no overcharge, but a comparison of the market rent actually charged during the recovery period -- over $18,000 per month -- against a reconstructed stabilized rent under the HSTPA considering rental history dating back to the tenants' initial occupancy of the apartment in 2005 (or before) could result in an enormous retroactive increase in liability. The same profound impact on overcharge calculations would occur in *Taylor* and *Raden*, involving tenants that took occupancy well over a decade before they sued.

Unlike cases where retroactive application rationally furthered a legislative goal, such as closing a state-administered fund benefitting insurers that imposed unsustainable costs on employers (*see American Economy*, 30 NY3d 136) or preventing legislation from being undermined by those seeking to escape its impact before enactment (*see R.A. Gray & Co.*, 467 US 717) -- there is no indication here that the Legislature considered the harsh and destabilizing effect on owners' settled expectations, much less had a rational justification for that result. While prospective application of Part F to overcharges occurring after the effective date may serve legitimate and laudable policy goals, no explanation has been offered, much less a rational one, for *retroactive* application of the amendments to increase or create liability for rent overcharges that occurred years -- even decades -- in the past.

Part F contains no statement of legislative findings. Such a statement is contained elsewhere in the legislation, noting the continuing housing emergency; the need "to prevent speculative, unwarranted and abnormal increases in rents"; the acute shortage of housing accommodations caused by high demand and decreased supply; and the need, with respect to those being charged market rents, to avoid profiteering and other disruptive practices (L 2019 ch 36, Part G, § 2). Prospective application of Part F could be understood to address these concerns by deterring future overcharges, but retroactive application to cases pending in the appellate pipeline does not do so; the HSTPA cannot deter conduct that has already occurred (*James Sq.*, 21 NY3d at 250). Likewise, to the degree that prospective application of certain provisions of the HSTPA is justified because the Legislature has concluded that those provisions will act to preserve the stock of stabilized housing or moderate rents going forward, retroactive application of the amendments to increase the amount of an overcharge judgment (or create overcharge liability where none existed) does not return apartments to rent stabilization or ensure the propriety of rents collected in the future. Rather than serving any of the policy goals of rent stabilization (which it would not), retroactive application of the overcharge calculation amendments would merely punish owners more severely for past conduct they cannot change -- an objective we have deemed illegitimate as a justification for retroactivity (*see James Sq.*, 21 NY3d at 249-250; *see also Turner Elkhorn*, 428 US at 17-18 ["we would . . . hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness"] [citations omitted]).

The dissent asserts that the overcharge calculation amendments were intended to ameliorate the overcharges arising from deregulations later revealed to be improper by *Roberts* and to address post-*Roberts* judicial confusion regarding how to calculate such overcharges and that, thus, retroactive application of such amendments to pending cases is supported by a rational basis (*see* dissenting op at 30-32, 38-39)[28]. This argument is unsupported by the text of the statute or its legislative history, which makes no reference to *Roberts*. The amendments impact far more than overcharges associated with the "14-year period of unlawful deregulation involving 50,000 [*Roberts*] apartments" referenced by the dissent (dissenting op at 39). The overcharge calculation amendments apply to all overcharge claims -- not merely those flowing from an improper deregulation, much less a *Roberts* deregulation. Thus, not only is there no basis to conclude that addressing *Roberts* was the Legislature's intent, neither would these broadly applicable amendments constitute a rational response to *Roberts*.

Relatedly, although the new treble damages provisions function distinctly from the integrated overcharge calculation provisions, retroactive application of any Part F amendments that would newly impose treble damages for past conduct is also impermissible[29]. Treble damages

are generally viewed as punitive (*Vermont Agency of Natural* ***18** *Resources v United States ex rel. Stevens*, 529 US 765 [2000]; *State of N.Y. ex rel. Grupp v DHL Express [USA], Inc.*, 19 NY3d 278 [2012]; *see also* Senate Introducer's Mem in Support, Bill Jacket, L 2019, ch 36 [describing treble damages as "punitive"]). They function as such in the RSL, under which actual damages are also available and there are no limitations on the amount of the annual overcharge that may be trebled (*see Landgraf*, 511 US at 281 ["Retroactive imposition of punitive damages would raise a serious constitutional question"]; dissenting op at 45-46 [identifying constitutional concerns with retroactive imposition of treble damages]).

The Legislature is entitled to impose new burdens and grant new rights in order to address societal issues and, in enacting the HSTPA, it sought to alleviate a pressing affordable housing shortage that it rationally deemed warranted action. But there is a critical distinction for purposes of a due process analysis between prospective and retroactive legislation. As the Supreme Court has observed, retroactive legislation that reaches "particularly far" into the past and that imposes liability of a high magnitude relative to impacted parties' conduct raises "substantial questions of fairness" (*Eastern Enters.*, 524 US at 534). In the retroactivity context, a rational justification is one commensurate with the degree of disruption to settled, substantial rights and, in this instance, that standard has not been met. Thus, the overcharge calculation and treble damages provisions in Part F may not be applied retroactively, and these appeals must be resolved under the law in effect at the time the overcharges occurred. The parties' remaining arguments lack merit, are rendered academic or are otherwise unreviewable.

In an attempt to delegitimize our analysis by association, our three dissenting colleagues raise the ghost of *Lochner v New York* (198 US 45 [1905]), an outdated and long-discredited Supreme Court precedent that has nothing to do with retroactivity (dissenting op at 2, citing *Lochner*). In *Lochner*, under the guise of due process analysis, the Supreme Court struck down economic legislation it viewed as unwise from a public policy standpoint (*see Ferguson v Skrupa*, 372 US 726, 730 [1963]). We agree wholeheartedly with the dissent that legislative judgments are presumptively constitutional and are subject to a rational basis analysis in which the policy preferences of judges have no role. Although the dissent repeatedly suggests otherwise, in stark contrast to the holding in *Lochner*, in this case we are not invalidating or "striking down" the overcharge calculation provisions in the HSTPA. The only question presented and resolved here is whether those provisions -- whose validity is not otherwise at issue in these appeals -- may be applied retroactively. The dissent never seriously engages with this issue or the substantial body of precedent governing it.

In this regard, the rational basis test -- although extremely deferential -- must be meaningfully applied to ensure basic principles of fairness and substantial justice, lest we abdicate our responsibility to the citizens of this State. As Justice Holmes wrote when dissenting in *Lochner* -- espousing a view that later prevailed in the Supreme Court -- "the word liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, *unless it can be said that a rational and fair [person] necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law*" (*Lochner*, 198 US at 76 [Holmes, J., dissenting] [emphasis added]). The modern rejection of *Lochner* has never been understood to require courts to abandon "fundamental principles" of fairness -- not even when reviewing economic legislation. There are few principles as fundamental or, in the words of the Supreme Court, as "elementary" or "deeply rooted" as the notion that government may not irrationally impose or expand liability for past conduct (*Landgraf*, 511 US at 265).

Indeed, the legislation imprudently struck down in *Lochner* was not retroactive at all -- it merely set a prospective cap on bakers' working hours (198 US at 52). If that legislation had directed that the cap be applied retroactively, requiring recoupment of wages bakers earned years if not decades in the past when working excess hours (or profits their employers earned as a result of the productivity associated with those hours), we would certainly look upon such retroactive application with skepticism. While it may be unusual -- but not unprecedented (*see Moe v Sex Offender Registry Bd.*, 467 Mass. 598, 6 NE3d 530 [2014] [retroactive application of amendments ***19** requiring publication of sex offender registry information violated due process rights of sex offenders]; *Neiman v American Nat. Property and Cas. Co.*, 236 Wis.2d 411, 613 NW2d 160 [2000] [retroactive application of amendment increasing cap on wrongful death damages violated defendant's due process rights]; *San Carlos Apache Tribe v Superior Court*, 193 Ariz. 195, 972 P2d 179 [1999] [retroactive application of amendments revising surface water law violated due process rights of tribes]) -- to decline to apply a statute retroactively on due process grounds, it is also unusual for parties to ask the Court to apply retroactively legislation that alters substantive rights in the way that Part F does.

We may have a fair disagreement over whether there is a rational justification for retroactive application of the HSTPA's overcharge calculation provisions, but the dissent's misguided attempt to cast as improper our application of a meaningful standard of constitutional review merits a response. We are persuaded by the words of Justice Breyer who, although disagreeing with the result in *Eastern Enterprises*, cautioned against the misplaced fear that reliance on the Due Process Clause in assessing the propriety of retroactive application of a statute somehow "resurrect[s] *Lochner*" (524 US at 557 [Breyer, J., dissenting]).

"[A]n unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself. To find that the Due Process Clause protects against this kind of fundamental unfairness--that it protects against an unfair allocation of public burdens through this kind of specially arbitrary retroactive means--is to read the Clause in light of a basic purpose: *the fair application of law*, which purpose hearkens back to the Magna Carta. It is not to resurrect long-discredited substantive notions of freedom of contract"' (*id.*, quoting *Ferguson*, 372 US at 729-732 [internal citations omitted]).

Our "Court . . . plays a crucial and necessary function in our system of checks and balances. It is the responsibility of the judiciary to safeguard the rights afforded under our State [and Federal] Constitution[s]" (*People v LaValle*, 3 NY3d 88, 128 [2004]). Our narrow holding here -- determining that newly-enacted overcharge calculation provisions may not be applied retroactively -- constitutes nothing more than an appropriate exercise of this quintessentially judicial authority.

Accordingly, in *Regina Metro.*, the Appellate Division order, insofar as appealed from, should be affirmed, with costs to petitioner Regina Metropolitan Co., LLC, and the certified question answered in the affirmative; in *Raden*, the Appellate Division order should be affirmed, with costs, and the certified question not answered as unnecessary; in *Taylor*, the Appellate Division order should be modified, without costs, in accordance with this opinion and as so modified affirmed, and the certified question answered in the negative; and in *Reich*, the Appellate Division order should be affirmed, with costs, and the certified question answered in the affirmative.

WILSON, J. (dissenting):

For the first time in its history, our Court has struck down, as violative of substantive due process, a remedial statute duly enacted by the legislature: Part F, section 7 of the Housing Stability and Tenant Protection Act of 2019 (HSTPA). According to the majority, when our legislature stepped in to remedy the unlawful deregulation of tens of thousands of rent-regulated dwellings, occurring because of the 13-year lapse between DHCR's erroneous statement of the law and this Court's correction of it, the legislature violated the United States Constitution by deciding that landlords could retain some, but not all, of the unlawfully obtained rent overcharges.

The majority's justification is that "the prior statutory scheme conferred on owners clear repose" to retain unlawful rent overcharges "that occurred, in some cases, many years or even decades before the HSTPA was enacted" (majority op at 3). But the prior rent control law offered no clear repose; rather, it produced differing judicial and administrative interpretations about how to calculate rent overcharge awards for past conduct. The legislature stepped in and resolved that question, as is its right. Moreover, even had the prior statute granted "clear repose," the legislature remains free to alter damage awards for unlawful rents obtained by unlawful past conduct. The very "claim-revival" jurisprudence cited by the majority establishes the legislature's right to do so.

One hundred and sixteen years ago, in *People v Lochner* (177 NY 145, 175 [1904]), our Court understood that the legislature, not the courts, is charged with making laws to advance the public welfare and that courts must give a wide berth to such legislative judgments, so long as they do not trample constitutionally protected rights. The United States Supreme Court reversed us. Time has not been kind to *Lochner v New York* (198 US 45 [1905]). It is regarded as one of the Supreme Court's most misguided decisions. The majority's description of it as "long-discredited" (majority op at 54) is charitable.

With today's decision, the disgraced era of *Lochner* makes its tragic return home. To find portions of the HSTPA unconstitutional on substantive due process grounds, the majority has disregarded jurisdictional rules and prudential concerns. It proceeds to mischaracterize the HSTPA's express application to "claims pending" as rendering it a retroactive "claim revival" statute. Answering a question not raised below, the Court decides it with a legal analysis not argued by the parties, applied to imagined factual circumstances on a nonexistent factual record.

In wielding substantive due process as a sword to strike down remedial economic legislation, the majority vitiates

the political choices of New York's legislature in passing the HSTPA. The amendments to the legislative scheme surrounding rent stabilization reflect the legislature's judgment, approved by the Governor, about the consequences for landlords who have violated New York law. In place of that judgment, the majority has substituted its own: the Court must "safeguard" the "substantive" "contractual or property rights" of New York's landlords. Indeed, late in its opinion, the majority identifies the substantive right protected by its resurrection of *Lochner*: the "substantive rights relating to overcharge recovery" (majority op at 46). That is, the rights of landlords to retain illegal overcharges wrongfully obtained from tenants.[30]

Make no mistake: the legislature unequivocally instructed that Section F of the HSTPA was to apply to "claims pending." The majority admits the legislature "intended [Part F] to apply to overcharge claims where the calculation issue remained unresolved as of the June 2019 effective date" (majority op at 38). As much as the majority protests it is "not invalidating or striking down' the overcharge calculation provisions in the HSTPA" (majority op at 54), it is striking down, as violative of substantive due process, the legislature's clear command: "This act shall take effect immediately and shall apply to any claims pending or filed on and after such date" (L 2019, ch ***20** 36, Part F, § 7)[31]. This is *Lochner* redux: a grotesque usurpation of the legislature's role in determining economic regulation when no fundamental rights are at issue.

Because Part F of the HSTPA contains economic regulations that reflect a legislative policy judgment and do not infringe on fundamental rights, it should be evaluated under the well-settled rational basis standard (*West Coast Hotel Co. v Parrish*, 300 US 379, 391 [1937]). The rational basis standard is not demanding (*see People v Knox*, 12 NY3d 60, 69 [2009]). Indeed, it is "the most relaxed and tolerant form of judicial scrutiny" (*Dallas v Stanglin*, 490 US 19, 26 [1989]). Simply, courts are barred from declaring economic legislation unconstitutional under the Due Process Clause of the Fourteenth Amendment if the regulation is conceivably rationally related to a legitimate government interest and is neither arbitrary nor discriminatory (*see Nebbia v New York*, 291 US 502, 537 [1934]). By finding a due process violation here, the majority ignores nearly a century of Supreme Court precedent in which the Court applied that rational basis test to state regulations (*see Ferguson v Skrupa*, 372 US 726, 729 [1963] [collecting cases]).

Since 1937, the Supreme Court has never struck down an economic regulatory statute, duly enacted by a legislature, on substantive due process grounds. Neither had we, until now. Because economic regulations, such as the rent control regulations before us, are not subject to any sort of heightened scrutiny and readily pass the rational basis test, I dissent.[32]

In 1894, reform-oriented Republicans took control of every branch of New York government, after years of Democratic dominance backed by the notorious Tammany Hall organization (*see* Paul Kens, *Lochner v. New York: Economic Regulation on Trial* 38 [1998]). When the legislature reconvened for its 1895 session, bakers on the Lower East Side were on strike over working hours and conditions (*id.* at 49). At the time, most bakeshops were housed in unfinished, stooped-ceilinged tenement basements. Workweeks were typically more than seventy hours, and in some cases over 100 hours, for less than $12 per week (before boarding costs that workers were required to pay) (*id*. at 13)[33]. The work was hot, grueling, unsanitary and unsafe. Although New York had enacted a statutory eight-hour workday in 1867, the law contained no enforcement mechanism and included a section providing that "no person shall be prohibited from working as many hours extra work as he or she may see fit" (*id.* at 26). The bakeshop law (codified, as relevant, L 1897, ch 415, § 110) set a ten-hour per day and sixty-hour per week limit for bakery employees. It also made any violation of the law a misdemeanor punishable by a $20 to $100 fine on first offense (*People v Lochner*, 73 AD 120, 123 [4th Dept 1902]). The bakeshop law passed unanimously in the Assembly and Senate and was signed by the Governor that May.

A Utica bakeshop proved to be the law's downfall. Joseph Lochner, a longtime adversary of Utica's journeyman bakers' union, was arrested in April 1901 for violating the bakeshop law by allowing (or compelling) his employee, Aman Schmitter, to work more than sixty hours per week. It was Lochner's second violation of the law, for which he faced a fine of $50. After his conviction in Oneida county court, Lochner argued on appeal that the bakeshop law prohibited him from freely entering into contracts, in violation of the Privileges and Immunities and Equal Protection clauses of the Fourteenth Amendment, and the Due Process Clause of the state Constitution ***21** (*Lochner*, 73 AD at 121). The Appellate Division sided with the state, holding that the statute was a valid exercise of the legislature's police power to create economic regulations and that the judiciary must not disturb such a regulation if it "really relates to, and is convenient and appropriate to promote, the public health" (*id.* at 124, quoting *In re Jacobs*, 98 NY 98, 100 [1885]).

We agreed. As we held, many states had adopted statutes to address working conditions in various industries, and the Supreme Court had regularly upheld them as not violative of the Fourteenth Amendment (*Lochner*, 177 NY at 148-149, citing *Barbier v Connolly*, 113 US 27 [1884] [upholding a San Francisco ordinance banning overnight work in public laundries]; *Holden v Hardy*, 169 US 366 [1898] [upholding Utah's eight-hour workday for mineworkers]). The standard for Fourteenth Amendment review of a statute was plain: "If the act and the Constitution can be so construed as to enable both to stand, and each can be given a proper and legitimate office to perform, it is the duty of the court to adopt such construction" and "it is not necessary to the validity of a penal statute that the Legislature should declare on the face of the statute the policy or purpose for which it was enacted" (*Lochner*, 177 NY at 159 [internal citations omitted]). The Court needed only to find a conceivable way in which the statute was addressed to the benefit of the public, which the bakeshop law was.

The Supreme Court held otherwise, spawning the dominant canon of review for state economic regulation from 1905 until its demise in 1937, and the dominant anticanon for the 83 years since (*see* Jamal Greene, *The Anticanon*, 125 Harv L Rev 379, 418 [2011]). In *Lochner*, the Court held that New York deprived bakers of the "the general right of an individual to be free in his person and in his power to contract in relation to his own labor" (198 US 45, 58 [1905]). The Court articulated a new, heightened protection for some class of economic liberty, including the right to contract freely:

"Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the state has no power to limit their right as proposed in this statute" (*Lochner*, 198 US at 61).

Justice Oliver Wendell Holmes, dissenting in an enviable 650 words, articulated the once and future position of the Court: "state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract" (*id.* at 75-76 [Holmes, J., dissenting]). Justice Holmes vigorously maintained that it is up the people and their political representatives to determine the extent of economic regulation, not a constitutional question for courts.

In the roughly 30-year *Lochner* era that followed, an estimated 200 state statutes were found to be unconstitutional as violative of due process because they interfered with the right to contract--what would come to be known as the first wave of the "substantive due process" doctrine (*see* Erwin Chemerinsky, *Constitutional Law* [5th ed], § 8.2.2, citing Benjamin Wright, *The Growth of American Constitutional Law* 154 [1942]). In *Block v Hirsh* (256 US 135 [1921]), Justice Holmes, this time writing for the Court, drove a crack into *Lochner*'s armor. During the pendency of a lease, the District of Columbia passed new legislation regulating rental property. The landlord objected to the application of the new legislation to the preexisting lease, claiming to do so would deprive him of due process. The Court upheld the statute, noting that "we have no concern of course with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired" (*id.* at 158).

Unbowed by the Supreme Court's *Lochner*-era jurisprudence, and perhaps emboldened by *Block*, in 1933, this Court upheld a New York statute setting the price of milk against a due process challenge (*People v Nebbia*, 262 NY 259 [1933]). That proved the turning point. The next year, reviewing *Nebbia*, the Supreme Court retreated to its proper deferential posture:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio" (291 US at 537).

The *coups de grâce* came in *West Coast Hotel v Parrish* (300 US 379 [1937]) and *United States v Carolene Products* (304 US 144 [1938]), where the Court clarified

that so long as legislation did not violate a specified constitutional right, "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or exhibit "prejudice against discrete and insular minorities," a reviewing court must defer to a legislature that employs reasonable means towards a legitimate purpose (*Carolene Products*, 304 US at 153-153 n 4; *Nebbia v New York*, 291 US 502, 537 [1934]).

The post-*Lochner* consensus has held for nearly a century, resting on two principles. The first principle is separation of powers. The legislature, not the courts, determines the extent of economic regulation aimed at goals like health, safety, prosperity and equity. The second principle is that the "freedom to contract" and associated economic liberties are not constitutionally protected rights. Legislation that threatens someone's pocketbook is not subject to any heightened constitutional scrutiny in the way that, for instance, legislation that discriminates based on sex or race is.

During World War II, civilian industries were mobilized for war. The construction workers who had not become soldiers were put to work making planes, munitions and other wartime necessities. Housing construction dramatically slowed (*see* Herbert Levy, *Rent Control in New York City: Another Look*, 47 NY St BJ 193, 194 [1975]). In the war's aftermath, New York City faced a severe housing shortage. Although the federal government had frozen New York City rents during the war, those controls were repealed in 1947, leaving military alumni and their booming families vulnerable (*see Rent Regulation after 50 Years: An Overview of New York State's Rent Regulated Housing 1993*, New York State Division of Housing and Community Renewal, Office of Rent Administration [1994]). In 1949, the federal government empowered the States to enact

rent control laws by giving States authority "to assume administrative control of rent regulation and the power to continue, eliminate or modify the Federal system" (*id.*).

Throughout the 1950s and 60s, New York City took charge of its rent-controlled housing, easing wartime-like rent control laws as it grew more prosperous and as more housing was built. However, by 1969, the City's housing crisis was once again dire: "the Vietnam War caused a steep rise in the rate of inflation and locally, housing production slumped. The overall vacancy rate which stood at 3.2% in 1965 fell drastically to 1.23% in 1968" (*id.*). War, once again, led to a rapid escalation in New York City rents, which encouraged the City to enact the Rent Stabilization Law of 1969. That local law laid the groundwork for New York's rent stabilization scheme underlying the cases before us, first passed as the Emergency Tenant Protection Act of 1974 (L 1974, ch 576) and subsequently amended in 1983, 1993, 1997, and again in 2019.

The legislature's purpose in rent regulation is conceptually no different than in regulating the hours of bakers or, for that matter, in any law seeking to regulate the welfare of New Yorkers. At bottom, each of the many changes to the rent regulation laws has reflected a legislative judgment about how those benefits and burdens must be weighed so that New York does not slip back into the unregulated tenements of *Lochner* or the strictures of wartime rent control. The HSTPA is just the next set of changes that reflect a legislative response to the current state of New York's housing woes, akin to legislative acts in countless other fields.

As the majority acknowledges, "no party doing business in a regulated environment like the New York City rental market can expect the [Rent Stabilization Law] to remain static" (majority op at 31). As with the workers' compensation system at issue in *American Economy Ins. Co. v State of New York* (30 NY3d 136 [2019]), "the allocation economic benefits and burdens has always been subject to adjustment," therefore rendering claimed rights ***22** to stasis "inchoate" (*id.* at 148 [internal citations omitted]). Neither landlord nor tenant has any fundamental right to the regulations of the moment, especially within a highly regulated industry such as rent stabilization (*see Schutt v New York State Div. of Hous. & Community Renewal*, 278 AD2d 58, 58 [1st Dept 2000] ["since rent regulation does not confer vested rights, petitioners' argument that the application of the RRRA's limitation period to pending cases violates due process by depriving them of the benefit of pre-RRRA rent regulation provisions law more favorable to their claims is without merit"] [internal citations omitted]). Rather, the legislature is free to calibrate its policy decisions to the needs of war, peace and everything in between, so long as its legislation is not irrational. That is the lesson of *Lochner*'s interment.

The majority knows that "legislative judgments are presumptively constitutional and are subject to a rational basis analysis in which the policy preferences of judges have no role" (majority op at 54). Under the majority's view, voiding sections of the HSTPA is not the product of heightened review but rather the product of the rational basis test "meaningfully applied" (*id.*), by which the majority means applied, for the first time since 1937, to strike down economic legislation making a policy choice about social welfare.[34]

In order to justify "meaningful" application of the rational basis standard, the majority asserts that, unlike other economic regulation, the HSTPA threatens "substantive rights" (majority op at 28, 31, 33, 45, 46, 56) and "considerable reliance interests" (majority op at 31). The majority insists it is not applying Lochnerian analysis, but then concludes that the HSTPA violates due process because its "impact on contract rights is unusually significant" (majority op at 49). It is odd to refer to a landlord's retention of an illegal rent as a "contract right." Indeed, the "substantive right" to which the majority refers is not the right of landlords to earn a reasonable return, it is the right to keep rents collected in violation of the rent stabilization laws.[35]

The majority tries to distinguish its holding from *Lochner* by asserting that the HSTPA is retroactive whereas the bakeshop laws were prospective (majority op at 55). That completely misunderstands what makes *Lochner* odious. *Lochner* did not err because it found that wage and hour laws violated the freedom of contract when in reality they did not; it erred because it treated the freedom to contract as a right that could not be overcome by a legislature's rational attempt to make policy decisions that impaired the economic positions of some while benefitting others. Regardless, as explained at length in section IV *infra* and throughout, the majority's attempt to distinguish *Lochner* fails because retroactive legislation is subject to the same rational basis review as prospective legislation (*see Landgraf v USI Film Prods.*, 511 US 244 [1994]; *American Economy Ins. Co. v State of New York*, 30 NY3d 136 [2019]). Today's majority is analytically indistinguishable from *Lochner*: it applies a substantive due process analysis to invalidate a statute based on economic interests that the majority treats as if they were constitutionally protected rights, when they are not.

Using the instant cases to re-animate the dead hand of *Lochner* requires a couple of grisly maneuvers. First, we lack jurisdiction to address the HSTPA; second, for prudential reasons if nothing else, striking down a statute on substantive due process grounds when the argument is made for the first time in this Court without record support for the claimed burden and equitable factors (*see e.g.* majority op at 31 [citing HSTPA's effect on "considerable reliance interests"]) is both unwise and injudicious.

In these cases, we lack jurisdiction to consider the HSTPA. All four cases are in our Court on certified questions from the Appellate Division. In *McMaster v Gould* (240 NY 379 [1925]), we considered the very jurisdictional issue raised here: when a new statute is enacted after the Appellate Division sends a case to us via certification, do we consider whether the Appellate Division's decision was correct under the new statute or under the law as it was when the Appellate Division rendered its decision? Our decision was clear: "If the court below was ***23** right when it certified the question it is still right" regardless of any later changes to the statute (*id.* at 385). Lest there be any doubt, we very shortly before, in *Robinson v Robins Dry Dock & Repair Co.*, explained that when an appeal comes to us in some way other than via a certified question (*e.g.*, as of right from a double dissent or by a leave grant from a final judgment), "the appellate court may dispose of the case in accordance with the law as changed by the statute" (238 NY 271, 281 [1924]).

The majority's attempt to sweep away our longstanding precedents by asserting that the breadth of the Appellate Division's question determines whether we may apply a statute enacted after the Appellate Division's decision is utterly groundless (*see* majority op at 22 n 15). Appellate Division practice cannot overrule Court of Appeals precedent. *McMaster* directs that, when a certified question asks whether the Appellate Division order was properly made, we must answer that question: was the order proper at the time it was made?

The only case cited by the majority to assert that we have jurisdiction to reach the challenges to the HSTPA is *Gleason v Michael Vee, Ltd.* (96 NY2d 117, 122 [2001]). However, *Gleason* was not before us on a certified question. It was a final decision as to which leave was granted, so it falls squarely under *Robinson*'s rule, not *McMaster*'s. The majority's further claim that certifying specific legal questions is an "largely abandoned practice" is irrelevant (majority op at 22 n 15; *see Olsen v Town of Richfield*, 81 NY2d 1024 [1993]; *Flick v Stewart-Warner Corp.*, 76 NY2d 50 [1990]).

B.

Even if we possessed jurisdiction to consider a constitutional challenge to the HSTPA, we should not invalidate a statute on substantive due process grounds when the argument is considered for the first time before us on an empty record.

A party seeking to invalidate a statute on substantive due process grounds bears the burden to prove that the legislature acted without a rational basis (*see Usery v Turner Elkhorn*, 428 US 1, 15 [1976]). Because the HSTPA was enacted after the Appellate Division rendered its decisions in these cases, the parties' briefs in the lower courts, naturally, did not mention the statute and

there was no evidence in the record concerning the statute--it did not exist. The majority emphasizes the burdens placed on landlords by the HSTPA without evidence that any substantial burdens exist in the real world. The Court now invalidates Part F, section 7 of the HSTPA based on a hypothesized calamity, announcing the severity of the burden as a matter of law, substantiated by nothing. It appears that, although we lack the power to find facts, we have the power to imagine them.

The prudent course here would be to do as we did in *Post v 120 E. End Ave. Corp*. remit these appeals to Supreme Court (or, in the case of *Regina*, to DHCR) (62 NY2d 19, 29 [1984] ["The amended statute should be applied to this appeal but because the facts have not been developed, we reverse and remit the matter to the Supreme Court for further proceedings"]). In that way, the parties could develop a record that would allow the careful determination of standing, preservation and burden, issues that would be first determined in courts (or an agency) able to find facts and then could come to us on a record that frames our legal determination.

I turn, next, to the fundamental proposition underlying the majority's substantive analysis of the HSTPA: that the HSTPA is retroactive because it shifts the statute of limitations and revives previously extinguished claims. That is a false premise.

To understand why the HSTPA is not a retroactive "claim revival" statute, one must keep three time-periods in mind: (1) the amount of time within which a tenant may challenge the unlawful deregulation of an apartment; (2) the amount of time for which a tenant can claim damages sustained as a result of an unlawful deregulation; and (3) the age of the records a court (or DHCR) can examine to determine what the rental rate would have been if an apartment had not been unlawfully deregulated.

As to the first time period, there is not, and there has never been, a time limit on when a tenant can claim that a unit has been unlawfully deregulated. Both before and after the HSTPA, tenants have always been able to challenge an unlawful deregulation of an apartment, no matter how far in the past the deregulation occurred (*see e.g. Roberts v Tishman Speyer Properties, L.P.*, 13 NY3d 270 [2009] [tenants brought suit in 2007 for an unlawful deregulation in 1993]; *Kuzmich v 50 Murray Street Acquisition LLC*, 34 NY3d 84 [2019] [tenants brought suit in 2016 for an unlawful deregulation in 2003]; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189 [1st Dept 2011] [tenants brought suit in 2009 for an unlawful deregulation in 1999]).

As to the second time period, in 1983, the legislature set a four-year limit on rent overcharges that could be recovered as a result of an unlawful deregulation (*see* L 1983, ch 403, § 35). So, although a tenant could always seek a declaration that a unit was unlawfully deregulated twenty years ago, that tenant could recover overcharges sustained only in the four years prior to bringing the complaint. In 1995, if a tenant sued because a unit had been unlawfully deregulated in 1975, the tenant could claim damages for rent overcharges for the years 1991-1995. However, the court (or DHCR) could look back to 1975 to determine what the proper rent *would* have been for the years 1991-95, had the unit not been unlawfully deregulated, and from that could determine the overcharge, if any, for those years.

As to the third time period, in the 1997 RRRA, the legislature amended the rent laws to limit courts (and DHCR) to looking back no more than four years from the filing of the complaint to determine the base rate from which the appropriate rental rate could be calculated (L 1997, ch 116 § 32; *see* Executive Chamber Memorandum in Support, Bill Jacket L 1997, ch 116 at 40). Accordingly, as a result of the 1997 RRRA, a tenant who sued for overcharges in 2002 for an unlawful deregulation occurring in 1975 was limited to the use of records from 1998 or later to establish the rate that should have been charged from 1998 forward. Thus, even after the 1997 amendments, tenants could challenge an unlawful deregulation no matter how many years before that deregulation had occurred and could obtain both an injunction returning the apartment to rent regulated status and a measure of damages. Both before and after the 1997 RRRA, the period of allowable damages was four years, even if a landlord had unlawfully received decades worth of overcharges.

The HSTPA left the first time period unchanged. Tenants may still bring an action to declare that a unit was unlawfully deregulated at any time. The HSTPA lengthened the second time period, allowing the recovery of six years of overcharges instead of four. Even if a landlord has been overcharging tenants for decades, a tenant can still recover only a portion of the overcharge, though a larger fraction than before. Finally, the HSTPA eliminated the third time period altogether, by repealing the four-year lookback period embodied in the 1997 RRRA. That repeal allows the courts and DHCR to consider whatever evidence would best establish the rent had the unlawful deregulation never occurred. Simply put: pre-HSTPA, the remedy for an unlawful deregulation, from any time in the past, was four years of damages calculated in one way; post-HSTPA, the remedy is six years of damages calculated in a different way--the way

they were calculated until 1997.

The majority's mischaracterization of the changes to the second and third time periods drives its retroactivity claim. Neither change created or extended a statute of limitations. From 1983 until 1997, if a tenant had suffered 20 years of illegal overcharges, the tenant could recover four years of damages determined (in some cases) by looking back 20 years to establish a base rate, carrying that rate forward, and applying it to the four-year period immediately preceding the complaint. From 1997 until 2019, tenants could still recover four years of damages, but the damages were cabined by requiring that the base rate could not be constructed by use of information more than four years before the complaint was filed. The cause of action stemming from the unlawful deregulation remained untouched[36]. Now, through the HSTPA, the legislature has again tinkered with the recoverable amount and relaxed the evidentiary restriction somewhat. Doing so does not revive claims, nor does it make the HSTPA retroactive.

At no point during rent stabilization's long history could a landlord who unlawfully deregulated an apartment use the passage of time to escape an action for (1) a declaration that the apartment was unlawfully deregulated, (2) an order returning it to regulation, and (3) some measure of monetary damage. Therefore, there has *never* been a statute of limitations as to challenges to the wrongful deregulation of apartments. New York's constantly evolving rent laws ***24** have once again altered the remedy available to injured tenants, but the claim has always been the same and has never been subject to a limitations period.

The majority's analogy to claim-revival statutes is inapt for the reason above--the HSTPA merely alters the fraction of overcharge damages recoverable by tenants and the evidence that may be used to prove the overcharge--and for another reason as well. Claim revival statutes, by definition, permit the assertion of claims that could not otherwise be brought. The claims here were all pending at the time the HSTPA took effect. The subject apartments were all unlawfully deregulated, for which the owners have been and remain liable. Indeed, by using "claims pending" to delineate cases that would be subject to the HSTPA, the legislature expressly did not revive claims that had been extinguished before the statute's effective date.

Comparison to the claim revival examples cited by the majority are instructive. The plaintiffs involved in the World Trade Center recovery efforts, whose claims were revived by Jimmy Nolan's law (L 2009, ch 440; reviewed in *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377 [2017]), had been completely barred from filing any claims by the statute of limitations' expiration. The same is true with the plaintiffs whose DES-related claims were revived by the Toxic Tort Revival Act (L 1986, ch 682 § 4, reviewed in *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487 [1989]). In contrast, the claims here are pending, live claims. The legislature did not "revive" them; it altered the measure of damages and evidentiary rules relating thereto.

Even if Part F of the HSTPA could fairly be characterized as a claim-revival statute, its intentional application to "claims pending" would survive the majority's test (*see* majority op at 34 ["When the Legislature has intended to revive time-barred claims, it has typically said so unambiguously, providing a limited window when stale claims may be pursued"]). First, as the majority recognizes, the legislature gave each of the HSTPA's fifteen parts "its own effective date provision" and included "claims pending" only in Part F's effective date (majority op at 37). That differentiation is telling; the legislature meant what it said with particularity as to Part F[37]. Second, the claims "revived" have a similarly narrow window to the claims in *Hymowitz* and *Matter of World Trade Ctr.*: only two years of additional damages that would not have been recoverable under the old statute are available to these tenants. Damages covering the period from mid-2015 through June 14, 2019 and beyond were recoverable prior to the passage of the HSTPA and have not in any way been "revived" merely because the courts can look to older evidence to see if and by how much a tenant had been harmed during that period.

The Supreme Court does have a body of law directly on point, concerning the application of newly-enacted legislation to pending cases. The majority ignores that law, preferring instead to misconstrue the Court's decision in *Landgraf v USI Film Prods.* (511 US 244 [1994]), even though *Landgraf* pointedly reminds us that "the constitutional impediments to retroactive civil litigation are now modest" (*id.* at 272). *Landgraf*, read correctly and in the context of the larger body of the Supreme Court's decisions, demonstrates the unassailability of the legislature's choice to apply Part F of the HSTPA to "claims pending."

Federal law has long recognized that new legislation governs pending cases. In *Thorpe v Housing Auth. of Durham* (393 US 268 [1969]), the Supreme Court of North Carolina had held that a new HUD regulation granting tenants additional rights did not apply to pending eviction proceedings. The United States Supreme Court reversed, reaffirming that "[t]he general rule is that an

appellate court must apply the law in effect at the time it renders its ***25** decision" (*id.* at 281). The Court grounded its holding on *United States v Schooner Peggy* (1 Cranch 103 [1801]), in which Chief Justice Marshall explained: "If subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. . . . [T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside" (*id.* at 110).

The Supreme Court has repeatedly reaffirmed that rule. "[T]he dominant principle is that *nisi prius* and appellate tribunals alike should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered" (*Vandenbark v Owens-Illinois Glass Co.*, 311 US 538, 543 [1941] [collecting cases]).

In *Bradley v School Bd. of City of Richmond* (416 US 696, 710-711 [1974]), the Court reasserted that principle in a factual context directly relevant here. While Bradley's case was pending on appeal, Congress enacted legislation allowing for awards of attorneys' fees in school desegregation cases. Reiterating its longstanding rule, the Court held that as to claims pending when new legislation takes effect "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary" (*id.* at 711). Although the statute in *Bradley* did not say it was to apply to pending cases, the Court held that Bradley could recover fees under the new statute. The Court concluded that taxing defendants with attorneys' fees where none had previously been allowed did not rise to a manifest injustice, and the absence of a legislative directive barring application to pending cases required application of the standard rule.

As in *Bradley*, the HSTPA has not imposed any new basis for liability: unlawful deregulation of rent regulated apartments was prohibited before and after the new legislation. The amount recoverable by the plaintiffs changed, but, as applied to pending cases, that did not and does not render the statutes unconstitutional. Furthermore, unlike the Congress in *Bradley*, our legislature was vocal, not mute. The changes made by Part F of the HSTPA were intended to "take effect immediately and shall apply to any claims pending or filed on and after such date" (L 2019, ch 36, Part F, § 7). That language "unequivocally convey[s]" that the HSTPA was explicitly formulated to apply to "any claims pending," including the claims before this Court (see majority op at 33; *see also Kimmel v State of New York*, 29 NY3d 386, 393 [2017] ["the word any' means all' or every' and *imports no limitation*"' [emphasis original] [internal citation omitted]). The majority ultimately agrees (majority op at 38 ["the Legislature evinced a sufficiently clear intent to apply Part F to timely pending claims"]).

Landgraf reinforces the above longstanding rule. The Civil Rights Act of 1991 "create[d] a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964" and "allow[ed] monetary relief for some forms of workplace discrimination that would not previously have justified *any* relief under Title VII" (*Landgraf*, 511 US at 247, 254 [emphasis in original]). By contrast, the HSTPA creates no new cause of action; the exact same conduct has always been proscribed by New York law. We stated clearly in *Roberts* that it was, and always had been, illegal under the statutory language of the RSL to decontrol luxury apartments while receiving J-51 tax benefits (*see* 13 NY3d at 285-86; *see also Becker v Huss Co.*, 43 NY2d 527, 542 [1978] [applying a new contribution requirement in Worker's Compensation Law to conduct that happened prior to the statutory change because "the amendment neither created a new right nor impaired an existing one"]).

That difference--the creation of a new legal obligation as distinct from an alteration in the amount of damages available--was one of the two pillars on which the Supreme Court rested its decision in *Landgraf* that Section 102 of the 1991 Civil Rights Act did not apply to pending cases. The majority admits the importance of that distinction when it notes that the legislation involved in *American Economy* did not violate due process because it "subjected the insurers to the possibility of such future costs but did not impose new legal liability" (majority op at 26 n 18). Just as "[t]he insurers were always legally liable for the closed cases" there (*id.*), the landlords have always been liable for unlawful deregulations and rent overcharges here. Just as "the fund merely provided [insurers] potential relief from the uncertain future coverage costs" in *American Economy* (*id.*), the four-year limitation on recoverable damages and the evidentiary lookback period merely provided potential relief to landlords from future rent overcharge cases. The same logic from *American Economy* applies here and should lead us to the same conclusion we reached there, unanimously.

The other pillar on which *Landgraf* rested was that the prior iteration of the bill, which was vetoed by the

President and as to which the attempted override failed, "contained language expressly calling for application of . . . the section providing for damages in cases of intentional employment discrimination, to cases arising before its ***26** (expected) enactment" (511 US at 255). The subsequent version that passed omitted that language and, in context, the Court concluded that the absence of a legislative directive to apply Section 102 to pending cases counseled against doing so. Here, again, the facts are just the opposite: our legislature has told us that Part F applies to "claims pending."[38]

Putting aside, for the moment, the preceding errors, I turn now to the majority's conclusion that Part F of the HSTPA, as applied to pending claims, violates substantive due process.

Why do parties seeking to invalidate economic regulatory statutes have such a high burden? Why does a party seeking to invalidate such a statute have to show that the legislature could have had no rational basis for enacting it? The "most relaxed and tolerant" rational basis test applied to substantive due process challenges is rooted in separation of powers doctrine. The New York State Constitution places legislative policy judgments squarely within the province of the legislature (NY Const art III, § 1)[39]. Policy judgments passed into law by the legislature are afforded a strong presumption of constitutionality to ensure that courts do not usurp the legislature's function (*see People v Knox*, 12 NY3d 60, 68 [2009]; *Montgomery v Daniels*, 38 NY2d 41, 54 [1975]). Even when a particular regulation may not be wise, "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement" (*Williamson v Lee Optical of Oklahoma, Inc.*, 348 US 483, 487 [1955]; *see also Defiance Milk Products Co. v Du Mond*, 309 NY 537, 541 [1956] ["Questions as to wisdom, need or appropriateness are for the Legislature. Courts strike down statutes only as a last resort and only when unconstitutionality is shown beyond a reasonable doubt"]).

Our Court is an unelected body, nominated by the Governor, confirmed by the Senate, and not subject to a popular vote. The authority granted by the People of the State of New York to legislate for their benefit and in their name does not reside with the members of this Court. Instead, the Legislature and Governor are responsible for making the final policy judgments that become law, and this Court is charged with exercising great restraint before invalidating an expression of popular will.

Separation of powers concerns--and the meager rational basis test used to evaluate substantive due process challenges as a result of those concerns-- apply with equal force to regulations that have a retroactive effect. A new provision may have retroactive effect if it "attaches new legal consequences to events completed before its enactment" (*Landgraf*, 511 US at 270-71 [1994]). When a statute with retroactive effect faces a substantive due process challenge, "the test of due process for retroactive legislation is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose"' (*American Economy Ins. Co. v State* ***27** *of New York*, 30 NY3d 136, 158 [2017] quoting *Pension Benefit Guaranty Corporation v R. A. Gray & Co.*, 467 US 717, 730 [1984]).[40] Although there is a presumption against retroactivity that applies to all legislative provisions, the legislature can negate that presumption merely by "explicitly stat[ing] or clearly indicat[ing]" its intent that a new provision in the law apply retroactively (*Gleason*, 96 NY2d at 122). In *Gleason*, the legislature amended a procedural requirement for reviewing arbitration awards, stating that "all subsequent applications shall be made" in the new manner. No other language suggested that the amended statute would apply retroactively. Yet that modest language, its sparse legislative history, and its remedial nature were sufficient to overcome the presumption against retroactivity and convince this Court that the amendment should be applied retroactively (*id.* at 122-23). Thus, even if we were to consider Part F of the HSTPA as retroactive, the legislature has unequivocally indicated its intent that Part F apply to "claims pending."

General Motors Corp. v Romein (503 US 181 [1992]) is particularly instructive. In 1981, the Michigan legislature allowed employers to decrease Workers Compensation payments made to disabled employees who were receiving benefits under the new, more generous state fund, enacted in 1980. Before the statute's effective date, employers began to reduce the payments they were making to previously-injured employees. The legislature did not amend the legislation, but instead responded with a joint resolution declaring that the 1981 law was not intended to apply to workers injured prior to the effective date. Despite the legislature's resolution, the Michigan Supreme Court sided with General Motors, permitting employers to reduce their payments to employees injured before the statute's effective date (*Chambers v General Motors Corp.*, 422 Mich 636 [1985]). In response to that decision, the legislature amended the workers compensation law, requiring General Motors to pay an additional $25 million to workers whose payments it had reduced. The United States Supreme Court upheld the amendment, even though General Motors was forced to pay for claims that had expired under the old law, because

"[t]he purpose of the 1987 statute was to correct the unexpected results of the Michigan Supreme Court's *Chambers* opinion. The retroactive repayment provision of the 1987 statute was a rational means of meeting this legitimate objective: it preserved the delicate legislative compromise that had been struck by the 1980 and 1981 laws" (*Romein*, 503 US at 191).

Romein requires that we find Part F constitutional as applied to pending cases. In *Roberts*, we held that under the RSL as enacted by the legislature, any building receiving J-51 benefits was not subject to luxury decontrol. Thereafter, a form of judicial chaos, or "understandable confusion" (majority op at 14), ensued (*see Regina Metropolitan v DHCR*, 164 AD3d 420, 427 [1st Dept 2018] [limiting records to a four-year lookback in the case of a post-*Roberts* illegal rent]; *Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 106 [1st Dept 2017] [refusing to limit records to a four-year lookback in the case of a rent overcharge because that provision would "essentially allow the owner to collect rent that might be in excess of what it could have otherwise charged plaintiffs, based upon its own misapprehension of the law"] [endorsed by the Attorney General and the DHCR]; *Irrevocable Trust v Biggart*, 2019 NYLJ LEXIS 2049 *6 [Sup Ct, New York County 2019, Lebovits, J.] [explaining that the *Taylor* court's method of determining the base rent had been "repudiated" by the First Department]; *160 East 84th Street Associates LLC v DHCR*, 160 AD3d 474 [1st Dept 2018] [affirming the DHCR's use of a sampling method to determine a default base rate]; *125 Court Street v Sher*, 58 Misc3d 150(A) [App Term, 2d Dept [2018] [freezing rent at the last registered rent and disallowing any increases]; *Ferentinos v CF E 88 LLC*, 2018 NY Misc LEXIS 6243 *12 [Sup Ct, New York County 2018, Cohen, J.] [refusing to freeze the rent at the last registered rent because such a freeze would result in a windfall]).

Before the legislature stepped in by enacting the HSTPA, not only were trial courts and appellate panels within the First Department split, but both the Attorney General and DHCR came down on one side of the split--the side now rejected by the majority. Before the majority here resolved the split, the legislature did. It passed Part F of ***28** the HSTPA and applied it to all pending claims, setting out clear rules for the courts in determining damages after the understandable confusion following *Roberts* (*see Dugan v London Terrace Gardens, L.P.*, 177 AD3d 1, 9 [1st Dept 2019] [the HSTPA "resolve[s] a split in this Department as to what rent records can be reviewed to determine rents and overcharges in

Roberts cases"]). Under *Romein*, clearing up judicial confusion about a prior statute meets rational basis scrutiny as to retroactive legislation (*Romein*, 503 US at 192).[41]

A party challenging a statute as violative of due process bears the burden "to establish that the legislature has acted in an arbitrary and irrational way" (*Turner Elkhorn*, 428 US at 15). Here, not only does the majority strike down Part F, section 7 of the HSTPA in the face of *Romein*'s clear precedent, but it does so without requiring the parties challenging the HSTPA's constitutionality to prove anything.

The majority can find no solace in *Eastern Enterprises v Apfel* (524 US 498 [1998]). There, as the majority notes, the Supreme Court held that retroactive application of a coal miner health care benefit scheme was unconstitutional (majority op at 42, 48-49). But only Justice Kennedy, in a sole concurrence, believed that the law violated substantive due process. The plurality rested on a takings theory, pointedly noting that "this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation" and quoting *Williamson*'s post-mortem for the *Lochner* era: "The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions" (*Eastern Enterprises*, 524 US at 537-38, quoting *Williamson*, 348 US at 488). The majority's attempt to use Justice Beyer's *dissent* in that case to support the use of a due process challenge to invalidate retroactive legislation is a farrago. In the passage that the majority quotes (majority op at 56-57, quoting *Eastern Enterprises*, 524 US at 557 [Breyer, J., dissenting]), the four-Justice dissent was criticizing the plurality for trying "to torture the Takings Clause to fit this case" when the claim was properly analyzed under due process (*Eastern Enterprises*, 524 US at 556)[42]. Justice Breyer, speaking for himself and three other Justices, ***29** emphasized that Congress' decision to make an employer pay retroactively for past health costs of its employees did not violate the Due Process Clause. I agree with the majority that the HSTPA is constitutional unless it fails a due process analysis. I, along with eight members of the *Eastern Enterprises* Court, part with the majority in its application of a moribund 1920s version of due process analysis.

Furthermore, were one to accept the majority's assertion that "there may be some correlation between due process and takings analyses of retroactive legislation" (majority op at 48 n 27), settled takings jurisprudence would doom the majority's invalidation of Part F, section 7. For a real property regulation to constitute a taking, it must entirely prevent the property from being economically viable (*see*

Lucas v S.C. Coastal Council, 505 US 1003, 1019 [1992] ["when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking"]; *Rent Stabilization Ass'n v Higgins*, 83 NY2d 156, 173 [1993] ["Regulation of private property constitutes an unconstitutional taking if it denies an owner economically viable use of the property (a per se regulatory taking), or if it does not substantially advance legitimate State interests"]).

The majority next turns to our tax jurisprudence, which is equally unavailing as a basis on which to invalidate Part F, section 7 of the HSTPA. In *Replan Dev., Inc. v Department of Housing Preservation & Dev.* (70 NY2d 451 [1987]), we adopted a "harsh and oppressive" standard when evaluating the retroactive application of a tax statute under due process. In *Replan*, a prior tax statute had exempted certain increases in the assessed value of property when the petitioner began renovating two buildings. We held that the petitioner "could not have justifiably relied" on the exemption and that the amendment in question did not unconstitutionally deprive the petitioner of due process. In doing so, this Court constructed a new test for tax statutes: "Retroactivity provisions in tax statutes, if for a short period, are generally valid, and ordinarily are upheld against due process challenges, unless in light of the nature of the tax and the circumstances in which it is laid', the retroactivity of the law is so harsh and oppressive as to transgress the constitutional limitation"' (*id.* at 455; *see also James Square Assocs. LP v Mullen*, 21 NY3d 233, 246 [2013]).

Replan's "harsh and oppressive" standard was lifted verbatim from the United States Supreme Court's holding in *Welch v Henry* (305 US 134, 147 [1938]). After we decided *Replan*, the Supreme Court overturned *Welch* (*see U.S. v Carlton*, 512 US 26, 30 [1994] ["The due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation"]). *Carlton* made clear that cases like *Welch*, which applied a heightened rational basis scrutiny to tax statutes, "were decided during an era characterized by exacting review of economic legislation under an approach that has long since been discarded" (*id.* at 34 [internal citations omitted]). Thus, *James Square* mistakenly relied on *Replan* without noticing *Carlton*. We recognized as much in *Caprio v New York State Dept. of Taxation & Fin.* (25 NY3d 744, 752 [2015] [" the harsh and oppressive formulation . . . does not differ from the prohibition against arbitrary and irrational legislation that applies generally to enactments in the sphere of economic policy"']). To the extent that *Replan* and *James Square* apply any form of heightened scrutiny to due process review of economic legislation, they are not good law.

B.

The Supreme Court proclaimed that using "the vague contours of the Due Process Clause to nullify laws which a majority of the Court believe[s] to be economically unwise" is an abandoned practice (*Ferguson*, 372 US at 731). Even retroactive statutes will withstand a due process challenge "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means"' (*Carlton*, 512 US at 30 [citation omitted]). Thus, contrary to the majority's bifurcation, there is no difference in the Supreme Court's ***30** jurisprudence when evaluating retroactive economic legislation and prospective economic legislation under due process: in both cases, courts are instructed to apply the rational basis test.[43]

Putting aside, for a moment, that it would be the landlords' burden to demonstrate that the application of Part F to "claims pending" could have no rational purpose, and also putting aside the complete absence of a record showing any irrationality in the legislature's action, the proper way to analyze Part F under the Due Process Clause would be to examine each challenged element separately, asking whether it has been proved to serve no rational purpose (*see Beary v Rye*, 44 NY2d 398, 411 [1978] [deciding whether each provision of a statute had retroactive effect]; *see also* L 2019, ch 36, Part M, § 28 ["If any provision of this act, or any application of any provision of this act, is held to be invalid, that shall not affect the validity or effectiveness of any other provision of this act, or of any other application of any provision of this act, which can be given effect without that provision or application; and to that end, the provisions and applications of this act are severable"]). In so doing, we must keep in mind that "[t]here is, of course, not only an exceedingly strong presumption of constitutionality but a further presumption that the Legislature has investigated for and found facts necessary to support the legislation" (*I.L.F.Y. Co. v Temporary State Housing Rent Com.*, 10 NY2d 263, 269 [1961]).

Court reliance on records more than four years old

The HSTPA allows a court, in determining the lawful rent, to consider records older than four years before the last registration or annual report was filed; whereas the prior law (the 1997 RRRA) had limited courts to records within four years of a filed complaint. A plain rational purpose is evident: the legislature wishes courts to have

access to all the evidence that is available to them when trying to establish what the regulated rent for an unlawfully deregulated apartment should be. That had been the law prior to the passage of the 1997 RRRA; the legislature merely changed an evidentiary rule about what courts may consider. By allowing courts to consider (or reject) old but reliable evidence of an overcharge, the legislature provided the return to a more flexible rule of evidence, and in so doing resolved a split within the First Department, deciding to side with the Attorney General and DHCR. That choice reflects a legitimate legislative purpose.

Change in period used to measure rent overcharge damages

The legislature chose to change the measure of damages for unlawful deregulation from a maximum of four years to a maximum of six years. That change represents its policy judgment about how much harm tenants living in illegally deregulated apartments have suffered (and should be compensated for) and how much landlords have improperly benefitted from unlawful deregulation while receiving J-51 tax benefits. It is important to remember that, on January 16, 1996, DHCR erroneously advised landlords that they were entitled to luxury decontrol of their apartments even while receiving J-51 tax abatements. Almost 14 years thereafter in *Roberts*, we held that DHCR was wrong, and all those apartments had been unlawfully removed from the rent-controlled housing stock within New York City (*Roberts*, 13 NY3d at 287). According to the majority, citing an amicus, 50,000 or more apartments were unlawfully removed from rent regulation between 1996 and 2009 because of DHCR's erroneous statement of the law (majority op at 19). Surely, the legislature was free to reexamine the sufficiency of the four-year damage measurement period and decide, while not permitting full recovery back to the date of the illegal deregulation, something more was required to adjust the balance after the DCHR-induced mass removal of rent-regulated apartments and the attendant overcharges stretching, in many cases, much longer than six years. It is fair to say that ***31** the legislature, when it set the four-year period for overcharge damages, could not have imagined a 14-year period of unlawful deregulation involving 50,000 apartments.[44]

In essence, both the 1997 RRRA's four-year measuring period and the HSTPA's six-year measuring period are akin to a liquidated damages statute. They both serve to render damage awards, often in amounts smaller than the actual damages sustained as a result of overcharges. Suppose the legislature said that in the event of a rent overcharge, in an effort to promote judicial economy and to avoid evidentiary problems, the landlord must pay damages to the tenant at a rate of $10 per square foot per year. If the legislature then changed the statutory award to $15 per square foot, because a lack of clarity in the law had caused a large, unexpected and protracted surge in illegal deregulations, it would be fully within its rights to do so. Simply because the measure used by the legislature is stated in terms of years, rather than dollars or square feet, does not render it unconstitutional (or a "revival" of claims). Look at it this way: any landlord who illegally deregulated an apartment 20 years ago, and who will now be liable for only six years of overcharges, has received a windfall. Any landlord who illegally deregulated an apartment five years ago, and is liable for only five years of overcharges, is merely refunding the unlawful overcharge in full. A legislative determination that, in view of the *Roberts* snafu, an increase in the allowable overcharge damages was necessary as to pending cases is exactly the sort of policy judgment with which we are forbidden to interfere.[45]

Furthermore, the legislature's choice to alter the way in which overcharge damages are measured aligned with the Attorney General's, DHCR's, and First Department's reading of the 1997 RRRA in *Taylor*. It thus provided a "legislative judgment about what the law in question should be" (*Gleason*, 96 NY2d at 122). The plain language of the HSTPA, the urgency with which it was passed, its remedial nature, and its clear policy choice are more than sufficient to rebut any "deeply rooted" presumption against retroactivity and demonstrate its lawfulness.

Record maintenance and production

What the majority calls the HSTPA's "document retention policy" is not really that. Before the HSTPA's effective date, the statute read "[a]ny owner who has duly registered a housing accommodation shall not be required to maintain or produce any records relating to rentals of such accommodation more than four years prior to the most recent registration or annual statement for such accommodation." That language did not require a landlord to retain or produce anything; it barred the courts and DHCR from ordering a landlord to maintain or produce records dating more than four years from the most recent registration statement for an apartment.

The HSTPA altered that provision to read that a landlord

"shall not be required to maintain or produce any records relating to rentals of such accommodation more than six years prior to the most recent registration or annual statement for such accommodation. However, an owner's

election not to maintain records shall not limit the authority of the division of housing and community renewal and the courts to examine the rental history and determine legal regulated rents pursuant to this subdivision" (RSL § 26-516 [g]).

The first modification prohibits a court or DHCR from ordering landlords to produce or maintain records that are more than six years older than the most recent registration statement, but, like the prior version, does not require landlords to retain any records absent court or agency action.

Moreover, under both the old law and the HSTPA, the "record retention" period ran from the most recent registration, not from the time of a tenant's complaint. Prior to the HSTPA, a landlord who deregulated a unit in 2000 and stopped filing registrations (*see* majority op at 9-10) could not be required to maintain or produce records prior to 1996 but could still be required to produce records that were 20 years old (or more) at the time of the complaint. Post-HSTPA, the same court could require the landlord to produce or retain records back to 1994. If, shortly after *Roberts*, a tenant filed suit for a 2000 deregulation, would the incremental difference between the 14 years of records (1996-2010) and 16 years of records (1994-2010) be so burdensome as to void this provision of the HSTPA?[46] Although the majority speculates that landlords may have destroyed records the moment the four-year lookback period expired (majority op at 45), landlords have numerous other reasons to retain records, including IRS audits (7 years); proof of depreciation of various assets (up to 40 years for residential rental real property); corporate record retention policies and the like. The majority's mere speculation that landlords may have destroyed records in reliance on the previous provisions of the Rent Regulation Laws is surely insufficient to establish the existence of a fundamental right in those prior provisions. In any event, no landlord here has claimed that it failed to preserve old records, much less that it did so on reliance on this statutory provision.

The second modification expressly allows the courts and DHCR to examine the rental history even if a landlord has not maintained records. A rational basis for that change is obvious: if damages may now be calculated on a six-year basis, DHCR and the courts should not be constrained by the prior language limiting their authority to order maintenance or production of documents in a given case to four years. Further, the second modification makes clear that a landlord's failure to keep documents does not divest DHCR or the courts from using other information--for example, rental history--to attempt to arrive at the appropriate regulated rent figure. That proposition is hardly novel: courts and agencies, faced with the unavailability of information formerly held by a party, should use the best information available to reach a decision; that legislative purpose is self-evident.

Treble damages for willful infringement

The HSTPA, like preexisting law, required the assessment of treble damages for a willful unlawful deregulation of dwellings. Under the prior law, treble damages were calculated based on two years' worth of overcharges, even though four years of overcharges could be recovered. Under the HSTPA, treble damages are measured against the full overcharge amount, that is, up to six years of overcharges.

Treble damages, as applied to willful violations of law, may serve several functions. They may serve as a strong deterrent, thus enhancing compliance with the law. They may serve a claim-pursuing function, encouraging vigorous challenges by private parties, which has both a deterrent and compensatory effect. They may also serve a punitive purpose directed at noxious violations of law (*see e.g.* ***32** *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 US 477, 486 n 10 [1977] [Antitrust]; *Universal Health Servs. v United States ex rel. Escobar*, 136 S Ct 1989, 1996 [2016] [False Claims Act]; *State ex rel. Grupp v DHL Express (USA), Inc.*, 19 NY3d 278, 286 [2012] [New York's False Claims Act]).

None of these defendants willfully violated the law by deregulating apartments according to then-existing DHCR guidance (*see* majority op at 13; RSL § 26-516 [a] [2] ["A penalty of three times the overcharge shall be assessed upon all overcharges willfully collected by the owner starting six years before the complaint is filed"]). All of the relevant plaintiffs have sought treble damages, but because they are not entitled to them as a matter of law (which the majority correctly recognizes as the consequence of *Borden v 400 East 55th Street Associates, L.P.*, 23 NY3d 382, 389 [2014]; *see* majority op at 13), deciding the constitutionality of that provision is not necessary to deny their claims. We should not gratuitously hold a statutory provision unconstitutional when there is a nonconstitutional basis on which to resolve the issue (*see People v Finkelstein*, 9 NY2d 342, 345 [1961]).

That aside, the legislature could have made a rational determination that, whereas the vast majority of the illegal deregulations it sought to address were unintentional, because DCHR provided an incorrect legal interpretation, some landlords may have illegally deregulated apartments

for reasons having nothing to do with reliance on DCHR's analysis, and may have known at the time that they were engaged in illegal deregulation. Because the legislature, in passing the HSTPA, decided not to allow tenants to recover their full overcharges, the legislature could rationally have determined that the overall cost of the illegal deregulation to the system should be borne differentially between the many landlords who relied on DHCR and the few who knowingly chose to violate the law. The treble damages, in this circumstance, would work as an allocation based on fault rather than as a penalty; such an allocation would be rational.

As to claims based on an unlawful deregulation occurring before the HSTPA's effective date, the deterrent rationale is absent (because the unlawful deregulation occurred prior to the HSTPA's enhancement of treble damages), and the claim-pursuing rationale is weakened though not absent (because the increase in treble damages provides a greater incentive to pursue pending actions vigorously, even though the claims have already been filed). The punitive rationale remains. Those rationales are sufficient to surmount a due process challenge on this vacant record.

However, New York courts have recognized that treble damages may be "punitive in nature and obviously designed to severely punish owners who deliberately and systematically charge tenants unlawful rents, while deterring other owners of stabilized premises who might be similarly inclined" (*Matter of H.O. Realty Corp. v DHCR*, 46 AD3d 103, 108 [1st Dept 2007]; *see also* L 2019, ch 36, Sponsor's Memo). Such damages "share key characteristics of criminal sanctions" (*Landgraf*, 511 US at 281 [dicta]). If legislatively applied to past conduct, the imposition of treble damages may "raise a serious question under the Ex Post Facto Clause" of the Federal Constitution (*id.*).

"The Ex Post Facto Clause of the United States Constitution prohibits States from enacting laws that criminalize prior, then-innocent conduct; increase the punishments for past offenses; or eliminate defenses to charges for incidents that preceded the enactment" (*Kellogg v Travis*, 100 NY2d 407, 410 [2003]). It applies to statutes that "seek to impose a *punishment*" (*id.* [emphasis original]). Although it is usually applied to criminal statutes, the clause "may also be applied in civil cases where the civil disabilities disguise criminal penalties" (*Louis Vuitton S.A. v Spencer Handbags Corp.*, 765 F2d 966, 972 [2d Cir 1985]). If the damages in a particular case are "punitive" or "exemplary" and are retroactively imposed (*Landgraf*, 511 US at 281), a civil court can evaluate whether the damages violate the Ex Post Facto Clause.

Whether the retroactive application of treble damages rose to such a level as to be punitive rather than redistributive might pose a constitutional problem under the Ex Post Facto Clause. Such a determination, of course, would need to await the award of treble damages in a particular case[47]. Therefore, we can say only that retroactive application of these damages may pose a constitutional issue that lower courts can evaluate if relevant to some case at bar.

Mandatory attorneys' fees

Finally, the HSTPA made attorneys' fees mandatory in any case in which a landlord was found to have violated the statute. However, a change from permissive to mandatory fees does not expand the scope of the fees that can be collected or retroactively change liability for a landlord's illegal conduct (*see Landgraf*, 511 US at 270). In *Bradley*, the Supreme Court approved precisely this legislative change, allowing a new statute awarding attorneys' fees to apply to pending litigation (*see* 416 US at 724). Mandating attorneys' fees for pending actions easily passes rational basis scrutiny by providing an incentive for plaintiffs' counsel to pursue their pending claims more vigorously. The same purpose that satisfies rational basis scrutiny for mandatory awards of attorneys' fees in new cases--encouraging suits to combat unlawful deregulation in the face of New York City's "grave emergency" (RSL § 26-501)--meets that standard in pending cases as well. Those cases are "pending," not over and, indeed, may be far from over, as is the case with three of the four cases before us, even under the majority's holding. Through awards of attorneys' fees, the legislature provides incentives to tenants--not merely to file claims, but also to pursue them vigorously. Mandatory attorneys' fees are a time-honored way to provide that incentive.

The greatest irony attendant to the majority's opinion appears when one compares today's decision with our Court's treatment of the RRRA, which, in 1997, altered the rent regulation laws in a way that substantially favored landlords.[48]

The legislature has judged the rent regulations laws, from their very inception through the HSTPA's amendments, to be both remedial and urgent (*see Gleason*, 96 NY2d at 122). RSL § 26-501 states that "[a] serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York" and that "unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious

threats to the public health, safety and general welfare" (*id.*; *see also* RSL § 26-502). The HSTPA, intending to update and refine the legislature's response to that persistent crisis, was likewise urgent.

The majority acknowledges that "the claims pending' language is sufficiently clear to evince legislative intent to apply the amendments to at least some timely overcharge claims that were commenced prior to enactment" (majority op at 36). Nevertheless, the majority refuses to follow the legislature's direction to apply Part F to pending claims. In stark contrast, we deferred to the 1997 New York legislature when it restricted, rather than expanded, the types of evidence and, hence, amount of damages recoverable in rent overcharge complaints. In 1997, as a result of the RRRA, tenants were barred from introducing the rental history of an apartment prior to four years from when they made their rent overcharge claim. In 1996, more documentation had been allowed; in 1997, the documentation a tenant could introduce at trial was explicitly limited, curbing a tenant's ability to bring a rent overcharge claim and reducing the amount recoverable.[49]

The 1997 RRRA stated that amendments such as this one "shall apply to any action or proceeding pending in any court or any application, complaint or proceeding before an administrative agency on the effective date of this act " (L 1997, ch 116, § 46 [1]). Therefore, we deferred. We simply looked to the language of the statute and held that, for example, "[b]y its terms, the Rent Regulation Reform Act of 1997 (L 1997, ch 116) applies to any proceeding that was pending before the New York State Division of Housing and Community Renewal at the time of its enactment" (*Matter of Partnership 92 LP v DHCR*, 11 NY3d 859, 860 [2008]). By the terms of the HSTPA, the legislature specifically included the word "pending," making clear that it did not want the new provisions in Part F to only apply to future claims. Nevertheless, the majority refuses to defer, even though the HSTPA's expanded evidentiary provision that the majority uses to proclaim that landlords' rights have been violated is the exact mirror of the provision changed by the 1997 RRRA.

We have also deferred to changes in the Real Property Law that affected landlords and tenants. In 1982, the New York Legislature amended section 226-b of the Real Property Law (L 1983, ch 403, § 37). That amendment prevented a tenant from assigning his or her lease to another party without the landlord's consent, unless the tenant's lease stated otherwise. The amended section stated that "[t]he provisions of this section shall apply to all actions and proceedings pending on the effective date of this section" (*id.*), and our Court did not hesitate to apply the statute to leases signed prior to the effective date of the amendment. Even though the tenant's rights under the lease were impaired by applying the new law to pending leases and lawsuits, we applied the statute to pending cases, as the legislature commanded, because the express language of the statute conveyed the legislature's clear intention (*see Blum v West End Associates*, 64 NY2d 939, 941 [1985]; *Vance v Century Apartments Associates*, 61 NY2d 716, 718 [1984]; *Bennett v Rockrose Dev. Corp.*, 106 AD2d 256, 257 [1984], *affd* 64 NY2d 1155, 1156 [1985]; *Fox v 85th Estates Co.*, 100 AD2d 797, 797 [1984], 63 NY2d 1009, 1010 [1984]; *Sitomer v Melohn Properties Management*, 108 AD2d 706, 707 [1985], *affd* 65 NY2d 881, 883 [1985]).

Going back to 1961, when the New York legislature passed a law forbidding retroactive increases in rent, lawful under prior statute, our Court deferred. We easily held that there was a rational basis for passing the statute and that landlords did not have, in any particular rent control rule passed by the Legislature, "an interest so vested as ***33** to entitle [them] to keep the rule unchanged" (*I.L.F.Y.*, 10 NY2d at 270). The legislature had been clear that the new rules applied to pending proceedings (*see id.* at 266), and we once again deferred to the legislature.

Thus, in every prior case altering the benefits and burdens of the economic relations between landlords and tenants, we have never--until now--held that either group had a substantive right protected by the due process clause, even when the legislative changes applied to pending cases in which the parties had relied on a prior incarnation of the legislation.

The majority has applied a different framework to the HSTPA than to every other economic and regulatory statute and abandoned jurisdictional and procedural rules along the way. The proud Court that recognized the legislature's right to address the crisis caused by tenement-based labor is here unrecognizable, as we deny the legislature the right to determine how best to address New York City's housing crisis. I may not have arrived at the plan devised by the legislature in the HSTPA. But that is not my job. Our Frankensteinian role in resurrecting *Lochner* by assembling ill-fitting fragments of moribund doctrines frightens me, because it portends ill for the future.

For No. 1: Order insofar as appealed from affirmed, with costs to petitioner Regina Metropolitan Co., LLC, and certified question answered in the affirmative. Opinion Per Curiam. Chief Judge DiFiore and Judges Stein, Garcia and Feinman concur. Judge Wilson dissents in an opinion in which Judges Rivera and Fahey concur.

For No. 2: Order affirmed, with costs, and certified question not answered as unnecessary. Opinion Per Curiam. Chief Judge DiFiore and Judges Stein, Garcia and Feinman concur. Judge Wilson dissents in an opinion in which Judges Rivera and Fahey concur.

For No. 3: Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed, and certified question answered in the negative. Opinion Per Curiam. Chief Judge DiFiore and Judges Stein, Garcia and Feinman concur. Judge Wilson dissents in an opinion in which Judges Rivera and Fahey concur.

For No. 4: Order affirmed, with costs, and certified question answered in the affirmative.

Opinion Per Curiam. Chief Judge DiFiore and Judges Stein, Garcia and Feinman concur.

Judge Wilson dissents in an opinion in which Judges Rivera and Fahey concur.

Decided April 2, 2020

FOOTNOTES

Footnotes

1 DHCR is the State agency tasked with administering the RSL and the J-51 program.

2 In *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (164 AD3d 420 [1st Dept 2018]), the tenants took occupancy in 2005 at a market rent of $5,195 per month, filing this overcharge claim in 2009; in *Raden v W7879, LLC* (164 AD3d 440 [1st Dept 2018]), the tenants took occupancy in 1995 at a market rent of $2,350 per month, commencing this action in 2010; in *Taylor v 72A Realty Assoc., L.P.* (151 AD3d 95 [1st Dept 2017]), the tenants took occupancy in 2000 at a market rent of $2,200 per month, initiating suit in 2014; and in *Reich v Belnord Partners, LLC* (168 AD3d 482 [1st Dept 2019]), the tenants took occupancy in 2005 at a market rent of $18,500 per month (plus a $350 per month electricity charge), bringing the overcharge claim in 2016.

3 In *Regina Metro.*, DHCR calculated the legal regulated rent by reconstructing what the rent would have been on the base date had the apartment never been deregulated, but the Appellate Division rejected that method as contrary to the evidentiary four-year "lookback" rule barring review of rental history outside the four years prior to the imposition of the overcharge claim (*see* 164 AD3d at 422, 424-426). *Raden* and *Reich* were decided consistent with the Appellate Division's approach in *Regina Metro.* In *Raden*, the Appellate Division affirmed a $448.50 judgment for overcharge damages calculated by applying the four-year lookback rule (*see* 164 AD3d at 441-442) and, in *Reich*, the Appellate Division affirmed an order dismissing the overcharge claim, where the owners' assertion that application of the four-year lookback rule would result in no recoverable damages during the four-year limitations period was unchallenged (*see* 168 AD3d at 482). However, in *Taylor*, the Appellate Division concluded that the reconstruction method -- which it later rejected in *Regina Metro.* -- was the proper method for determining an overcharge claim even in the absence of fraud, denying summary judgment to the owner, which argued that if the court applied the four-year lookback rule, there was no overcharge (*see* 151 AD3d at 105-106).

4 There is significant disagreement between us and the dissent concerning the pre-HSTPA law. Critically, there is a distinction between an overcharge claim and a challenge to the deregulated status of an apartment, although the two types of claims are repeatedly conflated by the dissent, which confuses the overcharge claims presented here with the sole issue presented in *Kuzmich v 50 Murray St. Acquisition LLC* (34 NY3d 84 [2019]), namely whether plaintiffs were entitled to a declaration that their apartments were subject to rent stabilization. Despite the suggestion to the contary, there has long been a statute of limitations restricting recovery of monetary damages in overcharge claims and this remains true under the HSTPA (*see* CPLR 213-a; found in CPLR article 2 [entitled "Limitations of Time"]). Because the apartments in each of these cases were returned to rent stabilization following our decision in *Roberts*, the focus here is the tenants' entitlement to overcharge damages; a separate declaratory judgment claim challenging the status of the apartment is before us only in *Taylor*. While an overcharge may arise from an improper deregulation, this is by no means the exclusive or even the most common explanation for the collection of excessive rent -- overcharge claims are routinely brought to challenge the rent associated with apartments that have never been destabilized. Nor is there a basis for the dissent's view that the overcharge calculation amendments in Part F were intended to specifically address *Roberts* cases; neither the legislation nor its history supports such a conclusion.

[5] The RSL also limited the imposition of treble damages -- recoverable unless the owner established by a preponderance of the evidence that the overcharge was not willful -- to the last two years of overcharges preceding filing of the complaint (former RSL § 26-516[a][2][i]). Treble damages could not be imposed on overcharges occurring prior to April 1984 (*id.*).

[6] Our decision in *Cintron* did not authorize consideration of rental history outside the four-year lookback period. Rather, we held that rent reduction orders issued prior to that period that remained in effect during the recovery period were part of the reviewable four years of rental history (15 NY3d at 356; *see also Scott v Rockaway Pratt, LLC*, 17 NY3d 739 [2011]). Such consideration did not contradict the record retention limitations because "DHCR can take notice of its own orders and the rent registrations it maintains to ascertain the rent established by a rent reduction order without imposing onerous obligations on landlords" (*Cintron*, 15 NY3d at 355-356).

[7] Fraud consists of "evidence [of] a representation of material fact, falsity, scienter, reliance and injury" (*Vermeer Owners v Guterman*, 78 NY2d 1114, 1116 [1991]; *see e.g. Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569 [2018]; *Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]). In this context, willfulness means "consciously and knowingly charg[ing] . . . improper rent" (*Matter of Lavanant v New York State Div. of Hous. & Community Renewal*, 148 AD2d 185, 190 [1st Dept 1989]; *see Matter of Old Republic Life Ins. Co. v Thacher*, 12 NY2d 48, 56 [1962] [interpreting "willful" in a regulatory context to mean "intentional and deliberate"]).

[8] Contrary to the *Raden* tenants' assertion, the owners in that case established that the deregulation was not fraudulent or willful because it was consistent with DHCR's guidance. That they deregulated the apartment in 1995 -- prior to the formal guidance DHCR issued the following year that such deregulation was proper -- does not constitute evidence of a fraudulent scheme to deregulate. Rather, during a time of uncertainty concerning the scope of the J-51 benefit scheme, the owners correctly anticipated the interpretation DHCR would ultimately adopt concerning the luxury deregulation provisions. Thus, the affirmed finding of fact that there was neither willfulness nor fraud is supported by the record and beyond our review.

[9] We also reject the tenants' arguments in *Taylor* and *Reich* that the rent should have been frozen under RSL § 26-517(e), which provides that "[t]he failure to file a proper and timely . . . rent registration statement" precludes an owner from collecting rent increases until a registration is filed. To the extent this provision is relevant to overcharge cases, the owners in *Taylor* and *Reich* filed registration statements for the years covered by the four-year recovery period and lookback rule (records prior to that period cannot be reviewed absent fraud). The fact that, in *Taylor*, these registration statements were filed retroactively is addressed by a separate statutory surcharge for late registration. In any event, rent freezing is inapplicable in *Roberts* cases where the failure to timely register resulted directly from DHCR's endorsement of a misunderstanding of the law (*see Taylor*, 151 AD3d at 106; *Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 113 [1st Dept 2017]).

[10] In some *Roberts* cases, lower courts approved use of the "sampling" method, authorized in the RSC for cases where the rent charged on the base date is unknown, in which DHCR sets the base date rent by averaging the rents of other similar stabilized apartments charged on the base date (*see e.g. Matter of 160 E. 84th St. Assoc. LLC v New York State Div. of Hous. & Community Renewal*, 160 AD3d 474 [1st Dept 2018] [reasoning that the market base date rent could not be accepted under *Lucas* and that a default formula was inappropriately punitive in a case without fraud]). Likewise, in *Regina Metro.*, the Appellate Division rejected the reconstruction approach applied by DHCR as violative of the four-year lookback rule but indicated in dicta that, on remittal, sampling could be within DHCR's discretion (164 AD3d at 428). As we explain, that suggestion was mistaken.

[11] In that scenario, section 2526.1(a)(3)(ii) directs that "the rent shall be determined by the DHCR in accordance with section 2522.6," which sets forth a framework for setting the legal regulated rent where "(i) the rent charged on the base date cannot be determined; or (ii) a full rental history from the base date is not provided; or (iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment; or (iv) a rental practice proscribed under section 2525.3(b), (c) and (d) of this Title [which concern conditional rentals designed to deprive tenants of the protections of rent stabilization] has been committed" (RSC § 2522.6[b][2]). In such a case, DHCR sets the legal regulated rent using the lowest number resulting from four formulas, which include the sampling method (*id.* § 2522.6[b][3]). These RSC provisions are inapplicable by their terms in an overcharge case, such as a *Roberts* case, where the base date rent is the result of a mere mistaken overcharge (not fraud) and the rent charged on the base date is known.

[12] Apartments subject to the RSL solely due to receipt of J-51 benefits generally are deregulated upon the first vacancy after expiration of benefits or at the moment of expiration, if every lease and renewal issued to the tenant in occupancy included a notice stating that the unit would be "subject to deregulation upon the expiration" of benefits and the approximate date of expiration (RSL § 26-504[c]).

13 This is not to say that tenants of those apartments necessarily are entitled to rent stabilization for the duration of their tenancy. Under the law in place before the HSTPA, the RSL contained luxury deregulation provisions, one of which permitted deregulation of occupied apartments where both the rent and the occupants' combined income exceeded enumerated levels (*see* former RSL §§ 26-504.1, 26-504.3). Nothing in the statutory scheme would have precluded the owner from pursuing luxury deregulation after J-51 benefits expired (*see generally Park*, 150 AD3d at 112). The fact that the owner had not provided notices advising the tenants of its participation in the J-51 program is irrelevant because the clause in RSL § 26-504(c) relating to buildings subject to the RSL regardless of J-51 benefits does not contain the notice requirement applicable to buildings subject to rent stabilization only by virtue of receipt of J-51 benefits (*see Lucas*, 101 AD3d at 402 and n). Thus, the analysis in *Lucas*, automatically affording rent-stabilized status for the duration of the tenancy, should not be followed when determining rent-stabilized status under pre-HSTPA law. While the apartment in *Taylor* was properly declared rent-stabilized as of the time of the complaint, the apartment was thereafter susceptible to luxury deregulation under the pre-HSTPA law.

14 We disagree with the suggestion in the dissent that it is premature or inappropriate to address the issues posed by retroactive application of Part F of the HSTPA. Soon after the HSTPA was enacted, parties in *Regina Metro.* and *Taylor* sent letters pursuant to Rule 500.6 advising the Court of the new legislation; the tenants asserted that Part F of the HSTPA applied to these appeals and the owners contended that the legislation was not intended to be applied retroactively and that such application would be unconstitutional. The impact of the HSTPA was also raised by DHCR in its reply brief in *Regina Metro.*, with the agency noting, among other things, that the owner's arguments were foreclosed by the Part F amendments. Multiple parties requested an additional opportunity for supplemental briefing in connection with these issues. The parties in *Reich* raised the applicability of the HSTPA and associated retroactivity and constitutional issues in their briefs, all filed after the enactment of the HSTPA. The Court provided the parties in all four cases an opportunity, if they so desired, to submit supplemental briefing on the issues of whether the HSTPA should be applied to these pending appeals, as well as "the propriety and desirability of this Court determining such questions in the first instance on this appeal," resulting in the filing of supplemental letter briefs in each case. All but one of the parties that addressed the latter question urged the Court to resolve these open issues without delay, noting there would be no benefit in remittal in light of the recent Appellate Division decision holding that relevant HSTPA Part F amendments apply retroactively to pending cases (*see Dugan v London Terrace Gardens, L.P.*, 177 AD3d 1 [1st Dept 2019]) -- precedent that would be binding on Supreme Court. The parties further cited concerns about incurring unnecessary additional delay and litigation costs in cases that have been pending for years. Under the circumstances, it is appropriate to address the statutory interpretation and constitutional issues, which were promptly raised by the parties, have been briefed and are presented for our review.

15 That three of these appeals (but not *Raden*) come to us as certified questions from non-final orders does not divest us of jurisdiction over the impact of recently-enacted legislation. *McMaster v Gould* (240 NY 379 [1925]), in which we declined to consider the applicability of a statute enacted after the Appellate Division certified a question to this Court from a nonfinal order, is inapposite. The question in that case was certified under a largely abandoned practice of framing the certified question with language specifically referencing the particular legal issue presented below in a manner that cabined our review to the law that existed at that time. The contemporary practice of broadly certifying the question whether the Appellate Division order was properly made gives this Court the flexibility to address any issue properly presented to us. In any event, the Appellate Division order in *Raden* is final, rendering the certified question -- and any limitation that might be imposed by its framing -- irrelevant to our resolution of that appeal, which presents the same issues relating to retroactive application of portions of the HSTPA.

16 The HSTPA also makes it harder for owners to prove a lack of willfulness, by deleting from RSL § 26-516(a) a provision stating that treble damages could not be imposed "based solely on said owner's failure to file a timely or proper initial or annual rent registration statement" and adding that, after an overcharge complaint has been filed and served on an owner, the voluntary adjustment of rent or tender of an overcharge refund shall not be considered as evidence of a lack of willfulness.

17 The Part F amendment relevant in *Collazo v Netherland Prop. Assets LLC* (decided herewith), a forum-selection provision clarifying that courts and DHCR have concurrent jurisdiction with respect to overcharge claims "subject to the tenant's choice of forum" (L 2019, ch 36, Part F, § 1), is a procedural statute that raises no retroactivity concerns when applied in that case, where Supreme Court granted a pre-answer motion to dismiss the action with the expectation that the merits of the claim would be adjudicated by DHCR. At this early stage of litigation, the issue in *Collazo* is which forum should resolve the claim in the first instance. "Application of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case" (*Landgraf*, 511 US at 274 [citation and internal quotation marks omitted]).

18 Likewise, it was "debatable" whether the statute in *American Economy* had a retroactive effect on insurers by barring future applications to a workers' compensation fund that covered workers whose closed cases reopened unexpectedly (30 NY3d at

149). The insurers were always legally liable for the closed cases, which arose out of their own policies, and the fund merely provided them potential relief from the uncertain future coverage costs associated with those cases, so its closure on a going-forward basis subjected the insurers to the possibility of such future costs but did not impose new legal liability (*id.* at 149, 141-145).

19 The dissent further asserts that, prior to the addition of the lookback rule provision in 1997, review of all rental history to establish the base date rent was permitted (dissenting op at 19). The dissent is mistaken (*see* n 26, *infra*) -- but even adopting the dissent's view, the repeal of the lookback rule upset over twenty years of repose. Likewise, the dissent's repeated reliance on cases that predate *Landgraf* reflects an unwillingness to engage with contemporary retroactivity jurisprudence (dissenting op at 23-24, 51).

20 The record retention provision does not exist in a vacuum but, before the HSTPA, was closely related to the lookback rule. Although the dissent suggests that consideration of the record retention amendment is somehow inappropriate (dissenting op at 42-43), it is impossible to fully assess the retroactive impact of the HSTPA's new overcharge calculation method without acknowledging that, previously, owners were permitted by those interrelated provisions to dispose of records after four years. The impact of the amendment is evident in a case like *Reich*, where the building has changed ownership twice since the tenants took occupancy fifteen years ago. If the HSTPA were applied to permit reconstruction of the base date rent in such a case, the change in record retention rules exacerbates the retroactive effect by hindering justification of rent increases taken outside the prior four-year lookback period, thereby impairing landlords' ability to defend themselves in an action alleging overcharges more than four years in the past.

21 When that intent is unambiguous, a claim revival statute withstands challenge under the Due Process Clause if it is "a reasonable response in order to remedy an injustice" (*World Trade Ctr.*, 30 NY3d at 400), such as remedying the plight of sick plaintiffs who were unable to commence timely claims because of the long period of latency between exposure and the manifestation of illness (*Hymowitz*, 73 NY2d at 503-504, 514).

22 To be sure, the language in the Part F effective date provision is less precise than the clause in the 1997 RRRA stating it was applicable to "any action or proceeding pending in any court or any application, complaint or proceeding before an administrative agency on the effective date" (L 1997, ch 116, § 46; *see Matter of Partnership 92 LP v New York State Div. of Hous. & Community Renewal*, 11 NY3d 859 [2008]), but given the contrast between the Part F language and that used in the remaining parts of the HSTPA, it is sufficient to convey a retroactive intent.

23 The tenants ask us to construe "claims pending" as encompassing any case pending on appeal which, in cases where the overcharge was already calculated, would involve reopening of the record for additional discovery and recalculation of the base date rent -- essentially, relitigation of the entire case. Given our resolution of the constitutional issue, we need not determine whether that broad view of "claims pending" reflects legislative intent because, at a minimum, "claims pending" encompasses cases like *Regina Metro.* and *Taylor*, in which the overcharge calculation still had to be performed.

24 The due process standard for gauging the propriety of retroactive tax statutes was articulated differently in the past. In earlier decisions relied on in *Replan*, the Supreme Court framed the inquiry as whether the statutes in question were "so harsh and oppressive as to transgress the constitutional limitation" (*Welch*, 305 US at 147). That this inquiry was not historically labeled as a "rational basis" test does not undermine the conclusion by both this Court and the Supreme Court that, in practice, the analysis "d[id] not differ" from the one applied to other types of retroactive statutes (*Caprio*, 25 NY3d at 752, quoting *Carlton*, 512 US at 30). Thus, there is no basis to dispute the continuing validity of *Replan* or *James Square* (applying *Replan*) which, contrary to the dissent's suggestion (dissenting op at 36), remain good law.

25 The Supreme Court has also considered whether impacted parties had forewarning of the retroactive effect. In *Romein*, employers and the Michigan Supreme Court interpreted a state statute permitting reduction of certain workers' compensation benefits to apply to workers injured prior to enactment, despite a contrary legislative resolution (503 US at 184-185). The Supreme Court upheld a second statute clarifying the original intent and mandating reimbursement of benefits wrongfully withheld during the period between enactment of the original statute and the clarifying legislation, indicating that there was no substantial reliance issue because the employers "knew they were taking a risk" when they acted based on a statutory interpretation that contravened that expressed by the legislature (*id.* at 191-192).

26 The impetus for the lookback amendment was explained when a bill containing substantially the same amendment was proposed in 1996. The legislative history for the 1996 bill makes clear that the Legislature originally intended the four-year statute of limitations "not only to limit the award for a rent overcharge to the four-year period preceding the complaint but also the

examination of the rental history prior to that four-year period" (Senate Introducer's Memorandum in Support, 1996 N.Y. Senate Bill No. S.7492). Nonetheless, "court decisions ha[d] erroneously interpreted the language of the statute . . . to permit examination of the rental history of an apartment prior to the four-year period" (*id.*). These legislative materials clarified that, "[n]otwithstanding the judicial opinions to the contrary, it was and is the intention of the Legislature to preclude the examination of the prior rental history" (*id.*). Indeed, since 1983, the statutory scheme contained a four-year limitations period and expressly stated that "no award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed" (1983 McKinney's Session Laws of N.Y. at 1791; L 1983, ch 403, § 14). The lookback amendment was included in the 1997 RRRA, among others, "to simplify the administration of rent laws while protecting the rights of tenants and owners" (Governor's Approval Mem, Bill Jacket, L 1997, ch 116 at 40). As the dissent notes, the 1997 RRRA as a whole "dramatically" and "historic[ally]" reformed New York's rent stabilization scheme (dissenting op at 48 n 19; *see* Senate Introducer's Mem in Support and Governor's Approval Mem, Bill Jacket, L 1997, ch 116 at 36, 40) -- including by creating a new vacancy bonus allowance, narrowing succession rights, establishing new penalties for harassment of tenants, amending the procedure for vacancy decontrol, authorizing the state to enter contracts exempting new construction from regulation, requiring deposit of rent payments into escrow during the pendency of certain landlord-tenant disputes and permitting owners to offer financial incentives to tenants in small buildings to vacate for the construction of new housing in that space (Senate Introducer's Mem in Support, Bill Jacket, L 1997, ch 116 at 36). The amendment adding the lookback rule was only one in this "extensive[]" suite of amendments (*id.*), and the breadth of the total legislative package has no bearing on the clarifying nature of that sole amendment.

27 The plurality in *Eastern Enterprises* observed that the Court's prior decisions had "left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience" and expressly clarified that it "need not address [the] due process claim" (524 US at 528-529, 538), and the one-justice concurrence -- the deciding vote -- viewed the statute as violative of the former mining operators' due process rights (*id.* at 539). Only the four dissenting justices opined that due process was satisfied. Indeed, there may be some correlation between due process and takings analyses of retroactive legislation (*see id.* at 537). The owner in *Taylor* asserted that retroactive application of the overcharge calculation amendments, which would impact income earned in the past from its real property, amounted to an unconstitutional taking. We need not reach that claim because we resolve the retroactivity issues on statutory interpretation and due process grounds.

28 Of course, to the degree the dissent argues that the Legislature "enact[ed] the HSTPA" -- in its entirety -- in order to "step[] in" concerning courts' uncertainty about calculation of overcharges in *Roberts* cases (dissenting op at 31), that assertion is patently untenable given the breadth of the HSTPA's amendments, which extend far beyond the realm of overcharge claims in general, and particularly far beyond the specific category of *Roberts* overcharge claims.

29 The dissent's assertion that we may not consider the propriety of retroactive application of the HSTPA amendments concerning treble damages is misplaced (dissenting op at 44). The owners' conduct in deregulating the apartments consistent with pre-*Roberts* DHCR guidance was not willful, and treble damages cannot be imposed on that basis. But the HSTPA -- by providing that a voluntary tender of a refund or adjustment of rent after filing of an overcharge claim cannot evidence a lack of willfulness -- indicates that conduct after an improper deregulation may be relevant to treble damages under the new law. Relying on another distinct provision that can be analyzed separately, the tenants also argue that a Part F amendment mandating the assessment of tenants' attorneys' fees on owners found liable for an overcharge (when previously such attorneys' fees were discretionary) should be applied to pending claims. The Supreme Court has held that new legislation providing reasonable attorneys' fees to a prevailing party may be applied in pending cases because "[a]ttorney's fee determinations . . . are collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial" (*see Landgraf*, 511 US at 276-277 [internal quotation marks and citation omitted] [explaining that *Bradley* (416 US 696), in which the Court applied such a provision in a pending case, "did not alter the well-settled presumption against application of the class of new statutes that would have genuinely retroactive' effect" in part because of the collateral nature of attorneys' fee determinations]). Attorneys' fees have yet to be addressed in *Regina Metro.*, in which the overcharge claim must be resolved before DHCR. However, attorneys' fees are no longer at issue in *Taylor* or *Reich*, in which there is no recoverable overcharge, or in *Raden*, where the tenants abandoned their request for attorneys' fees by failing to move specifically for such relief in Supreme Court.

30 As discussed in Section V, *infra*, we had no constitutional concerns whatsoever when, in 1997, the legislature curtailed *tenants'* right to recover overcharges in the exact provisions that the legislature now removed via the HSTPA (*see* L 1997, ch 116; *Matter of Partnership 92 LP v DHCR*, 11 NY3d 859 [2008] [applying the Rent Regulation Reform Act of 1997 retroactively to limit a tenant's recovery in a rent overcharge action pending at the time of the statute's enactment]). The majority cannot explain why landlords have a substantive right to retain ill-gotten rents while tenants have no substantive right to recover them. The answer, of course, is that neither group has an interest in the rent regulation laws that is protectable by substantive due process.

[31] The effective date of the statute was June 14, 2019.

[32] Although I disagree with some portions of the majority's analysis of the law pre-HSTPA, I do not address those, because HSTPA will be applied as written for claims that were not yet pending as of its effective date (*see* majority op at 4 ["we opine in no way on the vast majority of that legislation or its prospective application"]).

[33] For a general account of sweatshop working conditions in turn-of-the-century New York, *see e.g.* Jacob Riis, *How the Other Half Lives* (1890); *see also* Abraham Cahan, "A Sweatshop Romance," in *The Imported Bridegroom and Other Stories* (1898) ("They say a day has twenty-four hours. That's a bluff. A day has twelve coats . . . . I have still two
coats to make of the twelve that I got yesterday. So it's still Monday with me. My Tuesday won't begin before about two o'clock this afternoon").

[34] The normal application of the rational basis test is not "meaningless" just because it was, until now, used to validate rather than eviscerate legislation. Allowing the elected legislature, rather than the courts, to determine how to regulate our economy, reflects our meaningful commitment to the separation of powers and democracy.

[35] To be clear, there is not a scintilla of evidence in the record that any of these landlords--or any others--will fail to realize a reasonable profit if, as the legislature commanded, Section F of the HSTPA is applied to pending claims.

[36] Indeed, as the majority notes, some of the present plaintiffs are challenging unlawful deregulations that took place "more than a decade" ago (majority op at 12). Just several months ago, we upheld rent overcharge claims in which the unlawful deregulation occurred well outside the four-year lookback period (*Kuzmich*, 34 NY3d 84). The majority observes that the issue before us in *Kuzmich* was purely a question about declaratory relief, but that is merely the posture in which the issue came to us: the case itself simultaneously sought damages for overcharges. In any event, a declaratory judgment is a remedy, not a separate cause of action (*see* CPLR 3001). A determination of the allowable damages, whether in the 1997 RRRA or HSTPA, is not a restriction on the cause of action but a legislative judgment about how the appropriate damage remedy should be measured and what evidence should be considered in measuring it.

[37] *Gleason v Gleason* (26 NY2d 28 [1970]), on which the majority relies, undercuts its argument. In *Gleason*, we held that the new no-fault divorce law, which repealed New York's 200-year-old divorce laws, applied retroactively to a decree of separation entered into 16 years before the new divorce law's enactment, even though the legislature had not stated that the law was to apply retroactively, or to claims pending, or to previously entered decrees. Instead, we determined that statutory language stating the new two-year period of living apart "shall not be computed to include any period prior to September first, nineteen hundred sixty-six" evidenced the legislature's intent that the statute was "not to be given wholly prospective application" (*id.* at 36). From that tidbit, we held that the application of the new statute to pre-1966 decrees "offends against neither due process, the equal protection of the law nor any other constitutional provision" (*id.* at 34). In the HSTPA, the legislature stated its intent in terms far clearer than it did in the no-fault divorce law.

[38] The majority also relies on our decision in *Majewski v Broadalbin-Perth Cent. Sch. Dist.* (91 NY2d 577 [1998]). That case, like *Landgraf* turned the absence of a statement in the legislation itself saying it would apply to pending cases, and "[i]mportantly . . . the initial draft of the Act expressly provided that it would apply to *lawsuit[s] [that have] neither been settled nor reduced to judgment'* by the date of its enactment. That language does not appear in the enacted version" (*id.* at 587 [internal citations omitted]). The majority also fails to mention that *Majewski* reaffirmed that "equally settled" to the canon of construction disfavoring retroactive application of statutes in general "is that remedial' legislation . . . should be applied retroactively" in line with its legislative intent (*id.* at 584).

[39] The majority justifies its revival of substantive due process to invalidate Part F, section 7 by a citation to *Campaign for Fiscal Equity, Inc. v State* (100 NY2d 893, 925, 931 [2003]), calling today's decision a "quintessential judicial function" (majority op at 3-4). *Campaign for Fiscal Equity* involved the right to "a sound basic education" that is specifically enshrined in Article 11 of the New York State Constitution. The rights of landlords to rent overcharges is not in the text of our Constitution, though the majority unjustifiably pencils it in today. The standard of review for violations of an enumerated constitutional right is heightened, unlike review of an economic regulation under the due process clause, which must satisfy only rational basis scrutiny (*see Carolene Products*, 304 US at 152 n 4; *Federal Communications Commission v Beach Communications Inc.*, 508 US 307, 313 [1993]).

[40] The majority cites to *Landgraf*; *Usery v Turner Elkhorn* (428 US 1, 15 [1976]); *General Motors Corp. v Romein* (503 US 181, 191 [1992]); *Pension Ben. Guar. Corp. v R.A. Gray & Co.*, (467 US 717 [1984]); and our recent unanimous decision in *American Econ.*

Ins. Co. v State (30 NY3d 136, 149 [2017], *cert denied*, 138 S Ct 2601 [2018]) for the basic proposition that when a statute applies retroactively, the retroactive effect must itself pass rational basis review in order to comport with due process. The majority fails to mention that in every one of those cases, the court found that the retroactive effect survived rational basis scrutiny, and the retroactive statute was held constitutional.

41 The majority suggests that clarifying judicial confusion post-*Roberts* is an insufficient rational basis to sustain Part F, section 7 on due process grounds because "the amendments impact far more than overcharges associated" with *Roberts* (majority op at 52). The majority's argument improperly imports the narrow tailoring requirement of strict scrutiny into the rational basis test. If this were strict scrutiny analysis, the majority would be correct that the HSTPA is not narrowly tailored to a compelling government interest (*see Grutter v Bollinger*, 539 US 306, 326 [2003]). But in rational basis review, we ask only "whether there is any conceivable rational basis justifying" the statute and not "whether the conceived reason for the challenged distinction actually motivated the legislature" (*Beach Communications*, 508 US at 309, 315). *Olsen v State of Nebraska ex rel. Western Reference & Bond Association* (313 US 236 [1941]) is instructive. In that case, an employment agency challenged a Nebraska statute that limited an agency's maximum fee to ten per cent of the first month's wages for a candidate successfully placed. The agency challenged on two grounds: first, under *Ribnik v McBride* (277 US 350 [1929]), a *Lochner* era case that struck down a New Jersey statute regulating employment agency fees on substantive due process grounds as "an arbitrary interference with the right to contract" (*id.* at 356); and second, that the Nebraska statute was poorly designed, such that it failed to serve those "in need of special protection from exploitation" while harming "those members of the community for whom it is most difficult to obtain jobs" and thus, the agency contended "there are no conditions which the legislature might reasonably believe would redound to the public injury unless corrected by such legislation" (*Olsen*, 313 US at 246). The Supreme Court rejected the first rationale as "notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution" (*id.* at 247). The Court rejected the second rationale in its entirety: "We are not concerned . . . with the wisdom, need, or appropriateness of the legislation" (*id.*). Contrary to the majority's suggestion, there is no room in a rational basis inquiry for a court to opine as to whether legislation addresses a legitimate purpose effectively, narrowly or sufficiently, only whether it addresses a conceivable purpose in a manner that is not wholly irrational.

42 The *Ferguson* citation in the portion of Justice Breyer's dissent excerpted by the majority (majority op at 56-57) gives the historical background on "a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries" and concludes: "there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought"' (372 US at 729-732 [footnotes omitted]).

43 The majority's citation to three courts from other states that invalidated statutes on due process grounds does not bear on this appeal. In *Moe v Sex Offender Registry Bd* (467 Mass 598 [2014]) and *San Carlos Apache Tribe v Superior Court* (193 Ariz 195 [1999]), the courts explicitly grounded their holdings only in their respective state constitutions. In *Neiman v American Nat. Property and Cas. Co.* (236 Wis2d 411 [2000]), the Wisconsin court applied a balancing test where "the public interest served by the statute is weighed against the private interest that it overturns, including any unfairness caused by the retroactivity"-- a test for constitutionality under the Wisconsin constitution, established by Wisconsin caselaw, that is not the test used to evaluate claims under the U.S. Constitution or in New York. The need to resort to inapposite foreign state constitutions highlights the majority's error here.

44 Again, the majority's observation that this feature of the HSTPA would affect not just unlawful Roberts deregulations, but other deregulations as well, would be appropriate under a narrow tailoring analysis pursuant to strict scrutiny but is irrelevant under rational basis scrutiny.

45 In this regard, the majority offers a misleading illustration of the "destabilizing effect" of the HSPTA by referencing the dissenting Appellate Division Justice's comparison of the $285,390.39 award under DHCR's interpretation of the previous law compared to the $10,271,40 claimed by the landlord as the appropriate measure of damage under that law (majority op at 49). First, DHCR's award would have been substantially lower had the landlord attempted to prove the value of Individual Apartment Improvements (IAIs) for the subject apartment. DHCR specifically noted that it would have allowed the landlord to reduce the $285,390.39 award by proving the IAIs, but the landlord failed to tender it any evidence on that score. The landlord, belatedly, asserted IAIs that would have reduced the $207,096 pre-interest award to $141,147.24. Second, the rent collected by the landlord from these tenants over the period for which overcharges were measured was $576,726, which should be compared to

the $141,147.24 award exclusive of interest and inclusive of the IAIs that the landlord could have claimed, to allow for an apples-to-apples comparison as to the effect of the HSTPA (on the majority's assumption that the method used by DHCR was equivalent to what the HSTPA allows). Thus, DHCR determined that the rent had been inflated by 24% and ordered a refund in that amount. The nominal award sounds large, but only when taken out of the context of tenants who paid more than half a million dollars in rent. Whether such expensive apartments should be subject to rent control is a fair question ---- for the legislature, not us.

46 The majority fails to recognize that this provision is not directed at unlawful deregulations, where an apartment is removed from registration. If it were, the legislature likely would have protected records dating back from the time of a tenant's complaint, not the time of the last registration, which could be twenty years or more prior to the complaint. The only reason that the record retention provision is being considered in cases where the most recent registration long predates the proceeding is because of litigation in the wake of *Roberts*, which the legislature could not have predicted. Rather, the "produce or retain" language is meant to protect landlords who do file timely, but incorrect, registration statements--statements that show an illegal rent for an apartment the landlord still considers regulated.

47 Under a portion of the majority's holding with which I agree, none of the landlords in these cases can be held to be willful violators, and therefore cannot be subjected to treble damages.

48 The majority posits:
"No *Landgraf* analysis was necessary with respect to application of the 1997 lookback rule to pending cases because, unlike the sea change created by the HSTPA Part F amendments, it did not have a truly retroactive effect on liability" (majority op at 47).
Funny, the Senate Sponsor's Memorandum in support of the 1997 RRRA says: "This bill dramatically reforms New York State's system of rent regulation in many important respects." The Governor's Approval Memorandum describes the legislation as constituting "historic reforms to New York's system of rent regulation." Not only is "sea change" found nowhere in the HSTPA or its legislative history, but if there is to be some meaningful rank-ordering of "historic," "dramatic" and "sea change," I would place them in that order: Hurricane Sandy was historic and Irene dramatic. The sea changes twice daily.

49 The majority contends that the 1997 legislature was merely effectuating the intent of the 1983 legislature, which restricted the damages period of an overcharge claim to four years and meant to restrict the evidentiary burden also. Nothing in the 1997 legislative history supports that proposition. Instead, the majority cites the legislative history of the failed 1996 legislation, which claims to know the intent of the legislature thirteen years earlier. Putting aside the problem that the legislative history on which the majority relies is not from the legislation that passed, the legislature's characterization of what its predecessor legislature meant is of dubious, if any, value. As we have noted:
"Doubtless the legislative construction of the earlier statute is without binding force in any judicial proceeding. We cannot say that the Legislature has here attempted to interpose its authority upon the courts in regard to the construction of the earlier statute. In any matter brought before the courts in which rights of any party may be dependent upon the proper construction of the earlier statute, the courts are still free to place their own construction upon it, which may be contrary to the construction placed upon it by the Legislature. The validity of the provisions of the later statute does not depend upon the declaration of the legislative construction of the earlier statute. That declaration may be disregarded by the courts" (*New York v Lawrence*, 250 NY 429, 447-48 [1929]).
Moreover, after the 1983 amendments, courts regularly interpreted the 1983 rent regulation as permitting DHCR and the courts to look back far beyond four years of rental records to determine the base rent and corresponding overcharges (*see e.g. Vinsue Corp. v State Div. of Hous. & Cmty. Renewal*, 169 AD2d 592 [1st Dept 1991]; *Turner v Spear*, 134 Misc2d 733 [Civil Court 1987]). Had the courts genuinely misinterpreted the 1983 legislature's true intent, one would expect the legislature to have acted much more rapidly than the fourteen years it took for the legislature to "clarify" its true intent (*see Mayer v City Rent Agency*, 46 NY2d 139, 149 [1978] ["The city council's carefully calculated characterization of Local Law No. 76 as clarifying' its intent when Local Law No. 30 was enacted must give way to the substantive fact that under Local Law No. 30 as originally enacted authorized rent increases based on labor pass-along were allowed in addition to annual 7½% increases, whereas Local Law No. 76 purported to place labor cost pass-along increases under the general 7½% ceiling"]).

2020 N.Y. Slip Op. 02127

30 N.Y.3d 377, 89 N.E.3d 1227, 67 N.Y.S.3d 547, 2017 N.Y. Slip Op. 08166

**1 In the Matter of World Trade Center Lower Manhattan Disaster Site Litigation.
Stanislaw Faltynowicz et al., Appellants, and State of New York, Intervenor-Appellant,
v
Battery Park City Authority et al., Respondents.
Santiago Alvear, Appellant, and State of New York, Intervenor-Appellant,
v
Battery Park City Authority, Respondent.
Peter Curley et al., Appellants, and State of New York, Intervenor-Appellant,
v
Battery Park City Authority, Respondent.

Court of Appeals of New York
119
Argued and submitted October 17, 2017
Decided November 21, 2017

CITE TITLE AS: Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.

SUMMARY

Proceeding, pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals (22 NYCRR) § 500.27, to review two questions certified to the New York State Court of Appeals by the United States Court of Appeals for the Second Circuit. The following questions were certified by the United States Court of Appeals and accepted by the New York State Court of Appeals: "(1) Before New York State's capacity-to-sue doctrine may be applied to determine whether a State-created public benefit corporation has the capacity to challenge a State statute, must it first be determined whether the public benefit corporation 'should be treated like the State,' *see Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d 190, 192 (N.Y. 1987), based on a 'particularized inquiry into the nature of the instrumentality and the statute claimed to be applicable to it,' *see John Grace & Co. v. State Univ. Constr. Fund*, 375 N.E.2d 377, 379 (N.Y. 1978), and if so, what considerations are relevant to that inquiry?; and (2) Does the 'serious injustice' standard articulated in *Gallewski v. H. Hentz & Co.*, 93 N.E.2d 620 (N.Y. 1950), or the less stringent 'reasonableness' standard articulated in *Robinson v. Robins Dry Dock & Repair Co.*, 144 N.E. 579 (N.Y. 1924), govern the merits of a due process challenge under the New York State Constitution to a claim-revival statute?" The second certified question was reformulated by the New York State Court of Appeals to read: "Under *Robinson* and *Gallewski*, what standard of review governs the merits of a New York State Due Process Clause challenge to a claim-revival statute?"

*378 HEADNOTES

Parties
Capacity to Sue

Public Benefit Corporations

([1]) New York's general rule that state entities lack capacity to challenge the constitutionality of a state statute applies to public benefit corporations, and courts need not engage in a "particularized inquiry" to determine whether a particular public benefit corporation should first be treated like the State. Entities created by legislative enactment have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate. Municipal corporate bodies are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as agents. The capacity rule reflects the manifest improbability that the legislature would breathe constitutional rights into a public entity and then equip it with authority to police state legislation on the basis of those rights. It also reflects sound principles of judicial restraint, the extreme reluctance of courts to intrude in the political relationships between the legislature, the State and its governmental subdivisions. Although public benefit corporations have been described as enjoying an existence separate and apart from the State, its agencies and political subdivisions, those properties do not bring public benefit corporations outside of the scope of the

capacity rule. The features that arguably render public benefit corporations something more than mere subdivisions, such as the separation of their administrative and fiscal functions from the State, do not diminish the considerations supporting the rule.

Statutes
Validity of Statute

Claim-Revival Statutes—Due Process

([2]) A claim-revival statute will satisfy the Due Process Clause of the New York State Constitution (NY Const, art I, § 6) if it was enacted as a reasonable response in order to remedy an injustice. A more heightened standard would be too strict. In the context of a claim-revival statute, there is no principled way for a court to test whether a particular injustice is "serious" or whether a particular class of plaintiffs is blameless; such moral determinations are left to the elected branches of government. While the Court of Appeals has traditionally expressed an aversion to retroactive legislation, of which claim-revival statutes are one species, modern cases reflect a less rigid view of the legislature's right to pass such legislation. Nonetheless, there must first be a judicial determination that the revival statute was a reasonable measure to address an injustice.

RESEARCH REFERENCES

Am Jur 2d Constiutional Law §§ 149, 390; Am Jur 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 731, 733, 736; Am Jur 2d Parties §§ 26, 345–346, 368.

Carmody-Wait 2d Limitation of Actions §§ 13:6, 13:8–13:9; Carmody-Wait 2d Parties §§ 19:3, 19:13; Carmody-Wait 2d Actions By and Against Public Bodies and Public Officers §§ 144:1, 144:4, 144:7.

McKinney's, NY Const, art I, § 6.

***379** NY Jur 2d Constitutional Law §§ 52, 57; NY Jur 2d Declaratory Judgments and Agreed Case §§ 186–187; NY Jur 2d Limitations and Laches §§ 9, 11–12; NY Jur 2d Parties §§ 7–9.

Siegel, NY Prac §§ 38, 187.

ANNOTATION REFERENCES

Power of legislature to revive a right of action barred by limitation or to revive an action which has abated by lapse of time. 133 ALR 384.

Interest necessary to maintenance of declaratory determination of validity of statute or ordinance. 174 ALR 549.

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POINTS OF COUNSEL

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Jimmy Nolan's Law (L 2009, ch 440, codified at General Municipal Law § 50-i [4]) does not violate Battery Park City Authority's due process rights under the New York State Constitution. (*Robinson v Robins Dry Dock & Repair Co.*, 238 NY 271; *Gallewski v Hentz & Co.*, 301 NY 164; *Matter of McCann v Walsh Constr. Co.*, 282 App Div 444, 306 NY 904; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487; *Barrett v Wojtowicz*, 66 AD2d 604.)
Eric T. Schneiderman, Attorney General, New York City (*Andrew W. Amend, Barbara D. Underwood, Steven C. Wu* and *Eric Del Pozo* of counsel), for intervenor-appellant.
I. A New York public benefit corporation cannot assert a state due process challenge to a law that defines its powers and responsibilities. (*Matter of Ruffino v Rosen & Sons*, 142 AD2d 177, 74 NY2d 861; *Black Riv. Regulating Dist. v Adirondack League Club*, 307 NY 475; *Ruotolo v State of New York*, 83 NY2d 248; *Bernardine v City of New York*, 294 NY 361; *Trenton v New Jersey*, 262 US 182; *City of New York v State of New York*, 86 NY2d 286; *Matter of County of Cayuga v McHugh*, 4 NY2d 609; *Matter of County of Chemung v Shah*, 28 NY3d 244; *Village of Herkimer v Axelrod*, 58 NY2d 1069; *Matter of Jeter v Ellenville Cent. School Dist.*, 41 NY2d 283.) II. A claim-revival statute ***380** satisfies New York's Due Process Clause if it has a reasonable justification, as Jimmy Nolan's Law (L 2009, ch 440, codified at General Municipal Law § 50-i [4]) does. (*Robinson v Robins Dry Dock & Repair Co.*, 238 NY 271;

Brothers v Florence, 95 NY2d 290; *Chase Securities Corp. v Donaldson*, 325 US 304; *Gallewski v Hentz & Co.*, 301 NY 164; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487; *Ruotolo v State of New York*, 83 NY2d 248; *Jackson v State of New York*, 261 NY 134; *Wrought Iron Bridge Co. of Canton, Stark County, Ohio v Town of Attica*, 119 NY 204; *Schiavone v City of New York*, 92 NY2d 308; *Turner v New York City Tr. Auth.*, 257 AD2d 421.)

Boies Schiller Flexner LLP, New York City (*Luke Nikas* and *Nathan A. Holcomb* of counsel), and *Napoli Shkolnik PLLC*, New York City (*Paul J. Napoli* and *Christopher R. LoPalo* of counsel), for Santiago Alvear and others, appellants.

I. The Court should hold that public benefit corporations lack the capacity to challenge a state statute. (*Black Riv. Regulating Dist. v Adirondack League Club*, 307 NY 475; *City of New York v State of New York*, 86 NY2d 286; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382; *John Grace & Co. v State Univ. Constr. Fund*, 44 NY2d 84.) II. This Court should reaffirm its decision in *Robinson v Robins Dry Dock & Repair Co.* (238 NY 271 [1924]), and hold that its "reasonableness" standard governs the merits of a due process challenge to a claim-revival statute under the New York State Constitution. (*Gallewski v Hentz & Co.*, 301 NY 164; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487.)

Daniel S. Connolly, New York City, and *Wilson Elser Moskowitz Edelman & Dicker, LLP*, White Plains (*John M. Flannery* and *Eliza M. Scheibel* of counsel), for respondents.

I. Battery Park City Authority has capacity to challenge Jimmy Nolan's Law (L 2009, ch 440, codified at General Municipal Law § 50-i [4]) on due process grounds. (*John Grace & Co. v State Univ. Constr. Fund*, 44 NY2d 84; *Schulz v State of New York*, 84 NY2d 231; *Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn. v New York State Thruway Auth.*, 5 NY2d 420; *Collins v Manhattan & Bronx Surface Tr. Operating Auth.*, 62 NY2d 361; *Bordeleau v State of New York*, 18 NY3d 305; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382; *People v Miller*, 70 NY2d 903; *Matter of New York Post Corp. v Moses*, 10 NY2d 199; *Matter of Dormitory Auth. of State of N.Y. [Span Elec. Corp.]*, 18 NY2d 114; *Capital Dist. Regional Off-Track Betting Corp. v Levitt*, 65 AD2d 842.) II. Regardless of whether ***381** a "serious injustice" or "reasonableness" standard is applied, Jimmy Nolan's Law (L 2009, ch 440, codified at General Municipal Law § 50-i [4]) is unconstitutional as applied to Battery Park City Authority. (*Hopkins v Lincoln Trust Co.*, 233 NY 213; *Gallewski v Hentz & Co.*, 301 NY 164; *Robinson v Robins Dry Dock & Repair Co.*, 238 NY 271; *Matter of McCann v Walsh Constr. Co.*, 282 App Div 444, 306 NY 904; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487; *Barrett v Wojtowicz*, 66 AD2d 604; *Methodist Hosp. of Brooklyn v State Ins. Fund*, 64 NY2d 365; *Ruotolo v State of New York*, 83 NY2d 248; *Jackson v State of New York*, 261 NY 134; *Santangelo v State of New York*, 193 AD2d 25.)****2**

OPINION OF THE COURT

Feinman, J.

This matter comes to us from an order of the United States Court of Appeals for the Second Circuit certifying the following questions pursuant to rule 500.27 of this Court (Rules of Ct of Appeals [22 NYCRR] § 500.27):

> "(1) Before New York State's capacity-to-sue doctrine may be applied to determine whether a State-created public benefit corporation has the capacity to challenge a State statute, must it first be determined whether the public benefit corporation 'should be treated like the State,' [(*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 387 [1987])], based on a 'particularized inquiry into the nature of the instrumentality and the statute claimed to be applicable to it,' [(*John Grace & Co. v State Univ. Constr. Fund*, 44 NY2d 84, 88 [1978])], and if so, what considerations are relevant to that inquiry?; and
>
> "(2) Does the 'serious injustice' standard articulated in [*Gallewski v Hentz & Co.* (301 NY 164, 174 [1950])], or the less stringent 'reasonableness' standard articulated in [*Robinson v Robins Dry Dock & Repair Co.* (238 NY 271 [1924])], govern the merits of a due process challenge under the New York State Constitution to a claim-revival statute?" (*In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F3d 58, 70 [2d Cir 2017].)

We accepted the certified questions on February 9, 2017 (*see* 28 NY3d 1159 [2017]).

***382 I.**

Plaintiffs in the consolidated appeal before the Second Circuit are workers who participated in cleanup operations in New York City following the September 11, 2001 terrorist attacks. The defendant is Battery Park City Authority (BPCA). BPCA was established by the State Legislature as a public benefit corporation to redevelop blighted areas in lower Manhattan and to expand the

supply of safe and sanitary housing for low-income families (*see* Public Authorities Law §§ 1971, 1973 [1]). Plaintiffs initially brought claims between 2006 and 2009 alleging that they developed a host of illnesses as a result of their exposure to harmful toxins at BPCA-owned properties in the course of their cleanup duties.[1] However, in July 2009, the District Court dismissed plaintiffs' claims, together with hundreds of other similar claims against BPCA, on the grounds that the plaintiffs did not serve BPCA with timely notices of claim (*see* General Municipal Law § 50-e; Public Authorities Law § 1984).

The legislature responded to these dismissals by enacting Jimmy Nolan's Law, ****3** which became effective September 16, 2009 (*see* L 2009, ch 440). The law amended the General Municipal Law to provide, in relevant part:

> "Notwithstanding any other provision of law to the contrary, including . . . section fifty-e of this article . . . any cause of action against a public corporation for personal injuries suffered by a participant in World Trade Center rescue, recovery or cleanup operations as a result of such participation which is barred as of the effective date of this subdivision because the applicable period of limitation has expired is hereby revived, and a claim thereon may be filed and served and prosecuted provided such claim is filed and served within one year of the effective date of this subdivision" (General Municipal Law § 50-i [4] [a], as added by L 2009, ch 440, § 2).

The effect of the law was to revive the plaintiffs' time-barred causes of action for one year after its enactment.

***383** Many of the 9/11 cleanup workers whose claims had previously been dismissed, including plaintiffs, served new notices of claim on BPCA within the one-year revival period prescribed by Jimmy Nolan's Law. BPCA moved for summary judgment on the grounds that Jimmy Nolan's Law was unconstitutional under the Due Process Clause of the State Constitution (*see* NY Const, art I, § 6). Upon due notice, the Attorney General intervened to defend the constitutionality of the law.

The District Court granted summary judgment in favor of BPCA and held that Jimmy Nolan's Law was unconstitutional as applied (*see In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 66 F Supp 3d 466 [SD NY 2014]). As a threshold matter, the court recognized our "traditional rule that 'municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation' " (*id.* at 471, quoting *City of New York v State of New York*, 86 NY2d 286, 289 [1995]). Nevertheless, the court cited a line of cases stating that "a 'particularized inquiry is necessary to determine whether—for the specific purpose at issue—the public benefit corporation should be treated like the State' " (*id.*, quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 387 [1987]) and concluded that "BPCA is an entity independent of the State and has capacity to challenge the constitutionality of the Legislature's acts" (*id.* at 473). On the merits, the court found the law unconstitutional on the grounds that it was not passed in response to "exceptional" circumstances or a "serious injustice" (*id.* at 476, citing *Gallewski v Hentz & Co.*, 301 NY 164 [1950]).

Plaintiffs appealed to the Second Circuit. After discerning an "absence of authoritative guidance" on both the capacity issue and the proper standard of review in evaluating the constitutionality of claim-revival statutes (846 F3d at 69), the Second Circuit certified the questions set out above.

II.**4

The first question essentially asks us to decide whether our general rule—that state entities lack capacity to challenge the constitutionality of a state statute—is any less applicable to public benefit corporations than it is to other types of governmental entities, such as municipalities. We hold that it is not, and that no "particularized inquiry" is necessary to determine whether public benefit corporations should be treated like the State for purposes of capacity.

***384** A.

([1]) Capacity "concerns a litigant's power to appear and bring its grievance before the court" (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]). Entities created by legislative enactment, such as the BPCA, "have neither an inherent nor a common-law right to sue" (*id.* at 155-156). "Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate" (*id.* at 156). Capacity should not be confused with standing, which relates to whether a party has suffered an "injury in fact" conferring a "concrete interest in prosecuting the action" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-773 [1991]), and which "go[es] to the jurisdiction of the court" (*City of New York*, 86 NY2d at 292). Capacity, unlike standing, does not concern the

injury a party suffered, but whether the legislature invested that party with authority to seek relief in court. As such, capacity is a question of legislative intent and substantive state law.

Generally, "municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation" (*id.* at 289). During the more than 80 years predating our *City of New York* decision, our courts characterized this prohibition somewhat inconsistently, referring to it, at various times (and sometimes simultaneously), as a lack of capacity (*see County of Albany v Hooker*, 204 NY 1 [1912]), a lack of standing (*see Village of Herkimer v Axelrod*, 58 NY2d 1069 [1983]; *Black Riv. Regulating Dist. v Adirondack League Club*, 307 NY 475, 489 [1954]; *Matter of Town of Moreau v County of Saratoga*, 142 AD2d 864 [3d Dept 1988]; *City of Buffalo v State Bd. of Equalization & Assessment*, 26 AD2d 213 [3d Dept 1966]) or a substantive determination that the state acts complained of were not unconstitutional at all (*see Matter of County of Cayuga v McHugh*, 4 NY2d 609, 616 [1958]; *Black Riv.*, 307 NY at 489-490; *Matter of Bowen v State Commn. of Correction*, 104 AD2d 238 [3d Dept 1984]; *City of Utica v County of Oneida*, 187 Misc 960, 965-966 [Sup Ct, Oneida County 1946], *appeal dismissed* 70 NYS2d 582 [4th Dept 1947]). However, in *City of New York* (86 NY2d 286), we definitively stated the rule in terms of capacity, as opposed to standing or substantive constitutional law. It has remained a capacity rule ever since (*see Matter of County of Chemung v Shah*, 28 NY3d 244, 262 [2016]; *Matter of County of Nassau v State of New York*, 100 AD3d 1052 [3d Dept 2012], ***385** *lv dismissed and denied* 20 NY3d 1092 [2013]; *Matter of New York Blue Line Council, Inc. v Adirondack Park Agency*, 86 AD3d 756, 758-759 [3d Dept 2011], *lv denied sub nom. Matter of Clinton County v Adirondack Park Agency*, 18 NY3d 806 [2012]; *Gulotta v State of New York*, ****5** 228 AD2d 555 [2d Dept 1996], *appeal dismissed* 88 NY2d 1053 [1996], *lv denied* 89 NY2d 811 [1997]).[2]

In *City of New York*, we rejected claims by the City of New York, Board of Education of the City, Mayor and Chancellor of the City School District that the State's statutory scheme for funding public education denied school children their constitutional rights under the Education Article of the State Constitution, the Equal Protection Clauses of the Federal and State Constitutions and title VI of the Civil Rights Act of 1964 (*see City of New York*, 86 NY2d at 289). We observed that "municipal corporate bodies . . . are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as agents" and held that the municipal plaintiffs therefore lacked capacity to bring their claims (*id.* at 289-290).

Our capacity rule reflects a self-evident proposition about legislative intent: the "manifest improbability" (*id.* at 293) that the legislature would breathe constitutional rights into a public entity and then equip it with authority to police state legislation on the basis of those rights. It also reflects sound principles of judicial restraint, "the extreme reluctance of courts to intrude in the political relationships between the Legislature, the State and its governmental subdivisions" (*id.* at 296). "[T]he Legislature, within constitutional limitations, may by legislative fiat diminish, modify or recall any power delegated" to its political subdivisions (*Matter of County of Cayuga v McHugh*, 4 NY2d 609, 614-615 [1958]). "[T]he entire subject being one of governmental and public policy, . . . the wrong, if any, created and existing by the acts of the legislature, must be corrected by the legislature, or by an action where the people, as distinguished from a municipal corporate body, are before the court" (*City of New York*, 86 NY2d at 294, quoting *Hooker*, 204 NY at 18-19). Hence, with few exceptions, this capacity bar closes the courthouse doors to internal political disputes between the State and its subdivisions.

***386** The capacity rule is not absolute. A political subdivision with "express statutory authorization" to bring a constitutional challenge would not be found wanting in capacity (*id.* at 291; *accord Hooker*, 204 NY at 9), though a generic grant of authority to "sue or be sued" will be insufficient (*City of New York*, 86 NY2d at 293).[3] Even in the absence of explicit authority, the ****6** assertion of some constitutional rights may, by their nature, present special circumstances to which the general rule must yield (*see id.* at 291-292). To date, we have identified a limited number of situations presenting such special circumstances, such as where a public entity is "vested with an entitlement to a specific fund by a statute" and the challenged statute adversely affects its interest in the fund (*Matter of Town of Moreau*, 142 AD2d at 865; *accord City of New York*, 86 NY2d at 291-292; *County of Rensselaer v Regan*, 173 AD2d 37 [3d Dept 1991], *affd* 80 NY2d 988 [1992]), where a state statute impinges on a municipality's home rule powers under the State Constitution (*see Town of Black Brook v State of New York*, 41 NY2d 486 [1977]), or where a public entity asserts that if it is obliged to comply with a statute it "will by that very compliance be forced to violate a constitutional proscription" (*City of New York*, 86 NY2d at 292, quoting *Matter of Jeter v Ellenville Cent. School Dist.*, 41 NY2d 283, 287 [1977]).[4]

***387** We stress that the exceptions we have recognized to date are narrow. Under the general rule, we have barred public entities from challenging a wide variety of state actions, such as, e.g., the allocation of state funds amongst various localities (*see City of New York*, 86 NY2d 286; *Hooker*, 204 NY 1), the modification of a village-operated hospital's operating certificate (*see Village of Herkimer*, 58 NY2d 1069), the closure of a local jail by the State (*see Matter of County of Cayuga*, 4 NY2d at 616), special exemptions from local real estate tax assessments (*see City of Buffalo*, 26 AD2d 213), laws mandating that counties make certain expenditures (*see Gulotta*, 228 AD2d 555), state land use regulations (*see New York Blue Line Council*, 86 AD3d at 758-759) and state laws requiring electronic voting systems to be installed at polling places in lieu of lever-operated machines (*see County of Nassau*, 100 AD3d 1052).

B.

BPCA contends that public benefit corporations like itself are not fully governmental in nature. Therefore, BPCA argues, a court must conduct a "particularized inquiry" (*John Grace & Co. v State Univ. Constr. Fund*, 44 NY2d 84, 88 [1978]) to determine whether a particular public benefit corporation should be treated like the State before the capacity rule can be applied. For the reasons that follow, we disagree.

There are three types of public corporations: municipal corporations, district corporations and public benefit corporations (*see* General Construction Law § 65 [b]). A public benefit corporation is "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof" (*id.* § 66 [4]). Devised in the early twentieth century as "a new vehicle for funding public works projects" that "insulate[d] the State from the burden of long-term debt" (*Schulz v State of New York*, 84 NY2d 231, 244 [1994]), public benefit corporations are able to issue debt for which the State itself is not liable (*see* NY Const, art X, § 5). In addition, "[a]lthough created by the State and subject to dissolution by the State, these public corporations are independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary ***388** State board, department or commission" (*Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn. v New York State Thruway Auth.*, 5 NY2d 420, 423 [1959]). We have therefore understood the primary utility of public benefit corporations as twofold: to "protect the State from liability" and to "enable public projects to be carried on free from restrictions otherwise applicable" (*id.* at 423). In this context, we have sometimes described public benefit corporations as "enjoying an existence separate and apart from the State, its ****7** agencies and political subdivisions" (*Schulz*, 84 NY2d at 246 n 4 [collecting cases]).

These properties, however, do not bring public benefit corporations outside of the scope of our capacity rule. It is true that much of our analysis in *City of New York* rested on the "historical fact" that municipalities are "mere [ ] subdivisions" having no "right to contest the actions of their principal or creator" (*City of New York*, 86 NY2d at 289-291). However, our capacity rule is not a stilted axiom governing the position of the parts to the whole, or the relationship between the State as principal and its subdivisions as agents. Rather, as discussed above, it is nothing more than a commonsense presumption of legislative intent, informed by practical concerns about judicial overreach. The features that arguably render public benefit corporations something more than mere subdivisions, namely, the separation of "their administrative and fiscal functions from the State" (*Collins v Manhattan & Bronx Surface Tr. Operating Auth.*, 62 NY2d 361, 368 [1984]), do not diminish the considerations we have already mentioned that support this rule.

BPCA cites to a line of cases from this Court rejecting a per se rule that public benefit corporations are identified with the State. In those cases, we held that "[t]he mere fact that" a public benefit corporation

> "is an instrumentality of the State, and as such, engages in operations which are fundamentally governmental in nature does not inflexibly mandate a conclusion that it is the State or one of its agencies . . . Instead, a particularized inquiry into the nature of the instrumentality and the statute claimed to be applicable to it is required" (*John Grace & Co.*, 44 NY2d at 88).

***389** Under the particular circumstances presented in those cases, we held that a public benefit corporation would be treated like the State for purposes of immunity from punitive damages (*see Clark-Fitzpatrick, Inc.*, 70 NY2d 382), but not for purposes of contract bidding requirements under the State Finance Law (*see Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn.*, 5 NY2d 420), sovereign immunity (*Matter of Dormitory Auth. of State of N.Y. [Span Elec. Corp.]*, 18 NY2d 114 [1966]), statutes providing for equitable relief to certain public contractors (*see John Grace & Co.*, 44 NY2d 84) or a provision of the Penal Law punishing the submission of false instruments to the State (*see People v Miller*, 70

NY2d 903 [1987]).

However, applying this line of cases here would strip them of their context. The issue in each of these cases was whether a statute or common-law rule defining the State's rights or responsibilities vis-à-vis private parties could be extended to a public benefit corporation. Given the primary function of a public benefit corporation "to resemble in many respects a private business corporation . . . as a means of expanding government operations into areas generally carried on by private enterprise" (*Collins*, 62 NY2d at 368, 371 [internal quotation marks omitted]), we understood that a public benefit corporation's *outward-facing* relations with private parties—such as employees, customers and other business counterparts—would not necessarily be subject to the same laws that might apply when one does business with the government. ****8** Hence, in most of these cases, our overriding aim was to give maximum effect to the legislature's intent; we closely analyzed the public benefit corporation's enabling act, or the statute claimed to be applicable to it, in order to determine whether the corporation was intended to assume the guise of a private person in its legal relations with the general public (*see Clark-Fitzpatrick, Inc.*, 70 NY2d at 386-388; *John Grace & Co.*, 44 NY2d at 89; *Matter of Dormitory Auth.*, 18 NY2d at 117-118; *Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn.*, 5 NY2d at 423-424). As for *Miller*, we were specifically concerned that the statute at issue, if made applicable to statements given to public benefit corporations, could impose criminal penalties without "fair warning" to the public (70 NY2d at 907, citing *People v Nelson*, 69 NY2d 302 [1987]). None of the foregoing considerations apply where, as here, a court is called ***390** upon to evaluate a public benefit corporation's *inward-facing* relations with other state bodies.[5]

C.

The parties dispute the significance of two particular cases for our decision today. Plaintiffs and the Attorney General contend that this case falls within our ruling in *Black Riv. Regulating Dist. v Adirondack League Club* (307 NY 475 [1954]), where we held that the plaintiff, a river regulating district, could not maintain an action seeking a declaration that an act of the legislature was unconstitutional. By contrast, BPCA argues that our holding in *Patterson v Carey* (41 NY2d 714 [1977]) implicitly recognized that public corporations, under some circumstances, had capacity to bring such actions.

We agree with the plaintiffs and the Attorney General that our holding in *Black Riv.* precludes BPCA's proposed particularized inquiry approach. In that case, the Black River Regulating District (the District), a public corporation, sought a declaration that the Stokes Act (L 1950, ch 803), which prohibited "any river regulating board" from constructing certain reservoirs, was unconstitutional (*Black Riv.*, 307 NY at 483-485). We rejected the District's ****9** attempted challenge. We observed that the District's "only purpose," to construct reservoirs, was "a State purpose" and the District therefore had "no special character different from that of the State" (*id.* at 489). We also noted that the powers of the District to carry out these state purposes "are within the State's absolute discretion" to alter, impair or destroy (*id.* at 487). "[P]olitical power conferred by the Legislature," we explained, "confers no vested right against the government itself. . . . [T]he power conferred by the Legislature is akin to that of a public trust [and may] be exercised not for the benefit or at the will of the trustee but for the common good" (*id.* at 488).

***391** The District also argued that it could sue in order to vindicate the rights of its bondholders, whose bonds, it claimed, would be impaired if the Stokes Act were not struck down (*see Black Riv. Regulating Dist. v Adirondack League Club*, 282 App Div 161, 168-170 [4th Dept 1953], *revd* 307 NY 475 [1954]). We rejected this contention; the mere fact that the District could issue certificates of indebtedness, we held, "does not confer upon [the District] an independent status by which they have standing . . . to test the validity of the Stokes Act" (*Black Riv.*, 307 NY at 489).

The precise holding in *Black Riv.*, as we phrased it at the time, was that the plaintiffs lacked "standing" (or "status") to seek a declaration that the Stokes Act was unconstitutional (*id.* at 489-490).[6] However, it is clear that there was no real issue of "standing" in that case; the defendant was a private landowner subject to a condemnation proceeding by the District, a proceeding that would have been unlawful unless the District obtained the declaration it sought that the Stokes Act was unconstitutional (*see Black Riv. Regulating Dist. v Adirondack League Club*, 201 Misc 808, 811 [Sup Ct, Oneida County 1952], *revd* 282 App Div 161 [1953], *revd* 307 NY 475 [1954]). Rather, in holding that the District did not have "status" to sue (*Black Riv.*, 307 NY at 490), the Court was contemplating what we now recognize as capacity rather than standing (*see City of New York*, 86 NY2d at 291, citing *Black Riv.*, 307 NY 475).

We find unpersuasive BPCA's attempt to distinguish *Black Riv.* BPCA argues that the District was only

established as a "public corporation," not a "public benefit corporation." The Special Term in *Black Riv.* described the District's enabling statute as follows:

> "Section 431 provides that bodies corporate may be created 'to construct, maintain and operate reservoirs within such districts, subject to the provisions of this act, for the purpose of regulating the flow of streams, when required by the public welfare, including public health and safety. Such river regulating districts are declared to be public corporations and shall have perpetual existence and the power to acquire and hold such real estate ***392** and other property as may be ****10** necessary, to sue and be sued, to incur contract liabilities, to exercise the right of eminent domain and of assessment and taxation and to do all acts and exercise all powers authorized by and subject to the provision of this article. Such powers shall be exercised by and in the name of the board of the district' " (*Black Riv.*, 201 Misc at 813).

Therefore, it is clear that the District, in substance, if not in form, was a public benefit corporation (*see* General Construction Law § 66 [4]; *see also Northern Elec. Power Co., L.P. v Hudson Riv.-Black Riv. Regulating Dist.*, 122 AD3d 1185, 1186 [3d Dept 2014] [describing the Black River Regulating District as a "public benefit corporation"]). We note that the District would not qualify as either a municipal corporation or a district corporation (*see* General Construction Law § 66 [2], [3]), the only other types of public corporations (*see id.* § 65 [b]).

BPCA argues that, even if *Black Riv.* involved a public benefit corporation, our analysis was consistent with BPCA's proposed "particularized inquiry" test. According to this argument, the Court conducted such a particularized inquiry when it specifically identified the District's purposes "to construct reservoirs" as "a State purpose" (307 NY at 489). Although the District lacked power to sue in that particular case, BPCA argues that this does not necessarily foreclose challenges by other public benefit corporations with different purposes and under different circumstances. We do not read *Black Riv.* so narrowly. There was nothing special about reservoir construction that compelled us to rule as we did; rather, it was enough that the District's raison d'être was to carry out its activities "for the common good" (*id.* at 488). BPCA's attempt to harmonize its approach with *Black Riv.* fails because our description of the District's purposes in that case would apply with equal force to any other public benefit corporation, for the "true beneficiary" of any New York public benefit corporation is the State of New York and its people (*Matter of New York Post Corp. v Moses*, 10 NY2d 199, 204 [1961]).

BPCA's reliance on *Patterson* (41 NY2d 714) is misplaced. In that case, we considered an action by the members of the Board of the Jones Beach State Parkway Authority and the institutional trustee for the Authority's bondholders for a judgment declaring a state statute unconstitutional. However, as relevant here, we said only that "[w]e do agree with the Special ***393** Term . . . that the governmental plaintiffs, as well as the institutional representative of the bondholders, have sufficient standing to maintain this action" (*id.* at 719 n). The Special Term's ruling, in turn, suggests that the issue in *Patterson* (unlike in *Black Riv.*) was standing as traditionally defined, rather than capacity (*see Patterson v Carey*, 83 Misc 2d 372, 376 [Sup Ct, Albany County 1975] ["The individual plaintiffs as members of the Authority have the requisite standing to obtain a declaratory judgment . . . There can be no doubt that plaintiffs have a 'personal stake in the outcome' of this litigation" (citing ****11** *Board of Educ. of Cent. School Dist. No. 1 v Allen*, 20 NY2d 109 [1967], *affd* 392 US 236 [1968]; *Baker v Carr*, 369 US 186 [1962])], *affd* 52 AD2d 171 [3d Dept 1976], *affd as mod* 41 NY2d 714 [1977]).[7]

D.

We therefore hold that, under the capacity rule, public benefit corporations have no greater stature to challenge the constitutionality of state statutes than do municipal corporations or other local governmental entities. Of course, our holding today does not mean that public benefit corporations can never raise such constitutional challenges; like municipalities, they may avail themselves of an exception to the general rule (*see City of New York*, 86 NY2d at 291-292). However, courts need not engage in a "particularized inquiry" to determine whether a public benefit corporation should first be treated like the State. Unlike in other contexts, for purposes of our capacity bar, every public benefit corporation is the State.

III.

The second question, as originally certified, asks which of two purportedly inconsistent standards of review—the "reasonable[ness]" standard adopted in *Robinson v Robins Dry Dock & Repair Co.* (238 NY 271, 280 [1924]) or the "serious injustice" standard adopted in *Gallewski v Hentz & Co.* (301 NY 164, 174 [1950])—governs the constitutionality of a claim-revival statute under the Due

Process Clause of the New York Constitution.

***394** We do not read these cases to be in substantial disagreement; however, this case presents an opportunity for this Court to reconcile them and articulate a uniform standard of review. Therefore, in accordance with the certification of the Second Circuit (*see In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F3d at 70 ["we do not bind the Court of Appeals to the particular questions stated"]), we reformulate the second certified question as follows: "Under *Robinson* and *Gallewski*, what standard of review governs the merits of a New York State Due Process Clause challenge to a claim-revival statute?"

A.

At the outset, we note that the development of our law on claim-revival statutes has differed from the development of the federal rule.

Claim-revival statutes generally pose no issue under the Fourteenth Amendment to the United States Constitution (*see Plaut v Spendthrift Farm, Inc.*, 514 US 211, 229 [1995] [statutes of limitations "can be extended, without violating the Due Process Clause, after the ****12** cause of the action arose and even after the statute itself has expired"]). The United States Supreme Court articulated the rule in *Chase Securities Corp. v Donaldson*:

> "[W]here lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar" (325 US 304, 311-312 [1945]).

Unlike the federal rule, our state standard has not turned on this formal distinction between claim-revival statutes that intrude upon a "vested" property interest and those that do not. Rather, as we illustrate below, our cases have taken a more functionalist approach, weighing the defendant's interests in the availability of a statute of limitations defense with the need to correct an injustice. Each time we have spoken on this topic, we described circumstances that would be sufficient for a claim-revival statute to satisfy the State Due Process Clause, ***395** with specific reference to the facts then before us. Each of these cases merits our close attention.[8]

B.

The first case in which we directly addressed the constitutionality of a claim-revival statute was *Robinson* (238 NY 271), where a plaintiff brought a wrongful death action against defendants for the death of her husband. At the time, there was a two-year statute of limitations for such actions; the action was brought in December 1920, more than two years after the victim's death. During the two years following her husband's death, the plaintiff applied for, and received, a workers' compensation award, which by law was her exclusive remedy against the defendants. However, these benefits were cut off approximately two years after her husband's death when the United States Supreme Court struck down the applicable New York workers' compensation provision as unconstitutional (*see Knickerbocker Ice Co. v Stewart*, 253 US 149 [1920]). In response, the legislature amended the law in 1923 to allow such plaintiffs to commence an action, even if otherwise time-barred, within one year after the statute took effect.

The Court expressly declined to either adopt or reject the federal rule that the legislature had "general power to revive a cause of action for personal debts or a cause of action for tort," and decided that the case could be resolved on narrower grounds (*Robinson*, 238 NY at 276-277; *cf. Campbell v Holt*, 115 US 620 [1885]). While the Court acknowledged the possibility that, in some cases, a claim-revival statute would be unconstitutional, it declared that "both instinct and reason revolt at the proposition that redress for a wrong must be denied" where the ****13** enforcement of a statute of limitations would be "contrary to all prevailing ideas of justice" (*id.* at 279). In support of this proposition, the Court quoted at length from two decisions by then-Chief Justice Holmes of the Supreme Judicial Court of Massachusetts, both of which were highly skeptical of striking down claim-revival statutes on constitutional grounds, but which did not outright embrace the proposition that such statutes were always constitutional (*see id.* at 277-279, citing ***396** *Danforth v Groton Water Co.*, 178 Mass 472, 59 NE 1033 [1901]; *Dunbar v Boston & P.R. Corp.*, 181 Mass 383, 63 NE 916 [1902]). In particular, the Court cited with approval Justice Holmes' observation that

> "the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. . . . [M]ultitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were

> such as to appeal with some strength to the prevailing views of justice and if the obstacle in the way of the creation seemed small" (*id.* at 278, quoting *Danforth*, 178 Mass at 476-477, 59 NE at 1033-1034).

Ultimately, the Court upheld the claim-revival statute at bar on the grounds that there was "no arbitrary deprivation by the Legislature" and that the statute "was reasonable" in response to a situation that "call[ed] for remedy" (*id.* at 279-280).

The next case to revisit the *Robinson* doctrine was *Gallewski* (301 NY 164), an action by the administrator of the estate of Fritz B. Gutmann, a citizen and resident of the Netherlands. On May 10, 1940, the Netherlands was invaded by Nazi Germany. German authorities arrested Gutmann and deported him to a concentration camp; it was later learned that he was murdered there. Between May 14 and May 22, 1940, only days after the invasion, his New York brokerage firm executed a series of unauthorized securities transactions on his account. It was not until the liberation of the Netherlands in 1945 that a curator was appointed under Dutch law to administer Gutmann's assets. After the unauthorized transactions were discovered in 1946, the administrator of Gutmann's estate filed suit in 1948, but because the suit commenced more than six years after the cause of action accrued, it was barred by the statute of limitations. However, after the commencement of the action, the legislature amended the law to toll the statute of limitations for citizens of Axis-occupied countries during the period of such occupation (*see* L 1949, ch 326). The statute operated retroactively so as to revive claims, such as the plaintiff's, that had already been time-barred at the time of enactment (*see Gallewski*, 301 NY 170-171).

Addressing the constitutionality of the statute, the Court held that it would "treat the case within the limits of our decision***397** in the *Robinson* case," which "must be read, at the very least, as holding that a revival statute is not necessarily and per se void as a taking of 'property' without due process of law" (*id.* at 173, 174). The Court explained that *Robinson* "may be read, we think, ****14** as holding that the Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated" (*id.* at 174). Unlike the "inclusive and categorical rule" adopted by federal courts, *Robinson* "leave[s] the court free to approach each revival statute on its individual merits, in the light of its own peculiar circumstances and setting" (*id.*). Applying the rule to the facts, the Court upheld the statute on the grounds that, "as in the *Robinson* case, the 'extension of the time to bring . . . action was reasonable' " (*id.* at 175, quoting *Robinson*, 238 NY at 280). As with *Robinson*, the *Gallewski* Court expressly declined to either adopt or reject the federal standard (*see id.* at 173).

We next addressed the topic in 1954, when we affirmed, without opinion, a decision of the Appellate Division upholding amendments to the Workers' Compensation Law reviving claims for caisson disease (*see Matter of McCann v Walsh Constr. Co.*, 282 App Div 444 [3d Dept 1953], *affd without op* 306 NY 904 [1954]). The claimant in that case was exposed to compressed air as he worked on the construction of the Queens Midtown Tunnel, his last exposure being in 1938. He did not develop caisson disease symptoms until 1950. The law in effect in 1938 provided that an employee who contracted an occupational disease and then left his employer was not entitled to compensation unless the disease was contracted "within the twelve months previous to the date of disablement" (L 1931, ch 344). In 1946, the legislature "recognized that it was unjust to apply this general rule to a disease like caisson disease which was of a slow-starting or insidious nature," and therefore amended the law to exclude "compressed air illness" from this time limitation (L 1946, ch 642) (*McCann*, 282 App Div at 446-447). In 1947, the legislature also amended the then-governing statute of limitations so that claims for slow-starting diseases could be commenced "within ninety days after disablement and after knowledge that the disease is or was due to the nature of the employment" (L 1947, chs 77, 624). These statutes retroactively revived the claimant's previously time-barred ***398** claims. The claimant sued within days of the onset of his first symptoms in 1950.

The Appellate Division recited *Gallewski*'s holding that the legislature may revive a cause of action in response to a "serious injustice" (*McCann*, 282 App Div at 449, quoting *Gallewski*, 301 NY at 174). The *Gallewski* standard, according to the Court, "follow[ed]" *Robinson* (*id.*). Applying this standard, the Appellate Division easily found the law constitutional:

> "This is a classic instance of the granting of legislative relief in a situation where the arbitrary application of the Statute of Limitations would work injustice. As the Legislature recognized, in the case of a disease of an insidious character, the effects of which might be latent or long delayed, the right to compensation might be barred by the operation of the Statute of Limitations even before the claimant was aware of the fact that he had the disease. In these circumstances, the Legislature did no more than to comply with the simple demands of

justice in relieving innocent ****15** claimants of the effect of the statutory time limitations which would otherwise bar their right to compensation" (*id.* at 450).

The last of our cases addressing the constitutionality of claim-revival statutes was *Hymowitz v Eli Lilly & Co.* (73 NY2d 487 [1989]). Numerous plaintiffs brought suit against defendant drug manufacturers, alleging that they were injured by the drug diethylstilbestrol (DES) taken by their mothers while pregnant. As the Court recognized, "due to the latent nature of DES injuries, many claims were barred by the Statute of Limitations before the injury was discovered" (*id.* at 503). The applicable statute of limitations period accrued on the plaintiffs' exposure to the drug; it was not until 1986 that the legislature addressed this problem and statutorily instituted a discovery rule for "the latent effects of exposure to any substance" (L 1986, ch 692, § 2). The same statute also revived for one year causes of action for exposure to DES that had previously been time-barred (*id.* § 4).

The *Hymowitz* Court suggested a possible inconsistency between the *Robinson* and *Gallewski* tests (*see Hymowitz*, 73 NY2d at 514). The Court held, however, that it "need not light upon a precise test here," since the statute at issue would pass muster even under the purportedly stricter *Gallewski* standard:

***399** "The latent nature of DES injuries is well known, and it is clear that in the past the exposure rule prevented the bringing of timely actions for recovery. Thus we believe that exceptional circumstances are presented, that an injustice has been rectified, and that the requirements of *Gallewski v Hentz & Co.* (*supra*) have been met" (*id.*).

C.

The Second Circuit, in certifying this question, apparently read *Robinson* to hold that a statute will satisfy the State Constitution so long as it is "a 'reasonable' exercise of the Legislature's power" (*In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F3d at 68, quoting *Robinson*, 238 NY at 280). Our holding in *Robinson* was slightly more demanding than pure "reasonable[ness]": *Robinson* held that the Due Process Clause of the State Constitution is "satisfied if there was an apparent injustice which 'calls for [a] remedy,' and which is 'reasonable' and not 'arbitrary' " (*Hymowitz*, 73 NY2d at 514, quoting *Robinson*, 238 NY at 279-280).

A close reading of *Gallewski* reveals that it did not overrule or narrow *Robinson*. To the contrary, it expressly reaffirmed the *Robinson* standard (*see* 301 NY at 175 ["Here, as in the *Robinson* case, the 'extension of the time to bring . . . action was reasonable' "]). By elaborating that "[*Robinson*] may be read . . . as holding that the Legislature may constitutionally ****16** revive a personal cause of action where the circumstances are exceptional and . . . serious injustice would result to plaintiffs not guilty of any fault" (*id.* at 174), the Court was describing the particular circumstances of the case before it, providing additional color on *Robinson* and concluding that the extraordinary events of World War II more than satisfied the test. Any purported dichotomy between *Robinson*'s and *Gallewski*'s holdings is illusory.

The salient facts in each of *Robinson*, *Gallewski*, *McCann* and *Hymowitz* fall into the same pattern. First, there existed an identifiable injustice that moved the legislature to act. In *Robinson*, it was the plaintiffs' exclusive reliance on a provision of the workers' compensation law that was struck down by the United States Supreme Court (*see* 238 NY at 279); in *Gallewski*, it was the occupation of the plaintiffs' countries of residence during World War II (*see* 301 NY at 175); in *Hymowitz* and *McCann*, it was latent injuries caused by harmful exposure, which ***400** the plaintiffs were not able to attribute to an action or omission of the defendant until the statutory period to bring a claim had already expired (*see Hymowitz*, 73 NY2d at 514-515; *McCann*, 282 App Div at 445-446). Second, in each case, the legislature's revival of the plaintiff's claims for a limited period of time was reasonable in light of that injustice.

([2]) A more heightened standard would be too strict. In the context of a claim-revival statute, there is no principled way for a court to test whether a particular injustice is "serious" or whether a particular class of plaintiffs is blameless; such moral determinations are left to the elected branches of government. While we have traditionally expressed an "aversion to retroactive legislation" (*Matter of Hodes v Axelrod*, 70 NY2d 364, 370-371 [1987]), of which claim-revival statutes are one species (*see Matter of Decker v Pouvailsmith Corp.*, 252 NY 1, 5-6 [1929]), "we have noted that the modern cases reflect a less rigid view of the Legislature's right to pass such legislation" (*Hodes*, 70 NY2d at 371; *see also Usery v Turner Elkhorn Mining Co.*, 428 US 1, 15 [1976] ["legislative Acts adjusting the burdens and benefit of economic life come to the Court with a presumption of constitutionality"]). Nonetheless, there must first be a judicial determination that the revival statute was a reasonable measure to address an injustice.

D.

We now arrive at our answer to the second certified question, as reformulated herein. The cases we have just discussed all express one and the same rule: a claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice.

IV.

Accordingly, the first certified question should be answered in the negative and the second certified question, as reformulated, should be answered in accordance with this opinion.

Rivera, J. (concurring). We have accepted the following two certified questions from the Second Circuit.

> "(1) Before New York State's capacity-to-sue doctrine may be applied to determine whether a State-created public benefit corporation has the capacity ***401** to challenge a State statute, must it first be determined whether the public benefit corporation 'should be treated like the State,' [(*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 387 [1987])], based on a 'particularized inquiry into the nature of the instrumentality and the statute claimed to be applicable to it,' [(*John Grace & Co. v State Univ. Constr. Fund*, 44 NY2d 84, 88 [1978])], and if so, what considerations are relevant to that inquiry?; and
>
> "(2) Does the 'serious injustice' standard articulated in [*Gallewski v Hentz & Co.* (301 NY 164, 174 [1950])], or the less stringent 'reasonableness' standard articulated in [*Robinson v Robins Dry Dock & Repair Co.* (238 NY 271 [1924])], govern the merits of a due process challenge under the New York State Constitution to a claim-revival statute?" (*In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F3d 58, 70 [2d Cir 2017]).

I write separately to expand on the majority's answer to the first certified question, and to explain why, in our answer to the second question, we should expressly adopt the federal rule, according to which claim-revival statutes do not raise due process concerns unless "lapse of time has . . . [ ]vested a party with title to real or personal property" (*Chase Securities Corp. v Donaldson*, 325 US 304, 311 [1945]).

A. First Certified Question: Exceptions to the General No-Capacity Rule

With respect to the first certified question, I agree with the majority's comprehensive and well-reasoned analysis explaining that a public benefit corporation, like a municipal or local government entity, lacks capacity to sue unless the circumstances of the case support an exception to that rule. We have recognized exceptions to the capacity to sue bar where there is

> "(1) an express statutory authorization to bring such a suit; (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys; (3) ****17** where the State statute impinges upon 'Home Rule' powers of a municipality constitutionally guaranteed under article IX of the State Constitution; [or] (4) where the municipal ***402** challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription" (*City of New York v State of New York*, 86 NY2d 286, 291-292 [1995] [internal quotation marks and citations omitted]).

We have never stated that this list is exhaustive. While no "particularized inquiry" is necessary to determine whether a public benefit corporation should be treated like the State (because "for purposes of our capacity bar, every public benefit corporation is the State" [majority op at 393]), when a public benefit corporation seeks to sue the State, a court must determine whether its suit fits into one of the previously identified exceptions or some other exception deemed appropriate under the particular facts of the case. To reach that determination, a court must consider the common thread in the existing exceptions, which recognize the constitutional protections afforded state-created entities, as well as their legislative grant of authority. These exceptions are intended to ensure that state-created entities are not thwarted in achieving their constitutionally- and statutorily-mandated purposes within our democratic system of government.

The legislature may, of course, redefine, unchallenged, the powers and authority of a public benefit corporation (*Black Riv. Regulating Dist. v Adirondack League Club*, 307 NY 475, 487 [1954]), even dissolve the corporation. What it cannot do is prevent the corporation from exercising its authority to fulfill its statutorily-mandated purpose in compliance with the constitution and its enabling statutes.

To determine what a public benefit corporation may do, courts must scrutinize the public benefit corporation's laws, purpose, and the constitutional and statutory scheme into which it fits. As "[g]overnmental entities . . . [are] artificial creatures of statute, . . . [they] have neither an inherent nor a common-law right to sue" (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155-156 [1994]). Any capacity to challenge a state statute, then, "must be derived from the relevant enabling legislation or some other concrete statutory predicate" or, as relevant, our constitutional framework (*id.* at 156). Courts should therefore attend to the nature and purpose of the public benefit corporation seeking to bring suit, examining "the legislative [and constitutional] scheme" that encompasses it, with special attention to the public benefit***403** corporation's "power[s] and responsibilit[ies]" (*Matter of City of New York v City Civ. Serv. Commn.*, 60 NY2d 436, 441 [1983]). Courts should look to the public benefit corporation's (i) organic legislation, (ii) other legislation, if any, that the corporation is charged with implementing, (iii) the public benefit corporation's "functional responsibilit[ies]" (*Community Bd. 7*, 84 NY2d at 156, quoting *Matter of City of New York v City Civ. Serv. Commn.*, 60 NY2d at 445), (iv) indicia of legislative intent, and (v), as relevant or implicated, the State Constitution.

****18 B. Second Certified Question: Claim-Revival Statutes Do Not Deprive a Party of a Non-Vested Due Process Right**

The second certified question asks what standard governs the constitutionality of claim-revival statutes under our State Due Process Clause. The majority reformulates this question to focus narrowly on our prior decisions in *Robinson v Robins Dry Dock & Repair Co.* (238 NY 271 [1924]) and *Gallewski v Hentz & Co.* (301 NY 164 [1950]) (*see* majority op at 393-394). I have no disagreement with the majority's analysis of these cases. However, I would go beyond harmonizing our holdings in prior claim-revival cases and take the opportunity this question presents to state expressly that a claim-revival statute is constitutional unless it deprives a party of a vested property interest.*

The United States Supreme Court has determined that "where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the ***404** Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff [the] remedy, and divest the defendant of the statutory bar" (*Chase Securities Corp. v Donaldson*, 325 US 304, 311-312 [1945]). This "long[-standing] ****19** statement of the law of the Fourteenth Amendment" reflects the truism that statutes of limitations are not born of technical legal principles that underlie judicial decisionmaking, but instead are creatures of the legislature and represent policy judgments solely within the purview of elected officials (*id.* at 312). As the Supreme Court has explained:

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. [A party] may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control" (*id.* at 314 [citation omitted]).

Thus, the Court has explained that "[t]he Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is the taking of life, liberty or property without due process of law . . . [and], certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment" (*id.* at 315-316 [emphasis added]).

Even under our more expansive State Due Process Clause (*see e.g. People v LaValle*, 3 NY3d 88, 127 [2004] [gathering ***405** cases]), we are still concerned with an actual deprivation of life, liberty or property (*see* NY Const, art I, § 6 ["No person shall be deprived of life, liberty or property without due process of law"]). No such deprivation is at issue where a defendant seeks merely to cut short the time during which a plaintiff may sue. A defendant has no separate vested right in the timing of a lawsuit or the final date upon which a plaintiff may seek relief. Defendant may find it objectionable that the State Legislature saw fit to provide plaintiffs more time to pursue their remedy, but because the legislature did not

violate any fundamental right of the defendant in doing so, defendant has no grounds to legally challenge the claim-revival statute.

Adopting the federal standard, which recognizes the legislature's authority to revive claims where defendant is not deprived of a vested interest, is logically, historically, and jurisprudentially sound. Besides, it would seem to operate functionally the same as the rule announced by the majority today—that a claim-revival statute does not violate due process so long as it constitutes "a reasonable response in order to remedy an injustice" (majority op at 400). ****20** That rule would appear to be no barrier to enactment of claim-revival laws. The standard is easily met. It is not difficult to establish that a statute is "a reasonable response." Indeed, every time this Court has considered the issue in the past it has upheld the legislature's claim-revival statute as a proper response to the problem the legislature sought to address (*see Robinson*, 238 NY at 280; *Gallewski*, 301 NY at 174-175; *Matter of McCann v Walsh Constr. Co.*, 282 App Div 444, 450 [3d Dept 1953], *affd without op* 306 NY 904 [1954]; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487, 514 [1989]; *see also In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F3d at 69 [noting that "neither party has cited to us, nor have we found, any case in which any New York state court has struck down any statute reviving expired claims"]).

Certainly the judiciary is not the proper body to make the hard policy decisions behind these statutes. Instead, and appropriate to its position in our democratic system of government, the judiciary will defer to the legislative determination of what constitutes an injustice precisely because "there is no principled way for a court to test whether a particular injustice is 'serious' or whether a particular class of plaintiffs is blameless; [and] such moral determinations are left to the elected branches of government" (majority op at 400).

***406** Just as has been true every other time the Court has considered the constitutionality of a claim-revival statute, the rule announced by the majority will result in a finding that the statute does not deprive the defendant of due process. Rather than have a court attempt to balance policy considerations that are in fact consigned to the legislature, I would resolve the question directly and recognize the obvious: unless it impinges on a separate vested property right and not merely the hope of avoiding litigation, a claim-revival statute does not violate due process, because defendant has no fundamental right to a statute of limitations in perpetuity.

Wilson, J. (concurring). I subscribe fully to the Court's answer to the second certified question. I write separately because I do not view the first certified question as involving an issue of "capacity," even though a few of our decisions describe it that way. Nor do I view it as a question of when a public benefit corporation should be treated as if it were the State. The question, as I see it, is whether and under what circumstances a public benefit corporation can challenge a legislative act as unconstitutional. That is not a question of capacity, which has a firm and long-standing legal meaning relating to the binary ability to sue and be sued (or not), but of the power of a ****21** legislatively-created entity to challenge an action of its creator. The answer to that question is derived from the structure of government and the roles of the coordinate branches. We have most often articulated that doctrine not as one of capacity, but of "standing" or "power," which comes closer to describing the forces at work here.

The general presumption that legislatively created entities cannot challenge acts of the legislature derives from "the supreme power of the Legislature over its creatures" (*Black Riv. Regulating Dist. v Adirondack League Club*, 307 NY 475, 488 [1954] ["political power conferred by the Legislature confers no vested right as against the government itself"]). That presumption is rooted in the structure of government; legislatively-created entities, such as public benefit corporations, are subservient political entities. An entity's power is given by the legislature, and "[h]ow long it shall exist or how it may be modified or altered belongs exclusively to the people to determine" (*id.* at 488). Accordingly, it is the rare case when the entity may challenge an act of the legislature. Admittedly, our decisions have not always been clear in terminology; from time to time, we have muddied the waters. The appropriate response***407** today, as requested by the United States Court of Appeals for the Second Circuit, is to clear away the mud.

I.

"There is a difference between capacity to sue, which is the right to come into court, and a cause of action, which is the right to relief in court. Incapacity to sue exists when there is some legal disability, such as infancy or lunacy or a want of title in the plaintiff to the character in which he sues. The plaintiff was duly appointed receiver and has a legal capacity to sue as such, and, hence, could bring the defendants into court by the service of a summons upon them even if he had no cause of action against them. On the other hand, an infant has no capacity to sue, and, hence, could not

lawfully cause the defendants to be brought into court even if he had a good cause of action against them. Incapacity to sue is not the same as insufficiency of facts to sue upon" (*Ward v Petrie*, 157 NY 301, 311 [1898]).

Capacity is defined as "the satisfaction of a legal qualification, such as legal age or soundness of mind, that determines one's ability to sue or be sued" (Black's Law Dictionary [10th ed 2014], capacity). Capacity concerns "a litigant's power to appear and bring its grievance before the court" (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]). "Capacity may depend on a litigant's status or . . . on authority to sue or be sued" (*Silver v Pataki*, 96 NY2d 532, 537 [2001]). The capacity of governmental entities to sue can be either express or implied (*see* 84 NY2d at 155-156 ["Being artificial creatures of statute, (governmental) entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate"]). Thus, where the power to sue is expressly granted, an entity has capacity to sue or be sued; no further inquiry is required.**22

Here, there is no question that the Battery Park City Authority (BPCA) has the capacity to sue and be sued. Its enabling legislation specifically grants it that power, unlike the community board in *Community Bd. 7*, which lacked any express statutory authority to sue or be sued (*compare* Public Authorities Law § 1974 [1] [expressly providing that the BPCA "shall ***408** have power" "(t)o sue and be sued"], *with Community Bd. 7* at 157 ["neither New York City Charter § 2800 nor the relevant ULURP provisions expressly authorize community boards to bring suit"]). Indeed, if the BPCA lacked legal capacity, this lawsuit would not exist, and Jimmy Nolan's Law—which extended the statute of limitations for actions against a public corporation—would have been futile.

Whether a natural person or artificial entity may sue or be sued is a question of capacity. Whether a governmental entity may sue to challenge a governmental action could properly be thought of as one of general justiciability, but equally could be expressed as one of standing, which is the way most of our decisions have framed it. Standing has two components: a jurisdictional component, so that if a party suffers no injury, it may not sue; and a prudential component, involving "rules of self-restraint," which includes the determination that a party is well-situated to bring an action on its own or on behalf of another (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991] [explaining the "prudential limitations" of standing include "a general prohibition on one litigant raising the legal rights of another; a ban on adjudication of generalized grievances more appropriately addressed by the representative branches; and the requirement that the interest or injury asserted fall within the zone of interests protected by the statute invoked"]). We have cautioned that "the concept of capacity is often confused with the concept of standing, but the two legal doctrines are not interchangeable," and that "[t]he concept of a lack of capacity . . . has also occasionally been intermingled with the analytically distinct concept of a failure to state a cause of action" (*Community Bd. 7*, 84 NY2d at 154-155), yet we sometimes have failed to heed our own warnings.

In the context of challenges brought by legislatively-created entities to actions of the legislature, we have usually described the issue as one of "power," "standing," or "status," rather than "capacity." The occasional imprecise introduction of the word "capacity" is traceable to a quirk of jurisdiction evident in *County of Albany v Hooker* (204 NY 1 [1912]), which was adopted many years later in *City of New York v State of New York* (86 NY2d 286, 289 [1995]). In *Hooker*, the Appellate Division certified a question for appeal, casting it as: "Has the county of Albany legal capacity to bring this action?" Explaining that our court's "jurisdiction is restricted to a review of that question," we painstakingly noted that the "Revised ***409** Statutes of 1829 . . . provided: 'Each county, as a body corporate, has capacity . . . To sue and be sued in the manner prescribed by law"; and the Constitution of 1846 "provided that 'All corporations shall have the right to sue, and shall be subject to be sued in all courts, in like cases, as natural persons.' And such provision was continued in the Constitution of 1894"; and finally, that by statute, "A county is a municipal corporation." (204 NY at 9-11.) After emphasizing the capacity of counties to sue **23 and be sued, *Hooker* held that "the action cannot be maintained by the plaintiff, and the wrong, if any, created and existing by the acts of the legislature, must be corrected by the legislature" (*id.* at 18). *Hooker* rested on the proposition that counties, like "the several towns[,] are political divisions, organized for the convenient exercise of the political power of the state; and are no more corporations than the judicial, or the senate and assembly districts" (*id.*, quoting *Lorillard v Town of Monroe*, 11 NY 392, 394 [1854]).[1]

Most of the decisions cited by the majority do not express the underlying issue as one of capacity. In *Matter of County of Cayuga v McHugh* (4 NY2d 609 [1958]), Cayuga County sued the State Commission of Correction. We did not mention capacity; instead, we reached the merits and held that the Commission's action was not arbitrary (*id.* at 613). In *Town of Black Brook v State of New York* (41 NY2d 486, 489 [1977]), there is likewise

no mention of the town's capacity to sue; we determined that the town had "standing" to pursue its claim against the State. In *Village of Herkimer v Axelrod* (58 NY2d 1069, 1071 [1983]), we held that a municipal hospital lacked "standing" to sue the State Department of Health; again, there is no mention of the hospital's lack of capacity.

As the majority notes, the case most closely analogous to the present matter, *Black Riv.*, speaks only in terms of "status," ***410** "standing" or "power," not capacity.[2] The majority ****24** concludes that *Black Riv.*, despite discussing standing and not capacity, was really about capacity and involved "no real issue of 'standing,' " because the District's condemnation proceeding against a private landowner would have been unlawful unless the District obtained a declaration that the Stokes Act was unconstitutional. To the contrary, the District clearly had the power to sue and be sued—else it could not have brought a condemnation proceeding irrespective of the Stokes Act's constitutionality. Moreover, our detailed rationale does not mention the inability of the District to sue or be sued, but rather the District's lack of standing to challenge an act of the legislature, which is supreme over it: "Inherent in the grant of legislative power is the plenary power to alter or revoke. . . . The interests of the plaintiffs then are only those of the State and the State cannot challenge its own acts" (307 NY at 489). The District had no injury-in-fact from the Stokes Act, because the District itself could be eliminated or altered by legislative command.

The Appellate Division cases cited by the majority are largely in accord with our prior decisions, treating the issue as one of standing. *Matter of Town of Moreau v County of Saratoga* (142 AD2d 864 [3d Dept 1988]), *County of Rensselaer v Regan* (173 AD2d 37 [3d Dept 1991], *affd* 80 NY2d 988 [1992]), and *City of Buffalo v State Bd. of Equalization & Assessment* (26 AD2d 213 [3d Dept 1966]) discuss the issue in terms of standing only, not capacity. The two Appellate Division cases cited by the majority that do characterize the issue as one of capacity, *Matter of New York Blue Line Council, Inc. v Adirondack Park Agency* (86 AD3d 756 [3d Dept 2011]) and *Matter of County of Nassau v State of New York* (100 AD3d 1052 [3d Dept 2012]), were decided after *City of New York*, and repeat the wayward "capacity" language therein.

What the relevant cases have in common—and as to this, I believe the majority and I agree—is that the restriction on governmental entities challenging legislative action derives ***411** from the intrinsic structure of our government and separation of powers concerns. The legislative branch has the power to create entities (including public benefit corporations) to carry out its functions; the legislature also has the power to change, affect, and even eliminate those entities entirely. Because it is within the legislature's plenary power to do so, the courts generally have no role in determining the wisdom of legislative enactments regarding those entities. Judicial restrictions based on the separation of powers usually implicate justiciability, not capacity (*see Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233, 239 [1984]; *Matter of Korn v Gulotta*, 72 NY2d 363, 381 [1988]; *see also Jiggetts v Grinker*, 75 NY2d 411, 415 [1990] ["policy choices . . . are matters for ****25** the executive and legislative branches of government and the place to question their wisdom lies not in the courts but elsewhere"]). Indeed, the issue here is as much one of justiciability as of standing: in the ordinary case, the judiciary would not interfere in a legislative decision to eliminate, modify or impair an entity of its own creation. It is not our function to second-guess the wisdom of legislation that adversely affects only a legislatively-created entity. The majority explains that the rationale for the so-called "capacity bar" reflects concerns of "judicial restraint" and "governmental and public policy," and that the "capacity bar closes the courthouse doors to internal political disputes between the State and its subdivisions." Those principles, by their own words, implicate standing and justiciability, not capacity.

II.

I would tackle the certified question in stages. First, as the majority notes, we need to reformulate the question asked by the United States Court of Appeals for the Second Circuit, because the issue is much more specific than when a public benefit corporation should be treated like the State. Second, under the majority's test or mine, there is a "particularized inquiry," in the sense of an examination of facts particular to the entity's ability to sue and be sued (capacity) and its injury-in-fact and prudential concerns (standing and justiciability to me; capacity to the majority), but those are not the "particularized inquiry" of *John Grace & Co. v State Univ. Constr. Fund* (44 NY2d 84, 88 [1978]). Third, the Second Circuit has invited us to indicate how this particular case should be resolved, and I would accept that invitation.

***412 A.**

The cases identified by the Second Circuit in the first certified question, *John Grace & Co.* and *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.* (70 NY2d 382 [1987]), are not germane to the question of whether a public benefit corporation can challenge a legislative act as unconstitutional. I agree with the majority on this. *Clark-Fitzpatrick* holds that punitive damages are not available against public benefit corporations, and *John Grace & Co.* holds that a statute giving contractors relief from fuel cost spikes during the energy crisis did not apply to contracts with public authorities, but was limited to contracts with the State itself. Those cases do not relate to the power of public benefit corporations to sue or be sued, or under what circumstances they might be able to challenge an act of the State. I would reformulate the certified question to ask whether and under what circumstances a public benefit corporation can challenge a statute as unconstitutional.

B.

Putting aside the labels of "standing," "status," "power," or "capacity" used in our decisions and the decisions of the lower courts, the case law can be distilled into the following propositions. First, the general rule is that a legislatively-created artificial entity cannot challenge ****26** an action of the legislature, because that entity is a creature of the legislature, the legislature is vested with lawmaking authority, and the legislature may abolish or alter its creatures at will (*see Black Riv.* at 487 ["The number and nature of (the regulating district's) powers are within the State's absolute discretion and any alteration, impairment or destruction of those powers by the Legislature presents no question of constitutionality"]). In that sense, those subordinate legislative creations have no cognizable injury resulting from legislative action, because our system of government vests the lawmaking power in the legislature, not to be challenged by subordinate entities, whether those are municipalities, public authorities, public benefit corporations, or otherwise. Second, there are circumstances in which the general rule can be overcome. Those fall into two basic categories: (A) when the State Constitution grants a right specific to the subordinate governmental unit, that unit may challenge legislative action as violative of the specific constitutional grant to it (*see e.g. Town of Black Brook v State of New York*, 41 NY2d 486, 489 [1977] ["When, indeed, ***413** a local government's claim is based on one of the protections of article IX (the Municipal Home Rule Law), the principle underlying the otherwise general rule prohibiting it from questioning legislative action affecting its powers is no longer applicable"]); and (B) when the challenged legislative action impairs the rights of a third party, and the subordinate governmental unit is both affected and in a good position to bring the claim when compared to other potential litigants, that unit may challenge the legislative action (*see e.g. Patterson v Carey*, 41 NY2d 714, 724 [1977] [allowing the Jones Beach Parkway Authority to challenge section 153-c of the Public Authorities Law as violating the portions of the New York Constitution setting forth the Comptroller's powers]).

In category (A), the traditional concerns of standing are satisfied: the injury to the subordinate entity is direct and the right constitutionally guaranteed to it. In category (B), the concerns animating prudential standing come into play: there must be some actual injury to the subordinate governmental entity, but that alone is not sufficient; the courts must determine as a matter of prudence whether it is appropriate for the entity to bring the suit, taking into account the strong presumption that legislatively-created entities cannot challenge legislative actions (*see Black Riv.* at 488 ["The concept of the supreme power of the Legislature over its creatures has been respected and followed in many decisions"]) and the "general prohibition on one litigant raising the legal rights of another" (*Society of Plastics*, 77 NY2d at 773). Generally, if the third parties are the better-suited litigants, then the entity would not have standing to sue. However, sometimes the entity will be the better-suited litigant, and standing doctrine allows suit in those instances. In this regard, the inquiry is necessarily case-specific, and could be characterized as "particularized." Even the consideration of the applicability of the majority's four exceptions drawn from *City of New York* is case-specific—as is each of our prior decisions and of the decisions of the lower courts. Those same factors would figure into the determination if the issue was framed as one of justiciability rather than standing: a claim by a legislatively-created entity ****27** purporting to challenge a statute should not be justiciable if there is no specific constitutional guarantee to that entity and the only injury is to the entity itself, or the injury is to some third party who is better suited to bring the claim on its own behalf.

Our case that best encompasses the above structure is *Patterson v Carey* (41 NY2d 714 [1977]). The Jones Beach Parkway ***414** Authority raised the parkway toll from 10¢ to 25¢, and the State enacted legislation repealing the toll. The Jones Beach Parkway Authority and the trustee for bondholders sued the State, challenging the legislation as unconstitutional. Although the decision does not expressly delineate between plaintiffs and claims, the structure of the decision does so

quite clearly. As to the claims that the legislation unconstitutionally impaired the Authority's finances and with it, the value of the bonds, we were silent as to the impairment of the Authority's finances, focusing exclusively on the bondholders' rights when finding the statute unconstitutional (*see id.* at 720-722). In contrast, when addressing the claim that the legislation's restriction on the State Comptroller's procedures for auditing the Authority encroached on the Comptroller's constitutional authority, we focused exclusively on the Authority's claim (*see id.* at 723-725). Implicitly, we determined that the Authority did not have standing to pursue the claims relating to impairment of its finances, though the bondholders did, and the Authority had sufficient standing to challenge the statute's restriction of the Comptroller's auditing powers, because the Authority was affected by the restrictions and well-suited to challenge them. The majority, too, understands *Patterson* as a decision about standing, not capacity.

The four exceptions set out in *City of New York* are an application of the above principles in the context of municipal corporations, which—unlike public benefit corporations—have constitutional protections running directly to them. For that reason, however unlikely it is that a county, city, town or village would be able to challenge a legislative action, the possibility that a public benefit corporation would be able to do so is substantially more remote.

C.

Unlike the majority, I would accept the Second Circuit's invitation to provide "specific guidance . . . as to the appropriate result of the inquiry in this particular case" (*In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F3d 58, 70 [2d Cir 2017], *certified question accepted* 28 NY3d 1159 [2017]). It is uncommon for the Second Circuit to suggest that we provide guidance as to the proper disposition of a case before it, but in this case, the Second Circuit's suggestion makes eminent sense. The legislature made a choice, in the wake of an unprecedented terrorist attack, to extend the statute of limitations***415** for claims brought by first responders. The questions here purely concern New York public policy surrounding relief efforts in the wake of that attack—including what future first responders might expect from the legislature; the structure of New York State government; and the power of the New York State Legislature. Those are not in any sense federal questions, and relate powerfully to New York's status as a ****28** sovereign state. As implicitly recognized by the Second Circuit's invitation, New York State has an overriding interest in deciding the lawfulness of Jimmy Nolan's Law, which indisputably complies with the Due Process Clause of the Fourteenth Amendment.

I cannot speak for the majority. Whether thought of as "capacity," "justiciability" or "standing," I believe the clear result here is that the BPCA may not challenge the constitutionality of Jimmy Nolan's Law. No constitutional protection runs directly to the BPCA entitling it to avoid claim-revival statutes, the BPCA does not seek to vindicate the constitutional rights of others and, even if it did, there is no showing that it would be better situated to vindicate those rights than the third parties would be.

Chief Judge DiFiore and Judges Rivera, Stein, Fahey and Garcia concur, Judge Rivera in a concurring opinion; Judge Wilson concurs in a separate concurring opinion.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.27 of this Court's Rules of Practice, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, first certified question answered in the negative and second certified question, as reformulated, answered in accordance with the opinion herein.

FOOTNOTES

Footnotes

1 Though asserted in Federal District Court, New York law furnished the substantive law governing these claims (*see* Air Transportation Safety and System Stabilization Act, Pub L 107-42, § 408 [b] [2], 115 US Stat 241 [Sept. 22, 2001]; *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 846 F3d at 62 n 2).

2 In line with these precedents, all parties agree that the relevant bar to BPCA's challenge to Jimmy Nolan's Law, if it exists at all, is

a capacity bar. None of the parties have asked us to reconfigure the rule as one of standing.

[3] We disagree with the assertion in Judge Wilson's concurrence that capacity is a "binary," all-or-nothing proposition (Wilson, J., concurring op at 406). To the contrary, we have recognized that "[c]apacity is examined with a view towards the relief sought" (*Excess Line Assn. of N.Y. [ELANY] v Waldorf & Assoc.*, 30 NY3d 119, 123 [2017]), which means that the same party may have capacity to bring one kind of claim but not another (*see Matter of Graziano v County of Albany*, 3 NY3d 475, 479-481 [2004]; *Silver v Pataki*, 96 NY2d 532, 537-538 [2001]).

[4] Our capacity rule is ultimately derived from a line of analogous federal cases sometimes referred to as the "*Hunter* cases" (*see Hunter v Pittsburgh*, 207 US 161 [1907]; *see also Williams v Mayor of Baltimore*, 289 US 36 [1933]; *Trenton v New Jersey*, 262 US 182 [1923]). Other state and federal courts, including the Supreme Court of the United States, have identified some possible additional exceptions to the *Hunter* cases (*see e.g. Gomillion v Lightfoot*, 364 US 339, 342-345 [1960] [equal protection challenges to race-based redistricting]; *Branson Sch. Dist. RE-82 v Romer*, 161 F3d 619, 628-629 [10th Cir 1998] [Supremacy Clause challenge], *cert denied* 526 US 1068 [1999]; *Rogers v Brockette*, 588 F2d 1057, 1067-1071 [5th Cir 1979] [Supremacy Clause challenge]; *Star-Kist Foods, Inc. v County of Los Angeles*, 42 Cal 3d 1, 719 P2d 987 [1986 in bank] [Dormant Commerce Clause challenge], *cert denied* 480 US 930 [1987]; *but see Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 of Pima County, Ariz. v Kirk*, 91 F3d 1240, 1242-1243 [9th Cir 1996] [rejecting Supremacy Clause challenge], *appeal dismissed* 109 F3d 634 [9th Cir 1997 en banc]). We have not yet considered whether analogous exceptions exist for purposes of New York's capacity rule. In any event, they are not relevant here.

[5] BPCA argues that this case, too, involves a public benefit corporation's relationship with private third parties—the plaintiffs—and therefore falls within the "particularized inquiry" line of cases. This argument is unavailing. We are not distinguishing the "particularized inquiry" cases on the grounds that they only involved disputes between public benefit corporations and private parties—clearly, not all of them did (*see e.g. Miller*, 70 NY2d 903). Rather, the distinction is that, in those cases, the right, privilege or duty of the State claimed to be applicable to the public benefit corporation was one that regulated the State's legal relations with private parties, as opposed to a rule, such as our capacity rule, that only governs intrastate relations.

[6] Separately, the Court held that the law was constitutional on the merits (*see id*.).

[7] The Special Term appeared to be relying on the United States Supreme Court's suggestion in *Allen*, on writ of certiorari from this Court, that local public officials who took an oath to support the United States Constitution had a "personal stake in the outcome" of the litigation (*Allen*, 392 US at 241 n 5), thus satisfying the standing requirements articulated in *Baker* (*see Baker*, 369 US at 204).

[8] Although the parties disagree as to what the standard of review is, all parties agree that it should reflect our existing case law in some sense. Neither the plaintiffs nor the Attorney General have asked us to adopt the federal standard in this case.

[*] As a general rule, the Court considers only those arguments raised by the parties or which arise by necessity in our analysis of the questions explicitly presented. These limitations are grounded in prudential concerns closely connected with the consideration of concrete cases and controversies. However, here we are not deciding the appeal of a case, subject to our usual jurisdictional and reviewability limitations. Instead, we are presented with a certified question from the Second Circuit, which it has invited us to reformulate as we deem appropriate. Thus, this case does not raise the usual prudential concerns that arise when we pronounce on issues not properly developed below or by the parties.

Moreover, the argument I advance here is hardly novel or in need of greater prior elaboration. As the majority's comprehensive discussion of our case law makes abundantly clear, the constitutionality of claim-revival statutes has been before us on several earlier occasions, and each time this Court has discussed the Supreme Court's Fourteenth Amendment analysis. I do no more here. We are in no way disadvantaged by deciding the applicability of the federal rule now, when it is obvious the Court is already well familiar with the issues, our constitutional standards, and the federal analysis.

[1] Although it might be tempting to read *Hooker* as suggesting that counties have capacity to sue in their proprietary role but not in their governmental role, that reading is unsatisfactory, because counties can be sued in their governmental role, and can sue private citizens while acting in their governmental role. *Hooker* must be understood in its jurisdictional posture, where this Court, constrained to answer the question posed by the Appellate Division without the ability to reformulate it to remove the word "capacity," "assumed that by the question submitted it is intended that this court shall determine whether the county has capacity to maintain the *particular action* stated in the complaint" (204 NY at 9 [emphasis added]). That emendation, though restating the word "capacity," emphasizes that the court's rule is claim-specific, meaning it is not one of capacity, but of standing, justiciability or existence of a cause of action.

[2] In *Black Riv.*, the Black River Regulating District challenged the Stokes Act as unconstitutional. We held that

> "the plaintiffs are without power to challenge the validity of the act or the Constitution . . .
> "The issuance of certificates of indebtedness does not confer upon plaintiffs an independent status by which they have standing, either as a body politic or as individuals, to test the validity of the Stokes Act" (307 NY at 489).

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87 N.Y.2d 130, 661 N.E.2d 694, 637 N.Y.S.2d 964

Holy Properties Limited, L. P., Respondent,
v.
Kenneth Cole Productions, Inc., Appellant.

Court of Appeals of New York
262
Argued October 19, 1995;
Decided December 7, 1995

CITE TITLE AS: Holy Props. v Cole Prods.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered October 11, 1994, which affirmed a judgment of the Supreme Court (Jane S. Solomon, J.), entered in New York County after a nonjury trial, awarding plaintiff the total sum of $718,841.51 against defendant.

Holy Props. v Cole Prods., 208 AD2d 394, affirmed.

HEADNOTES

Landlord and Tenant
Landlord's Duty to Mitigate Damages

(1) In an action seeking rent arrears and damages in connection with a lease of commercial premises that provided plaintiff landlord was under no duty to mitigate damages, and that upon defendant tenant's abandonment of the premises or eviction it would remain liable for all monetary obligations arising under the lease, plaintiff landlord did not have a duty to mitigate its damages after the tenant's abandonment of the premises and subsequent eviction. While the law imposes upon a party subjected to injury from breach of contract the duty of making reasonable exertions to minimize the injury, leases are not subject to this general rule. Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages. Thus, once defendant tenant abandoned the premises prior to the expiration of the lease, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease. Moreover, although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please; accordingly, if, as here, the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Landlord and Tenant, § 816.

NY Jur 2d, Landlord and Tenant, §§ 112, 115, 406, 786.

NY Real Prop Serv, §§ 75:46, 75:47.

ANNOTATION REFERENCES

Landlord's duty, on tenant's failure to occupy, or abandonment of, premises, to mitigate damages by accepting or procuring another tenant. 21 ALR3d 534.***131**

POINTS OF COUNSEL

Fischbein Badillo Wagner Itzler, New York City *(Bruce H. Wiener, Bentley Kassal, Kenneth G. Schwarz* and *Deborah J. Locitzer* of counsel), for appellant.
I. The traditional no-mitigation rule does not apply to modern commercial leases. *(Matter of Hevenor*, 144 NY 271; *Kottler v New York Bargain House*, 242 NY 28; *Lenco, Inc. v Hirschfeld*, 247 NY 44; *Hermitage Co. v Levine*, 248 NY 333; *International Publs. v Matchabelli*, 260 NY 451; *Javins v First Natl. Realty Corp.*, 428 F2d 1071, 400 US 925; *Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316; *Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211; *City of New York v Farrell Lines*, 30 NY2d 76; *57 E. 54 Realty Corp. v Gay Nineties Realty Corp.*, 71

Misc 2d 353.)
II. Paragraph 18 of the governing lease does not relieve the landlord, upon its reentry, of the duty to mitigate its damages. *(Grays v Brooks,* 148 Misc 2d 646; *Cox v Dorlon Assocs.,* 113 Misc 2d 670; *Orr v Doubleday, Page & Co.,* 223 NY 334; *Rodolitz v Neptune Paper Prods.,* 22 NY2d 383; *Backer Mgt. Corp. v Acme Quilting Co.,* 46 NY2d 211; *City of New York v Farrell Lines,* 30 NY2d 76; *Fabulous Stationers v Regency Joint Venture,* 44 AD2d 547; *Broad Props. v Wheels Inc.,* 43 AD2d 276, 35 NY2d 821; *Kenilworth Realty Trust v Bankers Trust Co.,* 112 Misc 2d 523; *67 Wall St. Co. v Franklin Natl. Bank,* 37 NY2d 245.)
III. The Court below's cases offer conflicting views regarding a landlord's duty to mitigate damages. *(Syndicate Bldg. Corp. v Lorber,* 128 AD2d 381; *Wallis v Falken-Smith,* 136 AD2d 506; *Howard Stores Corp. v Robison Rayon Co.,* 36 AD2d 911; *Mitchell & Titus Assocs. v Mesh Realty Corp.,* 160 AD2d 465; *Sage Realty Corp. v Kenbee Mgt.-N. Y.,* 182 AD2d 480; *11 Park Place Assocs. v Barnes,* 202 AD2d 292; *Comar Babylon Co. v Goldberg,* 116 AD2d 551; *Goldman v Orange County Ch.,* 121 AD2d 683; *Centurian Dev. v Kenford Co.,* 60 AD2d 96.)
IV. Many lower courts have vigorously advocated adopting a promitigation rule in both residential and commercial lease cases. *(Parkwood Realty Co. v Marcano,* 77 Misc 2d 690; *Lefrak v Lambert,* 89 Misc 2d 197, 93 Misc 2d 632; *Paragon Indus. v Williams,* 122 Misc 2d 628; *Grays v Brooks,* 148 Misc 2d 646; *Rubin v Dondysh,* 146 Misc 2d 37, 153 Misc 2d 657; *Forty Exch. Co. v Cohen,* 125 Misc 2d 475; *Douglas Manor House v Wohlfeld,* 66 Misc 2d 265.)
V. Recent surveys demonstrate that a majority of States impose a duty to mitigate on commercial landlords.
VI. Public policy dictates adopting a promitigation rule for commercial landlords. *(Parsons v Sutton,* 66 NY 92; *Hamilton v McPherson,* 28 NY 72; *Bing v Thunig,* 2 NY2d 656; *Park W. Mgt. Corp. v Mitchell,* 47 NY2d 316.)***132**
Finkelstein, Borah, Schwartz, Altschuler & Goldstein, P. C., New York City *(Jeffrey R. Metz, Robert D. Goldstein, David R. Brody* and *Steven L. Schultz* of counsel), for respondent.
I. The Court below properly applied the plain language in the lease agreement between the parties. *(Hall v Gould,* 13 NY 127; *International Publs. v Matchabelli,* 260 NY 451; *Mann v Munch Brewery,* 225 NY 189; *186-90 Joralemon Assocs. v Dianzon,* 161 AD2d 329; *Backer Mgt. Corp. v Acme Quilting Co.,* 46 NY2d 211; *812 Park Ave. Corp. v Pescara,* 268 App Div 436, 294 NY 792; *Morgan Servs. v Lavan Corp.,* 59 NY2d 796; *Truck Rent-A-Ctr. v Puritan Farms 2nd,* 41 NY2d 420; *Boyle v Petric Stores Corp.,* 136 Misc 2d 380; *Musman v Modern Deb,* 50 AD2d 761.)
II. The parties negotiated a mitigation provision which placed the burden of mitigation upon the tenant.
III. The Court below properly followed the law. *(Becar v Flues,* 64 NY 518; *Underhill v Collins,* 132 NY 269; *Sancourt Realty Corp. v Dowling,* 220 App Div 660; *Syndicate Bldg. Corp. v Lorber,* 128 AD2d 381; *Mitchell & Titus Assocs. v Mesh Realty Corp.,* 160 AD2d 465; *Sage Realty Corp. v Kenbee Mgt.-N. Y.,* 182 AD2d 480; *11 Park Place Assocs. v Barnes,* 202 AD2d 292; *Milltown Park v American Felt & Filter Co.,* 180 AD2d 235; *Treeforms, Inc. v Action Audio,* 102 AD2d 920; *Centurian Dev. v Kenford Co.,* 60 AD2d 96.)
IV. Public policy supports a continuation of the no-mitigation rule for commercial tenancies.
Carb, Luria, Glassner, Cook & Kufeld, LLP, New York City *(James E. Schwartz* and *Carol W. Duffy* of counsel), for The Real Estate Board of New York, Inc., *amicus curiae.*
I. The court should reaffirm the long-standing rule that a landlord has no duty to mitigate damages where a commercial tenant unjustifiably abandons its premises before the expiration of the lease term. *(Becar v Flues,* 64 NY 518; *Sancourt Realty Corp. v Dowling,* 220 App Div 660; *Centurian Dev. v Kenford Co.,* 60 AD2d 96; *Syndicate Bldg. Corp. v Lorber,* 128 AD2d 381; *Mitchell & Titus Assocs. v Mesh Realty Corp.,* 160 AD2d 465; *Sage Realty Corp. v Kenbee Mgt.-N. Y.,* 182 AD2d 480; *11 Park Place Assocs. v Barnes,* 202 AD2d 292; *Auerbach v Bennett,* 47 NY2d 619; *Matter of Eckart,* 39 NY2d 493; *Maxton Bldrs. v Lo Galbo,* 68 NY2d 373.) II. Paragraph 18 of the lease relieves the landlord of any duty to mitigate. *(Tov Knitting Mills v Starr Realty Co.,* 148 AD2d 526; *812 Park Ave. Corp. v Pescara,* 268 App Div 436, 294 NY 792; *Hall v Gould,* 13 NY 127; *International Publs. v Matchabelli,* 260 NY 451; *Mann v Munch Brewery,* 225 NY 189; *Comar Babylon Co. v Goldberg,* 116 AD2d 551; *Halpern v Bargans,* 46 AD2d 657; *150/160 Assocs. v Mojo-Stumer* ***133** *Architects,* 174 AD2d 658; *Lenco, Inc. v Hirschfeld,* 247 NY 44; *Kalisch-Jarcho, Inc. v City of New York,* 58 NY2d 377.)

OPINION OF THE COURT

Simons, J.

In 1985, defendant Kenneth Cole Productions, Inc. entered into a written lease for premises in a commercial office building located at 29 West 57th Street in Manhattan. The term was to commence on January 1, 1985 and end on December 31, 1994. In December 1991, following a change of owners and an alleged deterioration

in the level and quality of building services, defendant vacated the premises. Shortly thereafter, the new owner, plaintiff Holy Properties Limited, L.P., commenced a summary eviction proceeding against defendant for the nonpayment of rent. It obtained a judgment and warrant of eviction on May 19, 1992 and subsequently instituted this action seeking rent arrears and damages. At trial defendant asserted, as an affirmative defense, that plaintiff had failed to mitigate damages by deliberately failing to show or offer the premises to prospective replacement tenants. Supreme Court entered judgment for plaintiff, holding that defendant had breached the lease without cause and that plaintiff had no duty to mitigate damages. The Appellate Division affirmed.

The issue is whether, on these facts, the landlord had a duty to mitigate its damages after the tenant's abandonment of the premises and subsequent eviction.

The law imposes upon a party subjected to injury from breach of contract, the duty of making reasonable exertions to minimize the injury (*Wilmot v State of New York*, 32 NY2d 164, 168-169; *Losei Realty Corp. v City of New York*, 254 NY 41, 47). Leases are not subject to this general rule, however, for, unlike executory contracts, leases have been historically recognized as a present transfer of an estate in real property (*see*, *Becar v Flues*, 64 NY 518, 520; *Reichert v Spiess*, 203 App Div 134, 139; *see also*, *Centurian Dev. v Kenford Co.*, 60 AD2d 96). Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages (2 Rasch, New York Landlord and Tenant § 26:22 [3d ed 1988]).

When defendant abandoned these premises prior to expiration of the lease, the landlord had three options: (1) it could do nothing and collect the full rent due under the lease (*Becar v* ***134** *Flues*, 64 NY 518, *supra; Sancourt Realty Corp. v Dowling*, 220 App Div 660), (2) it could accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or (3) it could notify the tenant that it was entering and reletting the premises for the tenant's benefit. If the landlord relets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and reletting and then to pay the tenant's rent obligation (*see*, lease para 18; *Underhill v Collins*, 132 NY 269; *Centurian Dev. v Kenford Co.*, *supra*). Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease (*see*, *Becar*, 64 NY 518, *supra; Underhill v Collins*, 132 NY 269, *supra; Matter of Hevenor*, 144 NY 271).

Defendant urges us to reject this settled law and adopt the contract rationale recognized by some courts in this State and elsewhere. We decline to do so. Parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. In business transactions, particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the "correct" rule (*see*, *Maxton Bldrs. v Lo Galbo*, 68 NY2d 373, 381). This is perhaps true in real property more than any other area of the law, where established precedents are not lightly to be set aside (*Heyert v Orange & Rockland Utils.*, 17 NY2d 352, 360).

Defendant contends that even if it is liable for rent after abandoning the premises, plaintiff terminated the landlord-tenant relationship shortly thereafter by instituting summary proceedings. After the eviction, it maintains, its only liability was for contract damages, not rent, and under contract law the landlord had a duty to mitigate. Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please (*see*, *International Publs. v Matchabelli*, 260 NY 451, 454; *Mann v Munch Brewery*, 225 NY 189, 194; *Hall v Gould*, 13 NY 127, 133-134). If the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable (*id.*).

In this case, the lease expressly provided that plaintiff was under no duty to mitigate damages and that upon defendant's abandonment of the premises or eviction, it would remain liable for all monetary obligations arising under the lease (*see*, lease para 18).***135**

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Titone, Bellacosa, Smith, Levine and Ciparick concur.

Order affirmed, with costs.***136**

661 N.E.2d 694, 637 N.Y.S.2d 964

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New York Official Reports

33 N.Y.3d 353, 128 N.E.3d 128, 104 N.Y.S.3d 1, 2019 N.Y. Slip Op. 03526

**1 159 MP Corp. et al., Appellants,
v
Redbridge Bedford, LLC, Respondent.

Court of Appeals of New York
26
Argued March 20, 2019
Decided May 7, 2019

CITE TITLE AS: 159 MP Corp. v Redbridge Bedford, LLC

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that Court, entered January 31, 2018. The Appellate Division affirmed an order of the Supreme Court, Kings County (David I. Schmidt, J.; op 2015 NY Slip Op 32817[U] [2015]), which had (1) denied plaintiffs' motion for a *Yellowstone* injunction; (2) granted defendant's cross motion for summary judgment dismissing the complaint; and (3) dismissed the action. The following question was certified by the Appellate Division: "Was the opinion and order of this Court dated January 31, 2018, properly made?"

159 MP Corp. v Redbridge Bedford, LLC, 160 AD3d 176, affirmed.

HEADNOTES

Landlord and Tenant
Lease

Waiver in Commercial Lease of Right to Commence Declaratory Judgment Action

([1]) The waiver clause in the parties' leases whereby plaintiff commercial tenants unambiguously agreed to waive the right to commence a declaratory judgment action as to the terms of their leases was not void as against public policy and was enforceable. The declaratory judgment waiver was clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and did not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract. There is nothing in contemporary statutory, constitutional, or decisional law indicating that the interest in access to declaratory judgment actions, or more generally, to a full suite of litigation options without limitation, is so weighty and fundamental that it cannot be waived by sophisticated, counseled parties in a commercial lease. While access to declaratory relief benefits the parties as well as society in quieting disputes, a declaratory judgment is merely one form of relief available to litigants in enforcing a contract. Critically, the waiver clause at issue here did not preclude access to the courts but left available other judicial avenues through which plaintiffs might adjudicate their rights under the leases. Moreover, arbitration clauses, which are routinely enforced, provide no access to court for initial litigation of the merits and limited judicial review and are more restrictive than the declaratory judgment waiver here, which permitted judicial resolution of the parties' dispute in a RPAPL article 7 proceeding with full appellate review.

Landlord and Tenant
Yellowstone Injunction

Waiver in Commercial Lease of Right to Commence Declaratory Judgment Action

([2]) Plaintiff commercial tenants' waiver of the right to commence a declaratory judgment action as to the terms of their leases was not rendered ***354** unenforceable because it resulted in an inability to obtain *Yellowstone* relief (*First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]). *Yellowstone* relief is not an end in itself but merely a means of maintaining the status quo by tolling a contractual cure period during a pending action, permitting a tenant who loses on the merits of the lease dispute to cure the defect and retain the tenancy. A *Yellowstone* injunction is not essential to protect property rights in a commercial tenancy which are governed by the

terms of the lease negotiated by the parties. Plaintiffs' inability to obtain *Yellowstone* relief did not prevent them from raising defenses in summary proceedings if commenced and thus vindicating their rights under the leases if defendant owner's allegations of default were baseless. If plaintiffs believed defendant was not performing its respective obligations under the leases, they could bring an action in Supreme Court for breach of contract and request specific performance. While *Yellowstone* injunctions are useful procedural tools for tenants seeking to litigate notices of default, there is no strong societal interest in the ability of commercial entities to seek such a remedy that would justify voiding an unambiguous declaratory judgment waiver negotiated at arm's length, merely because that incidentally precluded access to *Yellowstone* relief.

RESEARCH REFERENCES

Am Jur 2d Estoppel and Waiver §§ 186, 196; Am Jur 2d Landlord and Tenant §§ 18, 38, 39.

Dolan, Rasch's New York Landlord and Tenant including Summary Proceedings (5th ed) § 6:13.

NY Jur 2d Estoppel, Ratification, and Waiver §§ 80, 84; NY Jur 2d Landlord and Tenant §§ 58, 67.

ANNOTATION REFERENCE

See ALR Index under Declaratory Judgments; Estoppel and Waiver; Landlord and Tenant.

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Query: lease /s waive /s declaratory /2 judgment

POINTS OF COUNSEL

A. Joshua Ehrlich, Albany, and *Wenig Saltiel LLP*, Brooklyn (*Meryl L. Wenig* and *Jason M. Fink* of counsel), for appellants.
I. The Supreme Court, Appellate Division, erred by upholding that portion of the lease provision at issue which violates public policy by prohibiting declaratory relief. (*Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156; *John J. Kassner & Co. v City of New York*, 46 NY2d 544; *Mount Vernon Trust Co. v Bergoff*, 272 NY 192; *Hanover Ins. Co. v D & W* ***355** *Cent. Sta. Alarm Co.*, 164 AD2d 112; *Matter of Leifer v Gross*, 140 AD3d 959; *Hammelburger v Foursome Inn Corp.*, 76 AD2d 646; *Salomon Bros. v West Va. State Bd. of Invs.*, 152 Misc 2d 289, 168 AD2d 384; *Craig v Commissioners of Sinking Fund of City of N.Y.*, 208 App Div 412; *Kalman v Shubert*, 270 NY 375.) II. The Supreme Court, Appellate Division, erred by upholding that portion of the lease provision that prohibits declaratory relief based in part on the availability of judicial review regarding whether the alleged breaches of the leases even exist because the same lease provision explicitly prevents such judicial review and penalizes plaintiffs-appellants for seeking such review. (*Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 87 NY2d 927; *Westinghouse Elec. Corp. v New York City Tr. Auth.*, 82 NY2d 47; *Kane v Walsh*, 295 NY 198; *Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197; *Marbury v Madison*, 5 US 137; *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1; *Liang v Wei Ji*, 155 AD3d 1018; *Dimery v Ulster Sav. Bank*, 82 AD3d 1034.) III. The Supreme Court, Appellate Division, erred by upholding that portion of the lease provision at issue which prohibits declaratory relief as it encourages the defendant-respondent to act in bad faith regarding its performance under the leases, in violation of public policy. (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62.)
Lupkin PLLC, New York City (*Jonathan D. Lupkin* and *Isabel D. Knott* of counsel), for respondent.
I. There is no public policy against waiving the right to a *Yellowstone* injunction. (*First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630; *Steele v Drummond*, 275 US 199; *People v Hawkins*, 157 NY 1; *Victory Taxi Garage, Inc. v Butaro*, 16 Misc 3d 875; *Post v 120 E. End Ave. Corp.*, 62 NY2d 19; *Baltimore & Ohio Southwestern R. Co. v Voigt*, 176 US 498; *Miller v Continental Ins. Co.*, 40 NY2d 675; *New England Mut. Life Ins. Co. v Caruso*, 73 NY2d 74; *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62; *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211.) II. By agreeing not to bring an action for declaratory judgment, appellants did not deprive themselves of meaningful judicial review. (*Salomon Bros. v West Va. State Bd. of Invs.*, 152 Misc 2d 289; *Craig v Commissioners of the Sinking Fund of the City of N.Y.*, 208 App Div 412; *Kalman v Shubert*, 270 NY 375; *Kalisch-Jarcho, Inc. v City of New York*, 72 NY2d 727; *European Am. Bank v Mr. Wemmick, Ltd.*, 160 AD2d 905; *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1; *Liang v Wei Ji*, 155 AD3d 1018; *Dimery v Ulster Sav. Bank*, 82 AD3d 1034; ***356** *Westinghouse Elec. Corp. v New York City Tr. Auth.*, 82 NY2d 47.) III.

Respondent's alleged "bad faith" is neither demonstrated nor relevant. (*Bingham v New York City Tr. Auth.*, 99 NY2d 355; *Telaro v Telaro*, 25 NY2d 433.)

OPINION OF THE COURT

Chief Judge DiFiore.

In New York, agreements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language pursuant to our strong public policy favoring freedom of contract. In this case, commercial tenants who unambiguously agreed to waive the right to commence a declaratory judgment action as to the terms of their leases ask us to invalidate that waiver on the rationale that the waiver is void as against public policy. We agree with the courts below that, under the circumstances of this case, the waiver clause is enforceable, requiring dismissal of the complaint.

Plaintiffs 159 MP Corp. and 240 Bedford Ave Realty Holding Corp. executed two commercial leases with the predecessor-in-interest of defendant Redbridge Bedford LLC, the current owner of the subject building. Together, the 20-year leases permit plaintiffs to occupy 13,000 square feet of property in Brooklyn to operate a Foodtown supermarket. Rents started at $341,628 per year and were to increase over the lifetime of the leases to $564,659.02, which included a 10-year option at escalating rents. While the lengthy and detailed leases contained a standard form, its terms were not accepted as boilerplate but rather contained numerous handwritten additions and deletions, initialed ****2** by the parties. Of particular relevance to this dispute, each lease also incorporated a 36-paragraph rider, which was also replete with handwritten additions and deletions. Paragraph 67 (H) of the rider provides:

> "*Tenant waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease* . . . [I]t is the intention of the parties hereto that their disputes be adjudicated via summary proceedings" (emphasis added).

In March 2014, defendant sent notices to plaintiffs alleging various defaults and stating that plaintiffs had 15 days to cure the violations in order to avoid termination of the leases. Before the cure period expired, plaintiffs commenced this action by way of order to show cause in Supreme Court seeking, as relevant***357** here, a declaratory judgment that they were not in default. Plaintiffs also sought a *Yellowstone* injunction in order to prevent the owner from terminating the leases or commencing summary proceedings during the pendency of the declaratory judgment action. Defendant answered and cross-moved for summary judgment dismissing the complaint, arguing that the action and, thus, the request for *Yellowstone* relief were barred by the waiver clause in the leases.[1] In response, plaintiffs asserted, among other things,[2] that if interpreted in the manner urged by the owner, the waiver clause was unenforceable and that the waiver was premised on mutual mistake concerning the scope of summary proceedings.

Supreme Court denied plaintiffs' motion for a *Yellowstone* injunction, granted defendant's cross motion for summary judgment, and dismissed the action in its entirety. The court began by observing that, "[a]bsent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it may appear to a third-party" (*159 MP Corp. v Redbridge Bedford LLC*, 2015 NY Slip Op 32817[U], *6 [Sup Ct, Kings County 2015], citing *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 67-68 [1978]). Relying on the plain language of the contract, the court concluded plaintiffs clearly waived the right to bring a declaratory judgment action and, in enforcing the provision, referenced the fact that the waiver did not

> "prevent either side from performing the agreement or from recovering damages as a result of a breach or the parties' tortious conduct . . . [and did not] deny plaintiffs all legal redress in this instance [because i]f plaintiffs dispute that they are in breach of the leases, they may raise any defenses they may have in any . . . summary proceeding brought by defendant in Civil Court to evict them" ***358** (*159 MP Corp.*, 2015 NY Slip Op 32817[U], *7 [citations omitted]).

The court also rejected plaintiffs' mutual mistake argument, noting that plaintiffs had neither alleged fraud nor claimed they had been unable to review the leases with counsel (*id.*).

The Appellate Division, with one Justice dissenting, affirmed, determining that the declaratory judgment waiver was enforceable and barred plaintiffs' claim (*159 MP Corp. v Redbridge Bedford, LLC*, 160 AD3d 176 [2d Dept 2018]). The Court commented, in light of the strong public policy favoring freedom of contract, that parties may waive a wide range of rights, observing that the parties here are "sophisticated entities that negotiated at arm's length" and entered contracts that defined their obligations "with great apparent care and specificity" (*id.* at 187, 189). Like ****3** Supreme Court, the Appellate Division emphasized that the waiver clause did not leave

plaintiffs without other available legal remedies, noting that plaintiffs retained the right to receive notices under the leases (and thus cure defaults), to seek damages for breach of contract and tort, and to defend themselves in summary proceedings (*id.* at 191). Moreover, the Appellate Division observed that plaintiffs will remain in possession of the property unless summary proceedings are commenced and, if vindicated in a summary proceeding, would remain indefinitely until expiration of the leases (*id.* at 191-192). In contrast, if found to have been in default, plaintiffs would properly be evicted under the terms of the leases (*id.* at 192).

One Justice dissented, concluding that the waiver clause is void as against public policy and, thus, unenforceable (160 AD3d at 194 [Connolly, J., dissenting]). The dissent reasoned that declaratory relief serves the important societal function of providing certainty in contractual relationships and that the tenant's ability to litigate in summary proceedings commenced by the owner was not a sufficient substitute for the ability to commence a declaratory judgment action (*id.* at 203-206). The Appellate Division granted plaintiffs leave to appeal to this Court, certifying the question whether its order was properly made, and we now affirm.

We begin with the "familiar and eminently sensible proposition of law . . . that, when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [citation omitted]).***359** As we noted in *Vermont Teddy Bear*, a seminal case involving a commercial lease, this rule has "special import in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*id.* [internal quotation marks and citation omitted]). The lease provision at the center of this dispute could not be clearer. In it, plaintiffs "waive[d] [the] right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease." Applying our well-settled contract interpretation principles, this unambiguous waiver clause reflects the parties' intent that plaintiffs be precluded from commencing precisely the type of suit they initiated here and, as such, this action was foreclosed by the plain language of the leases. Plaintiffs nonetheless ask us to relieve them of the consequences of their bargain, contending that the waiver clause violates a public policy strong enough to warrant a departure from the bedrock principle of freedom of contract. We reject that argument.

Freedom of contract is a "deeply rooted" public policy of this state (*New England Mut. Life Ins. Co. v Caruso*, 73 NY2d 74, 81 [1989]) and a right of constitutional dimension (US Const, art I, § 10 [1]). In keeping with New York's status as the preeminent commercial center in the United States, if not the world, our courts have long deemed the enforcement of commercial contracts according to the terms adopted by the parties to be a pillar of the common law. Thus, "[f]reedom of contract prevails in an arm's length transaction between sophisticated parties . . . , and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995]).[3] We have cautioned that, when a court invalidates a contractual provision, one party is deprived of the benefit of the bargain (*see id.*; *Rowe*, 46 NY2d at 67). By disfavoring judicial upending of the balance ***360** struck at the conclusion of the parties' ****4** negotiations, our public policy in favor of freedom of contract both promotes certainty and predictability and respects the autonomy of commercial parties in ordering their own business arrangements.

Of course, the public policy favoring freedom of contract does not mandate that the language of an agreement be enforced in all circumstances. Contractual provisions entered unknowingly or under duress or coercion may not be enforced (*see Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450, 455 [1979]; *see also Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 [1971]). The doctrine of unconscionability also protects against "unjust enforcement of onerous contractual terms which one party is able to impose [upon] the other because of a significant disparity in bargaining power" (*Rowe*, 46 NY2d at 68). Plaintiffs raised none of these defenses.

([1]) Here, plaintiffs assert that the declaratory judgment waiver is unenforceable because it is void as against public policy. Thus, plaintiffs' challenge is not predicated on the circumstances surrounding the making of this particular agreement, such as allegations of unequal bargaining power, coercive tactics or lack of counsel—claims pertinent to other well-established contract defenses. Rather, plaintiffs' contention is that the right to bring a declaratory judgment action is so central and critical to the public policy of this state that it cannot be waived by even the most well-counseled, knowledgeable or sophisticated commercial tenant. We are unpersuaded.

We have deemed a contractual provision to be

unenforceable where the public policy in favor of freedom of contract is overridden by another weighty and countervailing public policy (*Oppenheimer & Co.*, 86 NY2d at 695).[4] But, because freedom of contract is itself a strong public policy interest in New York, we may void an agreement only after "balancing" the public interests favoring invalidation of a term chosen by the parties against those served by enforcement of the clause and concluding that the interests favoring invalidation are stronger (*see* ***361** *New England Mut. Life Ins. Co.*, 73 NY2d at 81). Although we possess the power to set aside agreements on this basis, our "usual and most important function" is to enforce contracts rather than invalidate them "on the pretext of public policy," unless they "clearly . . . contravene public right or the public welfare" (*Miller v Continental Ins. Co.*, 40 NY2d 675, 679 [1976], quoting *Baltimore & Ohio Southwestern R. Co. v Voigt*, 176 US 498, 505 [1900]).

The fact that a contract term may be contrary to a policy reflected in the Constitution, a statute or a judicial decision does not render it unenforceable; "that a public interest is present does not erect an inviolable shield to waiver" (*Matter of American Broadcasting Cos. v Roberts*, 61 NY2d 244, 249 [1984]). Indeed, we regularly uphold agreements waiving statutory or constitutional rights, indicating that we look for more than the impingement of a benefit provided by law before deeming a voluntary agreement void as against public policy (*see e.g. id.* [upholding waiver of Labor Law protections that serve the societal interest of preventing worker exhaustion]; *Abramovich*, 46 NY2d 450 [upholding waiver by tenured teacher of the protections in Education Law § 3020-a]; *Antinore v State of New York*, 40 NY2d 921 [1976] [upholding waiver of due process protections afforded by disciplinary hearings under Civil Service Law §§ 75 and 76]). Many rights implicate societal interests and, yet, they have been determined to be waivable.

Only a limited group of public policy interests has been identified as sufficiently fundamental to outweigh the public policy favoring freedom of contract. In some circumstances, the legislature has identified the benefits or obligations recognized in constitutional, statutory or decisional law that are so weighty and critical to the public interest that they are nonwaivable. For example, General Obligations Law § 5-321 states that agreements exempting a lessor for liability resulting from its own negligence are "void as against public policy" (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 418 [2006]). Likewise, Rent Stabilization Code (9 NYCRR) § 2520.13 states that "[a]n ****5** agreement by the tenant to waive the benefit of any provision of the [Rent Stabilization Law] or this Code is void" (*see Thornton v Baron*, 5 NY3d 175, 179 [2005]). The legislature has similarly deemed unenforceable agreements to extend the statute of limitations before accrual of a claim by express statutory proscription in General Obligations Law § 17-103 ("[a] promise to . . . extend . . . the statute of limitation" has no effect***362** except where made after accrual of a claim) (*see John J. Kassner & Co. v City of New York*, 46 NY2d 544, 552 [1979]). There are other examples (*see e.g. West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 156 [1995] [applying Lien Law § 34 classifying waivers of the right to file or enforce certain liens "void as against public policy and wholly unenforceable"]; *Symphony Space v Pergola Props.*, 88 NY2d 466, 476 [1996] [applying New York's rule against perpetuities statute EPTL 9-1.1 (b), stating that "(n)o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved"]). Where the legislature has not expressly precluded waiver of a right or obligation, we have deemed that to be a significant factor militating against invalidation of a contract term on public policy grounds (*see e.g. Ballentine v Koch*, 89 NY2d 51, 59 [1996] [there is no "general prohibition preventing the creation of benefits for retired public employees that exist separately from the applicable pension or retirement system"]; *Abramovich*, 46 NY2d at 455 ["the statute contains no express provision preventing a teacher from waiving its benefits"]; *Matter of Feinerman v Board of Coop. Educ. Servs. of Nassau County*, 48 NY2d 491, 498 [1979] [the relevant statute "does not contain a provision which prevents a prospective teacher from knowingly and voluntarily waiving the three-year probationary period embodied therein"]; *see generally Slayko v Security Mut. Ins. Co.*, 98 NY2d 289, 295 [2002]).

We have also classified as void agreements that involve illegal activity.[5] We refused to permit a lender that charged usurious interest from recovering principal (*see Szerdahelyi v Harris*, 67 NY2d 42 [1986]) and refused to permit a lawyer not licensed in New York from collecting fees for work performed here (*see Spivak v Sachs*, 16 NY2d 163 [1965]). Similarly, in *Mount Vernon Trust Co. v Bergoff* (272 NY 192 [1936]), we invalidated an agreement on the public policy rationale that it was essentially fraudulent as to society. Addressing an agreement***363** that a note made to a bank would be unenforceable against its maker, we explained that such "[a] fictitious note delivered to a bank, intended to become part of its apparent assets . . . is in itself a continuing falsehood calculated to deceive the public" and undermines the stability of banks, which is a matter of public concern reflected in the regulatory oversight systems for banking (*id.* at 196). No interest of this

magnitude is implicated in this case.

Here, the declaratory judgment waiver is clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract. Although plaintiffs argue otherwise, there is simply nothing in our contemporary statutory, constitutional, or decisional law indicating that the interest in access to declaratory judgment actions or, more generally, to a full suite of litigation options without limitation, is so weighty and fundamental that it cannot be waived by sophisticated, counseled parties in a commercial lease. CPLR 3001 enables Supreme Court to grant declaratory judgments in the context of justiciable controversies but in no way indicates that sophisticated parties may not voluntarily waive the right to seek such relief. A declaratory judgment is a useful tool for providing clarity as to parties' obligations and may, in some circumstances, enable parties to perform under a contract they might otherwise have breached. Access to declaratory relief benefits the parties as well as society in quieting disputes. However, a declaratory judgment is merely one form of relief available to litigants in enforcing a contract. In codifying the right to seek declaratory relief, the legislature neither expressly nor impliedly made access to such a claim nonwaivable with respect to any party, much less sophisticated commercial tenants.****6**

Our case law discussing declaratory relief explains its benefits in stabilizing uncertainty in contractual relations but likewise expresses no concrete public policy so weighty that it would justify broadly restricting commercial entities from freely waiving in negotiations the ability to seek such relief (*see e.g. James v Alderton Dock Yards*, 256 NY 298, 305 [1931]). To the contrary, this Court already held in *Kalisch-Jarcho, Inc. v City of New York* that a party can relinquish its right to commence a declaratory judgment action in favor of an alternative dispute resolution method (72 NY2d 727 [1988]). There, the ***364** Court held that a declaratory judgment action filed by a construction contractor was barred by a contract provision requiring the contractor to use an administrative procedure to resolve mid-project disputes, postponing claims for additional compensation until project completion (*id.*). The Court reached this conclusion despite recognizing the benefits of declaratory relief in "settling justiciable disputes as to contract rights and obligations" (*id.* at 731).

The availability of declaratory relief may indirectly encourage parties to freely contract at the outset, knowing that they can later obtain judicial clarification of their obligations at the moment a justiciable controversy arises. However, a party who has chosen freely to waive the right to seek such relief could not have relied on any such expectation; that party may compensate for the waiver by demanding greater clarity in the construction of other contract terms so that the parties' respective rights and obligations are fully understood before they sign the agreement. Regardless, a party may agree to such a waiver during contract negotiations to obtain a valuable benefit, such as a rent concession or the inclusion of a cure period following a notice of default. Such considerations are for the parties to weigh in crafting a commercial agreement that meets their unique needs.

Critically, the waiver clause at issue here does not preclude access to the courts but leaves available other judicial avenues through which plaintiffs may adjudicate their rights under the leases. The waiver permits plaintiffs to raise defenses to allegations of default in summary proceedings in Civil Court, under Real Property Actions and Proceedings Law article 7, and specifically states that "it is the intention of the parties . . . that their disputes be adjudicated via summary proceedings." As this Court has observed, RPAPL article 7 "represents the Legislature's attempt to balance the rights of landlords and tenants to provide for expeditious and fair procedures for the determination of disputes involving the possession of real property" (*Matter of Mennella v Lopez-Torres*, 91 NY2d 474, 478 [1998] [citation omitted]). Thus, the leases reflect the parties' general intent to resolve their disputes in proceedings carefully designed for that purpose. Moreover, the waiver does not impair plaintiffs' ability to seek damages on breach of contract or tort theories.

Indeed, despite the waiver clause, the judicial review available to plaintiffs is more generous than that available to parties***365** whose contracts contain arbitration clauses—yet we routinely enforce arbitration clauses (*see e.g. Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]). Such clauses preclude plenary litigation of disputes in court; when an award is made, typically the sole avenue for judicial review is a summary proceeding under CPLR article 75. Courts may set aside an arbitration award only if "it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" and may not "interpret the substantive conditions of the contract or . . . determine the merits of the dispute . . . even where the apparent, or even the plain, meaning of the words of the contract [was] disregarded" by the arbitrator (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79, 82-83 [2003] [internal quotation marks and citations omitted]). An

arbitration clause—providing no access to court for initial litigation of the merits and limited judicial review—is more restrictive than the declaratory judgment waiver here, which permits judicial resolution of the parties' dispute in an RPAPL article 7 proceeding with full appellate review.

Although they significantly limit access to court, arbitration clauses provide "an effective and expeditious means of resolving disputes between willing parties desirous of avoiding the expense and delay frequently attendant to the judicial process" (*Maross Constr. v Central N.Y. Regional Transp. Auth.*, 66 NY2d 341, 345 [1985] [citations omitted]). "It has long been the policy of the law to interfere as little as possible with the freedom of consenting parties to achieve that objective" (*Matter of Siegel [Lewis]*, 40 NY2d 687, 689 [1976]). That policy applies with equal force here where the parties selected a summary proceeding as the primary vehicle for resolution of their disputes. That we permit parties to waive the right to substantive review of their disputes in court by entering arbitration arrangements supports the conclusion we reach here: that there is no overriding public policy preventing sophisticated entities from waiving the right to commence a declaratory judgment action, which presents merely one tool for litigating a dispute.****7**

([2]) Nor was this declaratory judgment waiver rendered unenforceable because, under the circumstances presented here, it resulted in an inability to obtain *Yellowstone* relief. We have described the *Yellowstone* injunction as a "creative remedy" crafted by the lower courts to extend the notice and cure ***366** period for commercial tenants faced with lease termination (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]). In the wake of *First Natl. Stores v Yellowstone Shopping Ctr.* (21 NY2d 630 [1968]), tenants challenging notices of default in declaratory judgment actions "developed the practice of obtaining a stay of the cure period before it expired to preserve the lease until the merits of the dispute could be settled in court," and courts have "accepted far less than the normal showing required" for injunctive relief under CPLR article 63 (*Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 25 [1984]). Requests for a *Yellowstone* injunction are necessarily made in Supreme Court rather than Civil Court, which lacks authority to issue injunctive relief and, as such, may not be obtained in a summary proceeding under RPAPL article 7. *Yellowstone* relief is not an end in itself but merely a means of maintaining the status quo by tolling a contractual cure period during a pending action, permitting a tenant who loses on the merits of the lease dispute to cure the defect and retain the tenancy. Here, because plaintiffs' declaratory judgment action was barred by the lease waiver, there was no pending action in which to adjudicate the parties' rights and to support interim relief in the form of a *Yellowstone* injunction. Indeed, the request was rendered academic by the dismissal of the complaint.

Plaintiffs' inability in this case to obtain *Yellowstone* relief does not prevent them from raising defenses in summary proceedings if commenced and thus vindicating their rights under the leases if the owner's allegations of default are baseless. It is undisputed that the owner cannot evict plaintiffs without commencing a summary proceeding and establishing that plaintiffs materially breached the leases. Absent such a proceeding, plaintiffs remain in possession of the premises and their rights under the leases are undisturbed. If plaintiffs' defenses fail on the merits—if plaintiffs in fact breached the leases—then their interest in the tenancy would properly be extinguished under the plain language of the leases. Furthermore, if plaintiffs believe that the owner is not performing its respective obligations under the leases, they can bring an action in Supreme Court for breach of contract and request specific performance. Thus, a *Yellowstone* injunction is not essential to protect property rights in a commercial tenancy which, of course, are governed by the terms of the lease negotiated by the parties. As this Court has recognized, *Yellowstone* ***367** injunctions are useful procedural tools for tenants seeking to litigate notices of default (*see Graubard*, 93 NY2d at 514). But there is no strong societal interest in the ability of commercial entities to seek such a remedy that would justify voiding an unambiguous declaratory judgment waiver negotiated at arm's length, merely because this incidentally precluded access to *Yellowstone* relief.

Nothing in our statutory or decisional law suggests otherwise. The legislature has made certain rights nonwaivable in the context of landlord-tenant law (*see e.g.* General Obligations Law § 5-321 [right to seek damages for injury caused by landlord's negligence]; Real Property Law § 235-b [right to habitability]; Real Property Law § 236 [right of a deceased tenant's estate to assign the lease when reasonable]) but has not precluded a commercial tenant's waiver of interim *Yellowstone* relief. Notably, the legislature has recognized the utility of *Yellowstone*-type relief for some residential tenants. RPAPL 753 (4) (L 1982, ch 870) provides New York City residential tenants with a nonwaivable 10-day post-adjudication cure period at the conclusion of a summary proceeding and thus offers a losing tenant relief comparable to that obtained with a *Yellowstone* injunction in Supreme Court (i.e., the ability to cure a violation after a judicial determination that the tenant breached the lease) (*Post*, 62 NY2d at 26). The decision to provide this

benefit only to a class of residential tenants indicates that the legislature did not view this type of relief as fundamental for commercial tenants, believing that their rights were adequately protected under existing law, which included the availability of *Yellowstone* relief for parties who timely sought such an injunction. As remains true, at that time there was no appellate precedent suggesting that the right of commercial tenants to seek such relief could not be waived by the inclusion of unambiguous language to that effect in a negotiated lease. The legislature was obviously aware of our strong public policy favoring freedom of contract, which is why it included the narrowly-crafted benefit among a group of rights expressly declared to be nonwaivable (RPAPL 753 [5]). Yet, the legislature did nothing to alter the status quo for commercial tenants. Thus, notwithstanding plaintiffs' inability to obtain a *Yellowstone* injunction, we are unpersuaded that the voluntary declaratory judgment waiver by this sophisticated commercial tenant is void as against public policy.

The right to commence a declaratory judgment action, although a useful litigation tool, does not reflect such a fundamental***368** public policy interest that it may not be waived by counseled, commercial entities in exchange for other benefits or concessions. Entities like those party to this appeal are well-situated to manage their affairs during ****8** negotiations, and to conclude otherwise would patronize sophisticated parties and destabilize their contractual relationships—contrary to New York's strong public policy in favor of freedom of contract. Because the declaratory judgment waiver is enforceable, the action was properly dismissed.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question not answered as unnecessary.

Wilson, J. (dissenting). "In New York, agreements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language pursuant to our strong public policy favoring freedom of contract" (majority op at 356). Just so, but why? The majority's thesis is our State's commitment to freedom of contract is so powerful that it cannot be overcome by competing public policies unless, for example, the legislature has criminalized the object of the contract (majority op at 362) or has expressly stated a prohibition on waiver by statute (*id.* at 361). That thesis has little to do with this case. The public policy at play here, which requires us to disallow contractual provisions depriving a party of the ability to seek a declaratory judgment, is the freedom of contract itself. A contractual provision that forecloses a party from timely knowing its contractual obligations—instead forcing parties to gamble on the contract's meaning—undermines the contract and with it, society's benefit from the freedom of contract.

In any event, freedom of contract is not a limitless right. It should not be elevated above every other protection the law affords to litigants. The majority's decision today will result in the elimination of the "*Yellowstone* injunction," a common-law precedent that has existed in New York for more than half a century. That injunction allows commercial tenants to determine their responsibilities under the terms of their lease agreements without risking eviction. The *Yellowstone* injunction expresses a public policy of this State and is grounded in the legislature's century-old determination that New York's public policy broadly favors the availability of declaratory relief in preference to more protracted, costly and antagonistic litigation.

***369** After this decision, commercial building owners and landlords will undoubtedly include a waiver of declaratory and *Yellowstone* relief in their leases as a matter of course. Those clauses will enable them to terminate the leases based on a tenant's technical or dubious violation whenever rent values in the neighborhood have increased sufficiently to entice landlords to shirk their contractual obligations. The majority insists that its decision represents the application of the well-settled public policy supporting freedom of contract. That notion of the unlimited primacy of contract rights is based on a jurisprudence discredited since the Great Depression. The majority's decision will alter the landscape of landlord-tenant law, and of neighborhoods, throughout the state for decades to come, absent legislative action.

I.

What does "freedom of contract" mean, and why do we care about it? I can enter into an agreement with anyone about anything—I am "free" to contract in that sense, even if the agreement is not legally enforceable. You and I can agree to have dinner next Thursday, and we can both think of it as to our advantage, but if one of us cancels, society has no interest in treating that agreement as enforceable, letting you sue me for damages, or compelling us to sup. We make some agreements legally

enforceable because of the societal benefit from doing so, not because of the benefit to the contracting parties per se. Of course, the parties who strike a legally enforceable bargain believe the ****9** bargain will benefit each of them individually, and it most often will, but that is also true of agreements that are not legally enforceable.

Another vantage point from which to understand that freedom of contract is not an individual right, but rather is grounded in the benefit to society at large, is the concept of efficient breach. Damages for breach of contract are not punitive; they are calculated to make the nonbreaching party whole (*see e.g. Freund v Washington Sq. Press*, 34 NY2d 379 [1974]). If the breaching party can put its goods or services to a (societally) higher use than what the contract requires even after fully compensating the nonbreaching party, that is a socially beneficial result: the nonbreaching party receives the full value of its bargain, the breaching party earns more, and society benefits in the process because the property is put to a higher use. That the breaching party also receives a benefit is not the purpose of ***370** the efficient breach—it is the engine that drives the party to breach so that the resources can be put to their best use.

So "freedom of contract" cannot properly be understood as an individual right of the contracting parties. "Commerce and manufactures can seldom flourish long in any state . . . in which the faith of contracts is not supported by law." (Adam Smith, Wealth of Nations 910 [1976].) The free-market system is driven by the principle that contracting parties will reach agreements that maximize social welfare (output, thought of as price, quantity and quality) by maximizing their individual interests through bargaining in a market in which multiple buyers and sellers exist and transaction costs are as low as possible. The freedom of contract is of fundamental importance in society because it creates legally enforceable rights, on which the contracting parties can act now based on assurances about the future: contracts are a way that economic actors can obtain some measure of security about an otherwise uncertain future. "[T]he major importance of legal contract is to provide a frame-work for well-nigh every type of group organization and for well-nigh every type of passing or permanent relation between individuals and groups." (Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 Yale LJ 704, 736-737 [1931].)

Freedom of contract is based on the understanding that "stability and predictability in contractual affairs is a highly desirable jurisprudential value" (*Sabetay v Sterling Drug*, 69 NY2d 329, 336 [1987]). "The traditional concerns of contract law, and warranty law in particular, are the protection of the parties' freedom of contract and *the fulfillment of reasonable economic expectations*" (*Bellevue S. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 304 [1991] [emphasis added]). "It is clear that public policy and the interests of society favor the utmost freedom of contract" (*Diamond Match Co. v Roeber*, 106 NY 473, 482 [1887]). "[A] party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and having once done so he cannot subsequently invoke its protection" (*Sentenis v Ladew*, 140 NY 463, 466 [1893]). However, "waiver is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result" (*People ex rel. Battista v Christian*, 249 NY 314, 318 [1928]).

***371** Whether the State chooses to enforce certain types of agreements turns on whether enforcement would generally advance society's interests. Our rules about contract formalities, parol evidence, consideration, detrimental reliance, fraud, duress, illegality and so on are ways to cabin enforceability to the types of contracts from which society will ordinarily benefit. For example, since 1677, common-law jurisdictions like New York have had some version of the statute of frauds, requiring that certain kinds of contract be in writing so that highly consequential matters (marriage, long-term contracts, etc.) must be in writing to be enforced (*see* General Obligations Law § 5-701). Similarly, the parol evidence rule serves to clarify obligations by limiting the scope of a contractual dispute to its writing.

II.

Declaratory judgments constitute another vital strand in this cord. Because the future is hard to predict, because even the best efforts at precision in language may wind up imprecise, because contracting parties sometimes deliberately avoid negotiating a contentious issue in the expectation that it will never transpire during the life of the contract, and because motivations change, courts since time immemorial have been asked to interpret agreements. Declaratory judgment actions allow contracting parties to know their rights and obligations under a contract prior to breach (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 530 [1977] ["when a party contemplates taking certain action a genuine dispute may arise before any breach or violation has occurred and before there is any need or right to resort

to coercive measures. In such a case all that may be required to insure compliance with the law is for the courts to declare the rights and obligations of the parties so that they may act accordingly. That is the theory ****10** of the declaratory judgment action authorized by CPLR 3001"]; *see also* Rep of NY St Bar Assn Comm on Law Reform, Proceedings of 44th Ann Meeting at 193-196 [1921] ["congratulat(ing) the People of New York upon the adoption of this enlightened policy" that "enables parties to entertain an honest difference of opinion as to their rights, particularly under written instruments . . . without becoming enemies and undergoing a long expense"]). That knowledge removes a material uncertainty (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931] ["The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain***372** or disputed jural relation either as to present or prospective obligations"]). Uncertainty is itself a form of transaction cost that society has a clear interest in minimizing. As but one example, a party's ability to determine that breach would be efficient depends on its knowledge as to the interpretation of the contract.[1] "[C]ontract remedies should . . . give the party to a contract an incentive to fulfill [its] promise unless the result would be an inefficient use of resources" (Richard A. Posner, Economic Analysis of the Law 56 [1972]).

Although superficially a private matter between contracting parties, the availability of declaratory judgments has far-reaching societal impacts. Parties may enter into contracts that seem quite clear, only to later find the terms are ambiguous (*see e.g.* the famous "Peerless" case, *Raffles v Wichelhaus* [(1864) 159 Eng Rep 375, 2 Hurl & Colt 906]). Because ambiguity often strikes, society has a powerful interest in adopting procedures that permit a timely and conclusive determination that preserves the object of the parties' bargain. We have previously extolled the virtues of stability and certainty, particularly with respect to real estate (*see Matter of Estate of Thomson v Wade*, 69 NY2d 570, 574 [1987]). Here, the majority has conflated the object of the bargain (the lease of space to a grocery store) with a procedural provision (the prohibition of a declaratory judgment action). The object of the contract—the lease of space—provides the societal value. The provision barring the tenant from seeking a declaratory judgment impedes that very value, by forcing a party (in this case, the tenant) either to refuse to replace the ventilation system and risk eviction if a court later determines that the tenant was responsible, or to replace the ventilation system (if within the tenant's wherewithal) and later institute an action of some sort to recover the costs of doing so if a court later determines that the landlord was responsible. Because the legal liability remains in limbo when the tenant must make that choice, the tenant's ability to consider an efficient breach (e.g., moving to a different***373** space would be less expensive than paying for a compliant ventilation system, with which the landlord would be happy because it could rent the space to others at a higher price) is eliminated, and society's benefit is lost in the balance. Yes, both the use of the space and the declaratory judgment bar appear in the contract, but society's benefit derives from the former, and is defeated by the latter. The availability of declaratory judgments enhances the stability of contracts, allows deviations from the status quo to be done on an informed basis, and allows the efficiency gains of the freedom of contract to be spread throughout the economic system—the fundamental purpose of "freedom of contract."

A waiver of the right to declaratory judgment, by contrast, creates instability by undermining the purposes and benefits of the freedom of contract, and the enforcement of such a waiver violates that very public policy. The ability to obtain declaratory relief is a part of our State's public policy because it is an essential part of the policy of freedom of contract. We should no more allow contracting parties—however sophisticated—to strike declaratory judgments than we would allow them to strike the parol evidence rule or the statute of limitations. The majority's fundamental mistake comes from treating "freedom of contract" as if it were an individual right, when its raison d'être is the economic advancement of society.****11**

That mistake is the same conceptual mistake made during the *Lochner* era, in which the United States Supreme Court aggrandized freedom of contract as if it were solely a personal right, rather than an important ingredient to the formation and advancement of society as a whole (*Lochner v New York*, 198 US 45 [1905]). There, the Supreme Court invalidated a law enacted by the New York Legislature to prevent the overwork of bakers. Here, the majority upholds a contractual provision that prevents the tenant (and notably, the tenant alone) from seeking a judicial declaration of the rights and obligation of the parties to a lease agreement. Today's decision, like *Lochner*, rests on "juristic thought of an individualist conception of justice, which exaggerates the importance of property and of contract . . . [and] exaggerates private right at the expense of public right" (Roscoe Pound, *Liberty of Contract*, 18 Yale LJ 454, 457 [1909]).

III.

When contractual obligations are unclear and disputed, a declaratory judgment affords the parties a conclusive determination,***374** without the attachment of any damages or injunction. The availability of a pre-breach (or pre-enforcement) interpretation of disputed rights and obligations is incorporated by, but long predates, the common law.[2] In the Roman law of procedure, as in our own, actions at law resulted in an executory judgment, called a *condemnatio*, which decreed that something must be done, including that damages might have to be paid (*see* Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 Yale LJ 1, 10 [1918]). Often, a preliminary procedure would be sought, known as *prae-judicium*, where parties merely asked for questions of law or fact to be determined, resulting in statements of law known as *pronuntiatio* (*id.* at 11). Those preliminary proceedings proved so advantageous they eventually developed into independent actions, without any *condemnatio* ever sought (*id*.).

The declaratory judgment continued to develop in Italy through the Middle Ages, including the creation of negative declaratory actions, or actions to declare that another does not have a claim against the plaintiff (*id*. at 13). Upon the "reception" of Roman law into central Europe in 1495, both forms of declaratory judgment would have been known (*id*. at 12). The declaratory judgment of the Middle Ages first made its way into common-law countries through Scotland, with cases of "declarator" occurring as far back as the 1500s (*id*. at 21). England would adopt a form of the declaratory judgment in 1852, with a version much like what we know today adopted in 1883 (*id*. at 25).

That history is not some far-flung obscurity. Professor Borchard's 1918 article was the first written in the United States about declaratory judgments; three years later, the New York State Bar Association extolled the virtues of declaratory judgments, and referenced that history and Professor Borchard's work (Rep of NY St Bar Assn Comm on Law Reform, Proceedings of 44th Ann Meeting at 194-196 [1921]). The next year, 1922, when the New York Legislature first enacted the Civil Practice Act, a portion of that act authorized declaratory judgments (*see generally* Louis S. Posner, *Declaratory Judgments in New York*, 1 St. John's L Rev [No. 2, art 2] 129 [1927]). Shortly after, the federal government and numerous other ***375** states legislatively created the right to seek declaratory judgments. Unlike the several states that modeled their legislation on the Commission on Uniform State Legislation's Uniform Declaratory Judgment Statute, New York's declaratory judgment statute afforded the courts broad leeway in issuing declarations, "based on the theory that the courts should be given as broad powers as possible so that their discretion under the statute be unfettered and that they should accordingly be free to work out their own rules as contingencies may arise" (*id*. at 130). New York's adoption of the declaratory judgment was so swift that there is no formal legislative history. In its absence, the history of the federal counterpart, passed shortly afterwards, is instructive. Both the Senate and House Reports note that England had a declaratory judgment act in 1852 and that Scotland's had existed for nearly 400 years (S Rep 1005, 73rd Cong, 2d Sess at 4 [1934]; H Rep 1264, 73rd Cong, 2d Sess at 1 [1934]). Both cite Professor Borchard and the history his work chronicled (*id*.). The reports recount a rapid and substantial movement: between 1919 and the U.S. Senate's report on the Declaratory Judgment Act, 34 states and territories had passed their own declaratory judgment laws (S Rep 1005, 73rd Cong, 2d Sess at 4). The Senate Report ****12** notes that our Chief Judge Benjamin Cardozo was one of the principal advocates supporting the federal act (*see id.* at 1-2).

We know that the common law allowed suits that were de facto declaratory judgments long before this wave of declaratory judgment acts swelled. Suits to quiet title, declare marital status, declare the validity of a trust, or to declare the legitimacy of children are all declaratory judgments of one kind or another. Proponents of expanding declaratory judgments understood this (*see id.* at 4). When viewed in history properly, Civil Practice Act § 473, now embodied in CPLR 3001, is not the start of declaratory judgments in this state, but is rather an expansion and legislative endorsement of a right with a deep legal history.

IV.

The majority offers several arguments about why, "under the circumstances of this case" (majority op at 356), we should enforce the parties' agreement barring the courts from making a declaration of their rights and obligations: (A) barring declaratory relief does not bar all resort to the courts; (B) agree ***376** ments to arbitrate are enforceable, and those are a greater bar to the courts than the elimination of declaratory judgments; (C) many constitutional and statutory rights are waivable, so the right to a declaratory judgment must also be waivable; and (D) "[o]nly a limited group of public policy interests has been identified as sufficiently fundamental to outweigh the public policy favoring freedom of contract" (majority op at 361). I address each in turn.

A.

By observing that "[c]ritically, the waiver clause at issue here does not preclude access to the courts but leaves available other judicial avenues" (majority op at 364), the majority concedes that public policy would void a contractual provision that barred the contracting parties from all forms of judicial or quasi-judicial (arbitral) resolution. That concession makes sense, it comports with our cases voiding arbitration agreements as inimical to the common law (discussed below), and it reaffirms the central failure of the majority's thesis: freedom of contract is not merely an individual right (were it so, we would allow contract disputes to be determined by any means to which the parties agreed, including no means at all). Instead, the agreements society will enforce as binding are those of a type that generally improve output for society, because freedom of contract is rooted in its benefit to society. Although the clause in question does not absolutely bar judicial review, it obstructs it in clear contravention of public policy and the common law.

From the time the legislature enacted the declaratory judgment act through its present incarnation as CPLR 3001, the statute has always granted parties the right to seek a declaratory judgment "whether or not further relief is or could be claimed." Thus, when the majority relies on the availability of other avenues of redress as the reason to enforce a clause barring declaratory judgments, it contravenes the legislature's express command: declaratory actions are available regardless of the availability of other avenues for judicial review. Again, because society has an interest in the determination of the parties' contractual obligations, and because that interest is the basis for devoting society's resources to the enforcement of contracts in the first place, public policy demands that such ***377** clauses are unenforceable.[3] The public interest in declaratory relief is patent in cases like this, involving a commercial lease. ****13** Certainty and stability in the contractual affairs of a neighborhood grocery has consequences for local residents and employees, not merely for the grocer. The majority allows parties to contract away those societal benefits, which we would never allow for a statute of limitations or the parol evidence rule, even though the societal benefits of the latter are more abstract and attenuated.

B.

The common-law entitlement to judicial determination of contractual disputes is quite powerful, to be overcome by legislative action (narrowly construed) or a judicial modification of the common law based on some more important public policy. In that regard, the majority's framework is backwards, assuming instead that parties are free to avoid judicial (and, with arbitration now firmly established by statute, quasi-judicial) resolution of disputes if they so desire.

One would not understand, from the majority's opinion, that New York common law condemned arbitration clauses as contrary to public policy, and thus unenforceable, because arbitration agreements purported to bar parties from the courts (*Meacham v Jamestown, Franklin & Clearfield R.R. Co.*, 211 NY 346, 354 [1914, Cardozo, J., concurring] ["If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state ***378** the law has long been settled to the contrary"]). Ousting jurisdiction by contract is precisely what the majority seeks to legitimate by theorizing that a party might obtain "a valuable benefit, such as a rent concession" in exchange for waiving the right to a declaratory judgment (majority op at 364). So too might a party obtain that same benefit by waiving all judicial and arbitral resolution of contract disputes, or by waiving the statute of limitations or the rules of evidence. Thus, neither the benefit to a party nor the expectation of the parties determines whether our public policy is violated.

New York's policy was in line with other common-law courts, which had been deeply suspicious of arbitration for centuries, dating back to England (*see* Angelina M. Petti, Note, *Judicial Enforcement of Arbitration Agreements: The Stay-Dismissal Dichotomy of FAA Section 3*, 34 Hofstra L Rev 565, 570-571 [2005]). New York was at the forefront of the nationwide shift in attitude toward arbitration clauses, with the Arbitration Act, passed in 1920, serving as a template for the federal act passed five years later. The Court of Appeals accepted that legislative derogation of the common law, albeit with a strong caveat: "The new policy does not mean that there is to be an inquisition rather than a trial, and that evidence unknown to the parties and gathered without notice may be made the basis of the judgment" (*Berizzi Co. v Krausz*, 239 NY 315, 319 [1925, Cardozo, J., writing for the Court]).

Given the above, addressing the majority's argument

about arbitration agreements is short work. The legislature modified the common law in 1920 to make arbitration agreements enforceable, against a common law that voided them as contrary to public policy. Having expressly provided that declaratory relief is available "whether or not further relief is or could be claimed," the legislature never provided that private parties could contract otherwise. Ironically, the majority now justifies the contractual elimination of the legislature's grant by relying on the "availab[ility of] other judicial avenues" (majority op at 364).

The majority's claims about arbitration ignore the above history and, thus, erroneously invert the presumption against the derogation of the common law (*Fitzgerald v Quann*, 109 NY 441, 445 [1888] ["the rule to be well established and almost universally acted on, that statutes changing the common law must be strictly construed, and that the common law must be held no further abrogated than the clear import of the language ***379** used in the statutes absolutely requires"]; *Morris v Snappy Car Rental*, 84 NY2d 21, 28 [1994] ["It is axiomatic concerning legislative enactments in derogation of common law . . . that they are deemed to abrogate the common law only to the extent required by the clear import of the statutory language"]; *Artibee v Home Place Corp.*, 28 NY3d 739, 748 [2017] ["Because CPLR 1601 is a statute in derogation of the common law, it must be strictly construed"]). The common ****14** law has always been suspicious of clauses seeking to limit access to the courts. The history of arbitration clauses demonstrates precisely the opposite of what the majority has concluded.

C.

That certain rights afforded to individuals are waivable is true but uninteresting and irrelevant here.[4] Television workers may alter their statutory meal breaks through collective bargaining (*Matter of American Broadcasting Cos. v Roberts*, 61 NY2d 244 [1984]), and teachers may waive the Education ***380** Law's tenure protections (*Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450 [1979]). Those rights are personal, and we leave it up to each individual to determine whether that individual would be personally advantaged by asserting or relinquishing those rights in a particular situation. As explained above, the freedom to contract is not a purely individual right; it is a societal engine for growth and stability.

A criminal defendant may prefer to testify than to remain silent; another may make the opposite choice. Society is indifferent to the choice made, so long as it is knowing and voluntary. Society, however, is not indifferent to whether contracting parties can obtain a quick determination of their rights and obligations before they must or may take actions that would be better informed (and often different) with a declaration in hand. We, as a society, are not benefitted or burdened by the defendant's choice; we are burdened when a contracting party's choice is made based on guesswork as to contractual rights, and benefitted when contracting parties make decisions informed by knowledge of their rights and obligations. Indeed, the majority's tacit admission that parties cannot contractually waive *all* judicial and quasi-judicial review, like our common-law decisions voiding arbitration clauses before the legislature stepped in, demonstrates the fundamental difference between the waivable rights to which the majority points and the clause barring declaratory relief at issue here.

D.

The proposition that only a "limited group of public policy interests" is sufficiently strong to overcome freedom of contract is both wrong and irrelevant here. It is wrong for the following reason: most law-abiding people do not enter into agreements that are against public policy. Countless parties enter into agreements to violate criminal and civil laws; those laws embody thousands of public policies, but those parties do not come to court to seek enforcement of agreements to traffic drugs or people or to recover damages from an illicit stock tip gone bad. Instead of the majority's sweeping claim, a more accurate statement would be that there are a modest number of cases in which the courts have voided an agreement as against public policy, because that circumstance arises only when the alleged violation of public policy is a close call.

The majority's proposition is also irrelevant here: it describes when a public policy *other than* the freedom to contract is sufficient***381** to outweigh the freedom to contract. Here, the issue is whether the public policy underlying the freedom to contract *itself* voids the purported declaratory judgment bar, not whether some distinct public policy voids it. As discussed previously, freedom of contract is vital because of the benefits that flow to society—not because of any individual right to

have the government enforce agreements between parties. As the legislature recognized when it provided for a declaration of rights regardless of the existence of other remedies, society is benefitted when disputes between contracting parties can be resolved by a declaration of rights, and injured when parties must guess and act at their peril.

V.

This case offers a concrete illustration of why the public policy underlying freedom of contract requires voiding contractual provisions barring declaratory judgments. In 2010, 159 MP Corp. and 240 Bedford Ave Realty Holding Corp. (herein, collectively MP) entered into 20-year leases for retail and storage space in which to operate a Foodtown grocery store in the Williamsburg section of Brooklyn. Two years later, the lessor, BFN, sold the building to Redbridge Bedford, LLC. In 2014, Redbridge Bedford sent MP a "Ten (10) Day Notice to Cure Violations." The notice alleged that the site had had work done without proper approvals from city agencies, that the store configuration violated lease terms, that city agencies had improperly been denied access to the premises to inspect the sprinkler system, and that the ventilation system violated the lease and had to be removed. MP disputes all the violations, asserting they either depend on misreadings of the lease or on factual inaccuracies.

MP filed a verified complaint asserting four causes of action: (1) a request for a declaration that the lease was in effect and no violations had occurred; (2) a request to enjoin Redbridge Bedford from taking any steps to terminate the lease; (3) a claim to estop Redbridge Bedford from asserting violations, if any, to which it and BFN had consented; and (4) a claim for damages. To preserve the status quo, MP also sought a *Yellowstone* injunction, which would toll the cure period during the pendency of the action.

Redbridge Bedford moved for summary judgment on the ground "that the mere commencement of the declaratory judgment action constituted contractual grounds for terminating ***382** the tenancies" (*159 MP Corp. v Redbridge Bedford, LLC*, 160 AD3d 176, 181 [2d Dept 2018]). The contractual provision on which Redbridge Bedford relied states that MP:****15**

> "waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease. Any breach of this paragraph shall constitute a breach of substantial obligations of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunctive relief is sought by Tenant and such relief shall be denied, the Owner shall be entitled to recover the costs of opposing such an application, or action, including its attorney's fees actually incurred, it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings."

Both Supreme Court and the Appellate Division denied MP's request for a *Yellowstone* injunction on the basis of the above contractual provision.

The *Yellowstone* injunction derives from *First Natl. Stores v Yellowstone Shopping Ctr.* (21 NY2d 630 [1968]). In that case, we held that a tenant's failure to obtain a temporary restraining order prior to the expiration of the 10-day cure period in the lease deprived the court of the power to extend the cure period (*id.* at 637-638). In so doing, we implicitly endorsed what would come to be known as the *Yellowstone* injunction, which allows the court to stay the running of a cure period so that tenants may obtain a declaration as to the existence of an alleged lease default and retain the ability to cure such default once their obligations have been determined. The *Yellowstone* injunction is an important adjunct to one type of declaratory judgment action, in which a tenant threatened with eviction based on debatable claims of breach may obtain a judicial resolution of the debate before deciding whether to cure, to remain with no need to cure, or to accept the eviction. Although CPLR 3001 (and its predecessor) does not mention the prospect of judicial extension of a contractual cure period, we explained that " 'declaratory relief is *sui generis* and is as much legal as equitable' . . . Thus, in a proper case, a court has the fullest liberty in molding its decree to the necessities of the occasion" (21 NY2d at 637, quoting Edwin M. Borchard, Declaratory Judgments 239 [2d ed 1941]).

***383** MP has been operating a grocery store in a neighborhood that has undergone, and continues to undergo, rapid gentrification, rendering the real estate substantially more valuable. Its lease is for 20 years, with a further 10-year renewal option. It would like to keep operating the grocery store under the lease terms. Redbridge Bedford would, undoubtedly, like to terminate the lease and make a greater profit from it. Let us assume that there is a legitimate dispute about whether the

violations identified by Redbridge Bedford are MP's obligation to cure. The declaration sought by MP, coupled with the *Yellowstone* injunction, would allow MP to learn which, if any, of the claimed violations it is obligated to cure, and could then decide whether to cure any for which it is responsible or agree to termination of the lease. Enforcement of the waiver provision eliminates that possibility, requiring MP to take one of the following courses without the benefit of knowing its contractual liability: (1) cure all the alleged defects, even though it might be responsible for none of them; (2) cure none or some of the alleged defects, guessing which, if any, it may be held responsible for, and defend an eviction proceeding hoping that it has guessed correctly; or (3) accept termination of the lease because the eviction proceeding's result is too uncertain, and attempt to move its business elsewhere or shut it down.

The majority protests that MP and all other commercial tenants who waive declaratory and *Yellowstone* relief in their leases are left with "other judicial avenues through which [they] may adjudicate their rights under the leases" (majority op at 364). The only available legal avenue left to MP, however, as the majority acknowledges, is to wait for Redbridge Bedford to commence summary eviction proceedings in Civil Court and then raise any defenses it may have against the allegations of default in that summary proceeding (*see* majority op at 364).

Notably, the waiver provision at issue here prevents *only the tenant* from commencing a declaratory judgment action to clarify its rights and responsibilities. The leases permit Redbridge Bedford to commence a declaratory judgment action at will. As the dissenting Justice of the Appellate Division noted, MP is completely at the mercy of Redbridge Bedford to commence such summary eviction proceedings before it may raise any defenses it has to the allegations of default (*see* 160 AD3d at 206-207 [Connolly, J., dissenting]). "In other words, the plaintiffs, having been boxed into a corner, would be entirely dependent on the defendant commencing a summary proceeding***384** in order to bring the issue of the validity of a notice to cure before a court" (*id*.). Such a tenant "would be ****16** faced with great uncertainties with respect to any decision-making related to improving the property, accepting deliveries of new stock or merchandise, or the negotiation of any type of long-term agreement with customers or suppliers" (*id*. at 207).

Furthermore, as the majority acknowledges (majority op at 365-367), the waiver provision at issue here prevents MP from obtaining a *Yellowstone* injunction, even though it did not mention *Yellowstone* itself, because the tenants were limited to defending themselves in summary eviction proceedings commenced by Redbridge Bedford in Civil Court, and Civil Court lacks plenary authority to grant injunctive relief (*see* NY City Civ Ct Act § 209 [b]). If Civil Court therefore determines during the summary eviction proceeding that MP is responsible for some or all of the alleged defaults, even if MP has all along been willing and able to cure those defaults, it will be too late: the leases will have terminated. That "all or nothing result" (*Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 25 [1984]) destabilizes contract relationships and neighborhoods, and effectively allows landlords who own buildings in gentrifying areas to terminate commercial leases at any time based on technical or minor violations. In other words, if a waiver of declaratory and *Yellowstone* relief is enforceable, it will be used by landlords as a mechanism to vitiate a lawful contract. That does not preserve the parties' benefit of their bargain, it destroys it.

"The public policy behind Yellowstone relief is not difficult to envision: commercial enterprises leasing business locations have a vested interest in remaining at the locations known to their customers, their premises are often fitted with industry-specific fixtures, and commercial evictions disrupt employments and potential business profitability" (Hon. Mark C. Dillon, *The Extent to Which "Yellowstone Injunctions" Apply in Favor of Residential Tenants: Who Will See Red, Who Can Earn Green, and Who May Feel Blue?*, 9 Cardozo Pub L Pol'y & Ethics J 287, 315-316 [2011]). The majority's elimination of the clearly best option—knowing one's rights before determining whether and what action to take—strikes at the very core of declaratory judgments. One of the very first decisions under the then-new declaratory judgment act closely parallels the present case:

> ***385** "Plaintiff urges that this construction imposes upon the lessee the risk of forfeiture if he subleased and points out the practical difficulty of finding a sublessee under such circumstances. *Young v. Ashley Gardens Properties, Ltd.*, L. R. (1903) 2 Ch. Div. 112, shows the remedy. There plaintiff sought a declaratory judgment that defendant had no right to withhold consent. Cozens-Hardy, L. J., writes: 'I cannot imagine a more judicious or beneficial exercise of the jurisdiction to make a declaratory order than that which has been adopted . . . in this case.' Under Section 473 of the Civil Practice Act, plaintiff may, if the facts warrant, secure a similar declaration in the instant case" (*Sarner v Kantor*, 123 Misc 469, 470 [1924]).

The majority allows a lease provision to undo the legislature's creation of declaratory judgments, the common law's rejection of contractual provisions purporting to remove judicial interpretation of contracts,

and the long-standing efforts of our Court and the lower courts thereafter in fashioning the *Yellowstone* injunction, which, after 50 years of unquestioned existence, itself is engrained in the common law.

The majority's newfound dismissiveness towards *Yellowstone* cannot be justified by its observation that the legislature has granted a 10-day post-adjudication cure period for New York City residential tenants and made that cure period unwaivable (*see* RPAPL 753 [4], [5]). The majority reasons that the legislature's decision to provide that benefit "only to a class of residential tenants indicates that the legislature did not view this type of relief as fundamental for commercial tenants" (majority op at 367). To the contrary, the legislature did not enact this particular protection for residential tenants in New York City until 1982 (*see* L 1982, ch 870; *see Post*, 62 NY2d at 22-24). By that time, *Yellowstone* injunctions had been a long-established method for commercial tenants to preserve their right to cure if they were alleged to be in default of their lease agreements. It is entirely likely, then, that the legislature extended this protection to certain residential tenants in 1982 but did not extend it to commercial tenants because the legislature believed that *Yellowstone* itself already adequately protected the rights of commercial tenants. Indeed, a one-size-fits-all 10-day post-adjudication cure period might be appropriate for residential tenants, whereas commercial tenants, whose uses are more specialized and varied, would best be left to the ***386** court's discretion to determine the length and nature of any post-adjudication cure period. The majority's reasoning is backwards, drawing a negative inference about our jurisprudence from the legislature's provision of a fixed post-adjudication ****17** cure period to residential tenants. At most, this would qualify as long-standing legislative inaction in the face of well-established common law, which we typically construe as approval (*see People v Defore*, 242 NY 13, 23 [1926, Cardozo, J.] ["If we had misread the statute or misconceived the public policy, a few words of amendment would have quickly set us right. The process of amendment is prompt and simple. It is without the delays or obstructions that clog the change of constitutions. In such circumstances silence itself is the declaration of a policy"]). By holding today that commercial tenants may waive declaratory and *Yellowstone* relief, the majority is effectively unwinding 50 years of common-law precedent based in part on erroneous assumptions about the legislature's intent.

The majority appears to assume that commercial tenants have a relatively higher level of sophistication and bargaining power than residential tenants, and therefore commercial tenants should be allowed to waive the availability of *Yellowstone* relief even though some residential tenants cannot (*see* RPAPL 743 [4], [5]). Indeed, the majority states several times that "sophisticated" commercial tenants should be allowed to waive their right to declaratory relief. A contract provision that violates public policy, however, cannot be enforceable regardless of the level of the sophistication of the parties (*see* 160 AD3d at 207 [Connolly, J., dissenting]; *see e.g. Riverside Syndicate, Inc. v Munroe*, 10 NY3d 18 [2008] [wherein a sophisticated tenant bargained away the rent limits of the Rent Stabilization Code as part of an eviction settlement that allowed his tenancy to continue despite being a non-primary residence]; *see also Bissell v Michigan S. & N. Ind. R.R. Cos.*, 22 NY 258, 285 [1860] ["That contracts which do in reality contravene any principle of public policy are illegal and void, is not and cannot be denied. The doctrine is universal. There is no exception"]). Furthermore, there is no evidence on this record demonstrating the sophistication of these particular tenants.[5] The majority assumes that because they were commercial tenants, they were sophisticated. The level of ***387** sophistication of commercial tenants, and their relative bargaining power, may fall anywhere between Walmart and *Cheers*' Sam Malone. It is not true that all commercial tenants will understand the meaning of a waiver of declaratory relief, or will have the bargaining power to negotiate for removal of such a waiver if they understand it, and we should not assume otherwise.

VI.

The majority has now undone the faithful work of the courts over the past 50 years in creating the *Yellowstone* injunction, based on the uniform understanding of the Appellate Division Departments that the declaratory judgment act, when applied in the context of commercial leases, requires a specialized form of augmenting injunction (*see Another Slice, Inc. v 3620 Broadway Invs. LLC*, 90 AD3d 559 [1st Dept 2011]; *Caldwell v American Package Co., Inc.*, 57 AD3d 15, 18 [2d Dept 2008]; *Kem Cleaners v Shaker Pine*, 217 AD2d 787 [3d Dept 1995]; *Fay's Inc. v Park Centre Dev.*, 226 AD2d 1067 [4th Dept 1996]). That undoing calls for a simple enough legislative fix. The far more troubling aspect of the majority's decision is that it, perhaps unwittingly, heads us down the road of the roundly discredited *Lochner*-era jurisprudence, in which "freedom of contract" was misunderstood as an individual right instead of as a doctrine by which society decides to enforce only those

types of agreements that tend to enhance social welfare. "[F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses" (*West Coast Hotel Co. v Parrish*, 300 US 379, 392 [1937], quoting *Chicago, B. & Q. R. Co. v McGuire*, 219 US 549, 567 [1911], and overruling *Adkins v Children's Hospital of D. C.*, 261 US 525 [1923] and *Lochner*).****18**

It is easy to see why freedom of contract is enhanced when the parties, arriving at a dispute about what a contract requires, can have that dispute resolved and then act accordingly. That best preserves the substance of their bargain and provides assurance to future negotiating parties that our law will not require a Hobson's choice of them. Conversely, what reason is there to allow parties to agree to bar declaratory judgments, other than "the-parties-agreed-to-it-so-it-must-be-***388** their-right"? As Charles Evans Hughes commented in support of New York's Declaratory Judgment Act, "[w]hatever may be said as to the propriety of desirability of such a change in practice, the point that any body will be injured in that way cannot be regarded as well taken" (Rep of NY St Bar Assn Comm on Law Reform, Proceedings of 44th Ann Meeting at 196). We deserve better than the majority's resuscitation of the long-discredited "assumption that economic liberty is the holy of holies in a just constitutional system" (Robert Green McCloskey, American Conservatism in the Age of Enterprise 83 [1951]). "I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent" (*Lochner*, 198 US at 74-75 [Holmes, J., dissenting]).

Judges Stein, Garcia and Feinman concur; Judge Wilson dissents in an opinion in which Judges Rivera and Fahey concur.

Order affirmed, with costs, and certified question not answered as unnecessary.

Footnotes

1 Although defendant cited a portion of paragraph 67 (H) stating that commencement of a declaratory judgment action provided a separate basis for termination of the leases, it did not counterclaim seeking either a declaration that the leases terminated or eviction based on purported breach of this provision. Because that provision was not enforced in this case, we have no occasion to further address it.

2 Plaintiffs also argued that the complaint pleaded a cognizable breach of contract claim that was not barred by the waiver clause. However, that argument is not presented in this Court.

3 *See also Bluebird Partners v First Fid. Bank*, 94 NY2d 726, 739 (2000) (declining to enforce the contract on champerty grounds may "engender uncertainties in the free market system in connection with untold numbers of sophisticated business transactions—a not insignificant potentiality in the State that harbors the financial capital of the world"); *J. Zeevi & Sons v Grindlays Bank (Uganda)*, 37 NY2d 220, 227 (1975) ("In order to maintain [New York's] pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected").

4 When we refer to public policy in this context, we mean "the law of the State, whether found in the Constitution, statutes or decisions of the courts" (*New England Mut. Life Ins. Co.*, 73 NY2d at 81). It is not enough that the agreement appears unwise to outsiders (*see Rowe*, 46 NY2d at 68), or violates "personal notions of fairness" (*Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]) or "[courts'] subjective view of what is sound policy" (*Matter of Walker*, 64 NY2d 354, 359 [1985]).

5 "Decisions like these are not based on a search for the equitable outcome of a particular case, or on a calculation of which result will most contribute, in an immediate and practical way, to the enforcement of a particular statute or public policy" (*Balbuena v IDR Realty LLC*, 6 NY3d 338, 364-365 [2006]). "Rather, they are based on the sound premise that courts show insufficient respect for themselves and for the law when they help a party to benefit from illegal activity" (*id.* at 365).

1 Here, for instance, the landlord and tenant each claim that the other is responsible to resolve several lease violations, including the current configuration of a ventilation system. If the tenant knows it is liable, it might decide to terminate the lease; the landlord apparently has better offers for the space, so that the tenant could walk away without liability and the landlord could rent the space to a higher-paying tenant. If the landlord knows it is liable, it may then determine whether it is more profitable to buy out the tenant and lease the space to a higher-paying tenant or to continue under the existing lease terms.

[2] Even before Roman times, King Solomon issued a declaratory judgment, determining the rights of the parties without requiring either putative mother to abscond with the infant (1 *Kings* 3:16-28).

[3] The majority's reliance on *James v Alderton Dock Yards* and *Kalisch-Jarcho, Inc. v City of New York* (majority op at 363) is misplaced. In *James*, we upheld the denial of declaratory relief as an appropriate exercise of the trial court's discretion: "The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and necessary" (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]). Likewise, in *Kalisch-Jarcho, Inc. v City of New York* (72 NY2d 727 [1988]), the contract between the City and the contractor required the contractor to continue with work even if the obligation to do the work was contested, subject to payment for the additional work at the contract's end. The denial again was for discretionary reasons. Neither case upholds the validity of a provision purporting to extinguish the right to seek a declaration, because the contracts in those cases had no such provision. Even were we to strike as void against public policy the provision at issue here, nothing would prevent Supreme Court from denying declaratory relief or the *Yellowstone* injunction in a proper exercise of its discretion.

[4] The majority's observation that the legislature has specified that several types of agreements are void as against public policy (majority op at 361) is true but irrelevant. No one disputes the legislature's ability to do so (query, then, whether the purported force of the freedom of contract is so great as the majority claims), but the legislature's ability to declare contractual terms void as against public policy does not disable the common law from doing so as well. The cases the majority cites for the proposition that the legislature's failure to preclude a waiver is "a significant factor militating against invalidation of a contract term on public policy grounds" (*id.* at 362) do not support that proposition at all. *Ballentine v Koch* (89 NY2d 51 [1996]) contains no such statement; it rejected the plaintiffs' claim because "they attack as unenforceable an aspect of the legislation that was necessary to the creation of the rights they seek to enforce" (*id.* at 59), and rejected their Contract Clause argument to boot. *Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown* (46 NY2d 450 [1979]) is not a case in which the legislature was silent; instead, we concluded the waiver there was not against public policy because the statue affirmatively "authorized waiver by simple neglect" and the "waiver serves as the quid pro quo for countervailing benefits" (*id.* at 455). *Matter of Feinerman v Board of Coop. Educ. Servs. of Nassau County* (48 NY2d 491 [1979]) says nothing about legislative inaction, but instead is merely a follow-on to *Abramovich* concluding that nontenured faculty have, a fortiori, less of a property interest than tenured faculty, and therefore also can waive the rights determined waivable in *Abramovich*. Only *Slayko v Security Mut. Ins. Co.* mentions legislative inaction, but expressly conditions it on the rejection of the plaintiff's attempt to analogize the highly regulated field of automobile insurance to homeowner's insurance: "Cases involving auto insurance coverage—an area in which the contractual relationship and many of its terms are prescribed by law—provide a weak basis for generalization about the constraints public policy places upon other insurance contracts" (98 NY2d 289, 295 [2002]).

[5] The majority not only asserts that plaintiffs were "sophisticated" but also that they were "counseled" (majority op at 363, 368). There is no evidence in the record before us that plaintiffs reviewed the lease terms with counsel. Supreme Court concluded that plaintiffs had the "opportunity" to review the leases with the assistance and guidance of counsel, not that such assistance and guidance actually occurred.

End of Document

Exhibit 7

[NAME OF BUILDING]'S COVID-19 PROTOCOL

In these unprecedented times, our first and foremost concern is for the well-being of our residents, staff, and their families. We are updating everyone on the precautions and steps that the building is taking in this new era of living amidst the COVID-19 Pandemic. Please be advised that the following policies are in effect until further notice:

- Executive Order No. 202.10 (the "Order"), signed into law by the Governor of the State of New York on Monday, March 23, 2020 (a copy of which is annexed here), provides, as follows:

  > **Non-essential gatherings of individuals *of any size for any reason* (e.g. parties, celebrations, or other social events) are canceled or postponed at this time. (Emphasis supplied).**

  Therefore, pursuant to the Order, all non-essential visitors to the building are prohibited.
  - This includes any and all social visits of any size from any non-resident, including family and friends, for any reason.
  - Please contact our property manager, _____ (_____.com) immediately if you have extenuating circumstances, or feel you need a limited exception to the rule.
  - Please be advised that if any shareholder and/or occupant violates this protocol, the Corporation will file an emergency application against the violator seeking to enjoin them from engaging in further violations, and the Corporation will be seeking reimbursement of all of its fees and costs against such violators. Should any violator fail to comply with any subsequent court order, such violator may be held in contempt of court or even jailed.
- Please **strictly follow social distancing when in the common areas**, meaning that a distance of at least six (6) feet should be maintained.
- **If you are sick and presenting symptoms of the virus, please follow the health authority's guidelines**: Self-quarantine, notify management immediately, as well as the Center for Disease Control and local health officials. This information will be held confidentially, but is for the safety of the staff and the community.
- **No new apartment renovation or construction projects will be approved.**
  - All "non-essential" repair work by staff or contractors will be prohibited until further notice. Only repairs deemed to be emergencies or "essential" by the NYC Department of Buildings will be permitted.
  - No new move-in or move-outs will be scheduled during this period.
  - No roommate or sublet requests will be considered until further notice.

We acknowledge that these policies may be inconvenient for many of our residents and would not have implemented them if we did not believe they were necessary in light of the current outbreak of this extremely virulent disease. The situation is extremely fluid, and we may make adjustments to our policies as warranted.

The building will return to its regular policy regarding visits by non-residents once further directives are received from the State and Local officials.

Exhibit 8

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____ CORPORATION, *Plaintiff,* -against- _____, *Defendant.*	Index No. **VERIFIED COMPLAINT**

The Plaintiff, _____ ("Plaintiff" or "Corporation"), as and for its Verified Complaint, by its attorneys, _____, complaining of Defendant, _____ ("Defendant" or "Shareholder"), respectfully avers:

PRELIMINARY STATEMENT

1. In this action, Plaintiff seeks a declaratory judgment declaring that Defendant has persistently violated the Plaintiff's COVID-19 Protocol (the "Protocol") since the Protocol was recently adopted by the Plaintiff's Board of Directors (the "Board"), which Protocol is required in order to protect the life and safety of the residents and occupants of the Plaintiff's building, as well as the Plaintiff's staff, in the midst of the coronavirus Pandemic that has overtaken the City of New York.

2. It should be noted that Defendant has openly, intentionally and maliciously failed and refused and continues to fail and refuse to abide with the Protocol, which is also in direct violation of Executive Order No. 202.10 (the "Order 202.10"), signed into law by the Governor of the State of New York on Monday, March 23, 2020, providing that"[n]on-essential gatherings of individuals of any size for any

reason (e.g. parties, celebrations or other social events) are canceled or postponed at this time," as well as the Governor's subsequent orders with regard to social distancing.

3. It should further be noted that Defendant subsequently also violated Executive Order No. 202.33 (the "Order 202.33") signed into law by the Governor of the State of New York on Friday, May 22, 2020, which enlarged Order 202.10's gathering ban by explicitly permitting gatherings of less than 10 people or more insofar as "social distancing protocols and cleaning and disinfection protocols required by the Department of Health ("DOH") are adhered to."

4. As a result of Defendant's outrageous and despicable conduct which is propagating COVID-19 – an extremely virulent disease – Defendant is placing the life and safety of the building's residents, some of whom are elderly or who have underlying health conditions, in grave danger of serious injury and death.

5. Therefore, Plaintiff seeks an immediate emergency prohibitive and mandatory injunction enjoining Defendant, as well as his roommate, agents, and/or guests, from further violating the Protocol.

6. Additionally, Plaintiff seeks the recoupment of its reasonable attorney fees and costs against Defendant in accordance with the parties' proprietary lease.

THE PARTIES

7. The Plaintiff is a domestic corporation duly published and formed under and existing by virtue of the laws of the State of New York with a principal place of business in the County, City, and State of New York.

8. Plaintiff, a Cooperative, is the owner and landlord of the building known as _____ (the "Building").

9. Upon information and belief, the Defendant-Shareholder is the owner of the shares and proprietary lease appurtenant to Apartment _____ (the "Apartment").

10. Upon information and belief, the Defendant is in possession of the Apartment.

FACTS COMMON TO ALL CAUSES OF ACTION

11. On March 12, 2020, the World Health Organization ("WHO") announced the COVID-19 outbreak as a pandemic.[1]

12. On the scale of pandemics, the novel coronavirus, commonly referred to as COVID-19, is unprecedented, and ranks among one of the worst in human history, not only in terms of its virulence, but in economic destruction as well.

13. While scientists hastily work toward developing a vaccine and antiviral drugs to combat COVID-19, world leaders in the countries afflicted by the virus have

[1] http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic

imposed strict governmental lockdowns, barred travel, closed courts,[2] blocked tourism and employed social distancing measures in an effort to stop the rapid spread of the pathogen.

14. In the state of New York, Gov. Andrew M. Cuomo recently issued a string of executive orders[3] shuttering schools, courts and nearly all businesses, with only a select few "essential" businesses being permitted to remain open, such as grocery stores and pharmacies.

15. Similar business closures were adopted by other states across the country resulting in, among other things, a massive loss of jobs, an implosion of the health care system, and a precipitous debasing of the stock market, with a likely recession looming on the horizon.

16. More important than the vast economic destruction, however, is the massive loss of lives of New Yorkers that the virus has taken within the past few weeks, with hundreds of thousands infected.

17. According to the most recent report from the U.S. National Institute of Allergy and Infectious Diseases, over 240,000[4] Americans may be killed by the virus with millions being infected.

18. It has just been reported that at least 15 judges in the City of New York have contracted coronavirus, with one judge, the Hon. Johnny Lee Baynes, J.S.C.

[2] On March 12, 2020, the Supreme Court of the United States announced its indefinite closure amidst the COVID-19 pandemic, its first disease-related closure since the 1918 H1N1 Virus; https://www.supremecourt.gov/
[3] https://www.governor.ny.gov/keywords/executive-order
[4] https://www.nytimes.com/2020/03/31/us/politics/coronavirus-death-toll-united-states.html

having passed away last week due to complications with COVID-19, and with Kings County Administrative Judge, the Hon. Lawrence Knipel, J.S.C., in the hospital battling for his life against COVID-19.

19. As of yesterday, _____ New Yorkers have died at the hands of the virus, and _____[5] New Yorkers have been confirmed to have been infected with the virus.

20. There are issues with curbing the exponential spread of the virus because many of the people that contract the virus can apparently be entirely asymptomatic from anywhere between 7 to 14 days, and therefore they unknowingly continue to spread the virus to the general populace.

21. According to scientists, the virus is extremely virulent and can survive on metal surfaces for up to 3-4 days, and on plastic and cardboard for 24 hours or even longer.[6]

22. Despite the Governor's orders regarding social distancing and even with the prohibitions, the number of deaths and infections only continue to increase prospectively.

23. It has recently been suggested that New York, which is at the epicenter of the COVID-19 pandemic within the United States, is presently at the apex.

[5] Many scientists believe that the infection figures are actually much higher because approximately 80% of those infected are asymptomatic, or demonstrate mild symptoms. (https://www.nytimes.com/2020/02/27/world/asia/coronavirus-treament-recovery.html).
[6] https://www.who.int/emergencies/diseases/novel-coronavirus-2019

24. In light of the foregoing, on March 31, 2020, the Plaintiff's Board adopted a resolution enacting its emergency Protocol in order to protect the life and safety of the Corporation's shareholders, residents, staff, employees and/or other representatives from the COVID-19 outbreak. True and accurate copies of the Plaintiff's resolution, together with the Protocol, Executive Order No. 202.10, and Executive Order 202.33, are annexed hereto as Exhibits A, B, & C, respectively.

25. Paragraph 4 of the Corporation's House Rules (the "House Rules") specifically provides:

> No Tenant-Shareholder shall make or permit any disturbing noises in the Building or do or permit anything to be done therein which will interfere with the rights, comfort or convenience of other Tenant-Shareholders…
>
> A true and accurate copy of Corporation's form proprietary lease containing the House Rules is annexed hereto as Exhibit C.

26. The House Rules are incorporated into the Lease. Article 4, Section 4.4 of the Lease provides, in relevant part, as follows:

> The Apartment Corporation has adopted House Rules which are incorporated herein. *The Board of Directors may alter, amend or repeal such House Rules and adopt new House Rules. The House Rules may* (i) regulate the use of the Building, all facilities therein, and the Apartments; (ii) regulate the conduct of all persons occupying, visiting, or working in the Building; (iii) impose User Charges pursuant to Paragraph 2.3.4 hereof; (iv) impose charges and fees on Tenant-Shareholders for violating this Lease and/or the House Rules; (v) impose requirements for the Tenant-Shareholders to carry homeowners' insurance; and (vi) *include policies and resolutions carrying out the rights, powers and privileges of the Board of Directors authorized by this Lease and by the By-Laws of the Apartment Corporation.*

(Emphasis supplied).

27. Despite the adoption of the Plaintiff's Protocol, together with the Governor's Orders, Defendant has openly, intentionally and blatantly violated the Protocol placing the lives of everyone living in the Building in great danger.

28. Plaintiff believes that the only way to stop this danger and to protect the health and safety of the Plaintiff's residents and staff is to immediately enjoin Defendant from further violating the Protocol and the laws of this State.

A. Defendant's Outrageous, Intentional, and Malicious Conduct

29. First, on or about [INSERT HERE ALL INSTANCES OF WRONGFUL CONDUCT WITH SPECIFICITY AND ATTACH EVIDENCE (PHOTOGRAPHS, VIDEO, ETC., AS APPLICABLE].

B. Defendant's Prior Shocking and Nuisance Type Conduct

30. On or about [INSERT HERE ALL PRIOR INSTANCES OF WRONGFUL CONDUCT WITH SPECIFICITY AND ATTACH EVIDENCE (PHOTOGRAPHS, VIDEO, ETC., AS APPLICABLE].

31. However, if Defendant's prior conduct was not bad enough, which it is, Defendant's current conduct in skirting the Protocol is much worse, as he is intentionally and maliciously placing the lives of his fellow shareholders in great peril.

32. Thus, in order to protect the health, safety, and welfare of the Defendant himself, and all the other residents who live in the Building, including the elderly and those with underlying health conditions, and to prevent the coronavirus from spreading, it is necessary that the Defendant be forced to comply with the Protocol and the law.

33. Despite the Protocol, as well as the law, Defendant has failed and refused and continues to fail and refuse to refrain from having his various non-essential guests access the Building, and is engaging in public gatherings in the Building.

34. However, at all relevant times, Defendant has failed and refused to comply with the Protocol or the law.

35. As a result, Plaintiff has no adequate remedy at law.

AS AND FOR A FIRST CAUSE OF ACTION
(Prohibitive Injunction)

36. Plaintiff repeats all of the foregoing allegations of this Complaint with the same force and effect as if set forth at length herein.

37. Defendant should be required and charged with complying with the Protocol and the Order in refraining from having "non-essential gatherings of individuals of any size for any reason," the violation of which is causing a life safety hazard to Defendant, as well as the other residents and visitors of the Building some of whom are elderly and have underlying health conditions.

38. Plaintiff believes that many of the shareholders and Building staff will be unnecessarily exposed to the coronavirus if Defendant fails to comply with the Protocol and/or the Order.

39. Plaintiff further believes that many of the shareholders and/or the Building staff may file claims against Plaintiff to compel the Plaintiff to rid their respective apartments and/or the common areas of the virus being spread by Defendant.

40. Such proceedings could result in court orders being issued against the Plaintiff with which the Plaintiff is, by reason of the Defendant's actions, unable to comply.

41. Plaintiff therefore, by reason of the Defendant's actions, risks being cited for damages, fines, and/or penalties.

42. As a result, Plaintiff has no adequate remedy at law.

43. Upon information and belief, Defendant's guests are similarly intentionally and maliciously violating the Protocol, along with the Order, which makes it even more critical to provide Plaintiff with the level of injunctive relief sought herein.

44. Plaintiff is therefore entitled to a prohibitive injunction prohibiting the Defendant from permitting his guests to enter the Apartment and/or engaging in gatherings within the Apartment so as to facilitate the propagation of COVID-19, and Plaintiff seeks such an injunction to ensure that the virus does not spread throughout the Building, however long that may be.

AS AND FOR A SECOND CAUSE OF ACTION
(Mandatory Injunction)

45. Plaintiff repeats all of the foregoing allegations of this Complaint with the same force and effect as if set forth at length herein.

46. Defendant should be required and restricted from having non-essential visitors visit his unit and/or engage in public gatherings within the Apartment during the current COVID-19 Pandemic, as such conduct is causing a life safety hazard to Defendant, as well as the other residents of the Building.

47. Many of the shareholders may claim a breach of the warranty of habitability by reason of the ongoing propagation of the coronavirus if Plaintiff does not force Defendant to comply with the Protocol and/or the Order.

48. Plaintiff further believes that many of the shareholders and/or the Building staff may file claims against Plaintiff to compel the Plaintiff to rid their respective apartments and/or the common areas of the virus being spread by Defendant.

49. Such proceedings could result in court orders being issued against the Plaintiff with which the Plaintiff is, by reason of the Defendant's actions, unable to comply.

50. Plaintiff therefore, by reason of the Defendant's actions, risks being cited for damages, fines, and/or penalties.

51. As a result, Plaintiff has no adequate remedy at law.

52. Plaintiff is therefore entitled to a mandatory injunction requiring the Defendant to: (i) refrain from engaging in non-essential gatherings of individuals of any size for any reason within the Building and/or the Apartment; (ii) to refrain from facilitating non-essential guests from entering the Building and/or the Apartment in accordance with the Protocol and/or the Order; (iii) refrain from having non-essential guests visit Defendant at the Building and/or the Apartment in accordance with the Protocol and/or the Order during the pendency of the COVID-19 Pandemic; and (iv) refrain from having gatherings of individuals of any size for any reason within the Building and/or the Apartment in accordance with the Protocol and/or the Order during the pendency of the COVID-19 Pandemic.

AS AND FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

53. Plaintiff repeats all of the foregoing allegations of this Complaint with the same force and effect as if set forth at length herein.

54. The actions of the Defendant are such as to render the Plaintiff liable to an unknown number of persons for claims that may arise out of such persons' claims that Plaintiff improperly permitted their apartments and/or the common areas of the Building to be infected by viral matter.

55. Such liability is in sums unknown to the Plaintiff and on theories unknown to the Plaintiff.

56. Plaintiff has no fault whatsoever with regard to any such liability.

57. Any fault with regard to any such liability would be solely that of the Defendant.

58. By reason thereof, Plaintiff is entitled to a declaration that the Defendant is liable to indemnify the Plaintiff for any claims by any persons claiming any losses of any kind by reason of infections related to COVID-19, together with any attorneys' fees the Plaintiff may be required to expend and/or reimburse thereon.

AS AND FOR A FOURTH CAUSE OF ACTION
(Attorneys' Fees)

59. Plaintiff repeats all of the foregoing allegations of this Complaint with the same force and effect as if set forth at length herein.

60. There is a lease between the Plaintiff and the Defendant.

61. The lease obliges the Defendant to reimburse the Plaintiff for its attorneys' fees in the event Plaintiff is obliged to take any legal action to enforce the lease.

62. Upon information and belief, the Defendant has the obligation under the lease not to maintain a nuisance and/or to abide by the duly adopted resolutions of the Board, as well as the law.

63. Upon information and belief, the violation of the Protocol, thereby exposing the shareholders and other Building residents to be infected by the coronavirus, as hereinabove set forth constitutes a type of nuisance.

64. Upon information and belief, Plaintiff is therefore entitled to its legal fees in the prosecution of this action.

65. Plaintiff cannot compute its damages with regard to the attorneys' fees, but believes that they can amount to as much as $25,000.

WHEREFORE, Plaintiff demands judgment as follows:

a. On the first cause of action, a prohibitive injunction prohibiting the Defendant from permitting his guests from entering the Apartment and/or engaging in gatherings within the Apartment so as to facilitate the propagation of COVID-19, and Plaintiff seeks such an injunction to ensure that the virus does not spread throughout the Building, however long that may be.

b. On the second cause of action, a mandatory injunction requiring the Defendant to:(i) refrain from engaging in non-essential gatherings of individuals of any size for any reason within the Building and/or the Apartment; (ii) to refrain from facilitating non-essential guests from entering the Building and/or the Apartment in accordance with the Protocol and/or the Order; (iii) refrain from having non-essential guests visit Defendant at the Building and/or the Apartment in accordance with the Protocol and/or the Order during the pendency of the COVID-19 Pandemic; and (iv) refrain from having gatherings of individuals of any size for any reason within the Building and/or the Apartment in accordance with the Protocol and/or the Order during the pendency of the COVID-19 Pandemic.

c. On the third cause of action, a judgment declaring that the Defendant is liable to indemnify the Plaintiff for any claims by any persons claiming any losses of any kind by reason of the infection of COVID-19, together with any attorneys' fees the Plaintiff may be required to expend and/or reimburse thereon

d. On the fourth cause of action $25,000 or such other amount as the Court shall determine after trial to be reasonable under the circumstances;

e. The costs, disbursements, and interest of this action; and

f. Together with such other and further relief as to the Court seems just and proper.

Dated: New York, New York
[DATE]

Yours, etc.,
[LAW FIRM]
by

Exhibit 8

[NAME AND ADDRESS OF LAWYER SIGNING PAPERS]

Exhibit 8

VERIFICATION

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

_____, being duly sworn, deposes and says, that he is the President of the Board of Directors of the Plaintiff named in the foregoing Verified Complaint; that he knows the contents thereof; and that, to his knowledge, the Verified Complaint is true, except as to matters stated therein to be alleged upon information and belief, and, as to those matters, he believes them to be true.

_____
[PRINTED NAME]

Sworn to before me this
th day of _____, 2020

_____
NOTARY PUBLIC

Exhibit 8

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____,

Plaintiff,

-against-

_____,

Defendant.

Index No.

Date Filed:

SUMMONS

Venue is based on: location of the subject real property

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the verified complaint in this action and to serve a copy of your answer or, if the verified complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorneys within 20 days after service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for relief demanded in the verified complaint.

Dated: New York, New York
[DATE]

Yours, etc.,
[LAW FIRM]
By:

Defendant's Address:

[NAME AND ADDRESS OF LAWYER SIGNING PAPERS]

Exhibit 8

At an IAS Part __, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, NY on the ___ day of _____, 2020.

PRESENT
Hon.
J. S. C.

_____,

Plaintiff,

-against-

_____,

Defendant.

Index No.

IAS Part:

ORDER TO SHOW CAUSE

Upon reading and filing the annexed affidavit of _____, sworn to on the __th day of _____, 2020, the annexed affidavit of _____, sworn to on the __th day of _____, 2020, the annexed affirmation of _____, Esq., duly affirmed the __th day of _____, 2020, the affirmation of Emergency of _____, Esq., duly affirmed the __th day of _____, 2020, the exhibits annexed hereto and, upon all papers and proceedings heretofore had herein,

LET, the Defendant, or his counsel, show cause before this Court at an IAS Part____, to be held in and for the County of New York, to be held at the Courthouse, Room ___, 60 Centre Street, New York, New York, on the _____ day of _____,

2020 at ____ am/pm in the forenoon/afternoon of that day, or as soon thereafter as counsel can be heard, why an Order should not be made and entered herein:

> Temporarily, preliminarily and permanently enjoining and restraining the Defendant from: (i) having, permitting and/or facilitating non-essential guests from entering the Building located at _____ (the "Building") and/or _____ at the Building (the "Apartment") in accordance with the Plaintiff's COVID-19 Protocol (the "Protocol"), the Executive Order No. 202.10, and/or the Executive Order 202.33, issued by the Governor of the State of New York during the pendency of the COVID-19 Pandemic; and (ii) having, permitting and/or facilitating non-essential gatherings of individuals of any size for any reason at the Building and/or the Apartment during the pendency of the COVID-19 Pandemic.

Sufficient cause therefore being alleged, it is

TRO	
Granted	JSC
Denied	JSC

ORDERED, that pending the hearing of this motion, Defendant, is hereby enjoined and restrained from permitting and/or facilitating non-essential guests from entering the Building and/or the Apartment in accordance with the Plaintiff's Protocol and/or the Orders issued by the Governor of the State of New York; and (ii) having, permitting and/or facilitating non-essential gatherings of individuals of any size for any reason at the Building and/or the Apartment; and it is further

ORDERED, that service of a copy of this Order to Show Cause and supporting papers upon Defendant, _____, by e-mail at: _____ (Tel. No. _____), together with overnight mailing via nationally recognized courier, by on or before _____ ___, 2020, be deemed good and sufficient service and it is further

ORDERED, that answering papers to the within motion, if any, shall be served upon Plaintiff's attorneys, by e-mail to: _____ (Tel. No.

_____), together with overnight mailing via nationally recognized courier, by on or before April ___, 2020, and that reply papers thereto be served upon Defendant, by e-mail and via nationally recognized courier, no later than _____ _____, 2020.

E N T E R:

J.S.C.

Exhibit 8

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____, *Plaintiff,* -against- _____, *Defendant.*	Index No. **CLIENT AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE**

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

_____, being duly sworn, deposes and says:

1. I am the President of the Board of Directors of Plaintiff, _____, the Cooperative which is the owner of the property that is the subject of this action and located at _____, New York, NY (the "Building").
2. I make this Affidavit based upon my own personal knowledge, in support of Plaintiff's motion for a Preliminary Injunction, enjoining and restraining the Defendant from further violating the Plaintiff's COVID-19 Protocol (the "Protocol"), the Executive Order No. 202.10 (the "Order"), and/or the Executive Order No. 202.33, in order to prevent the spread of the coronavirus throughout the Building and protect the life and safety of the Defendant, as well as the Building's residents and staff.

3. I have read the Plaintiff's Verified Complaint, and everything stated therein is true and accurate to the best of my knowledge, except as to those matters stated upon information and belief, and as to those matters, I believe them to be true.
4. The Defendant has had a long history of breaking the Building's rules, wreaking havoc, being a menace and causing a substantial nuisance to the shareholders.
5. However, now the Defendant is putting not only his own life at risk, but is intentionally and maliciously placing the lives of the shareholders, some of whom are elderly and who have underlying health conditions, at serious risk of injury and death.
6. This is no laughing matter, and I fear that absent intervention by the Court to enjoin Defendant from violating the Protocol and/or the Order, the Building's residents may become infected with COVID-19 or even die.
7. In fact, I am advised by my counsel that the coronavirus is extremely virulent, has already killed many New Yorkers, at least one judge so far, and that hundreds of thousands of New Yorkers are infected with the disease.
8. The building in question is a moderately sized building containing ___ stories with ___ residential units.
9. The Plaintiff has expended substantial costs into the Building to make it an attractive, clean, safe, highly maintained facility, designed to ensure that the shareholders can live in comfort.
10. Moreover, the Board has, together with counsel, expended substantial time in developing its Protocol in accordance with the Order in an effort to stop the

spread of the coronavirus from spreading in the Building and infecting the shareholders.

11. The Defendant, unfortunately, is somehow unable to understand the nature and consequences of his actions in violating the Protocol and/or Orders.

12. As stated previously, Defendant, together with this visitors, have had a long history of breaking the rules and engaging in nuisance type conduct, but now he and his guests are putting our lives at risk. Annexed hereto as Exhibit B are true and accurate copies of the Plaintiff's security logbooks; see also video showing Defendant's persistent violation of the Protocol and/or the Order annexed hereto as Exhibit C.

13. The Building's other shareholders are similarly disgusted, concerned and overly anxious because of Defendant's outrageous conduct and blatant disregard for propagating COVID-19 within the Building, which is adversely impacting their life and safety, as well as the other residents in the building, some of whom are elderly and have underlying health conditions. These folks are the most vulnerable to die should they contract coronavirus.

14. No one in the building, or anywhere for that matter, should have to live with this fear resulting from Defendant's outrageous conduct or experience it, and as there are ___ families in the building (inclusive of the super) whose unit this could potentially spread to, as well as their visitors, friends, and/or other individuals, it renders this a true emergency.

15. What we have been asking of the Defendant is not extraordinary. It has simply been to follow the Protocol, as well as the Order so that we can all stay safe and healthy during this unprecedented global pandemic.

16. Unfortunately, I strongly believe that the only way Defendant will understand the nature and consequences of his action in putting other peoples' lives at risk is by court ordered injunction forcing him into compliance.

17. This is an immediate emergency because due to the Defendant's actions, at the very least, the shareholders may be infected by the virus, or worse, die.

18. My attorneys have informed me that in order to sustain an application for a preliminary injunction, it is required that the Plaintiff make a showing of likelihood of success on the ultimate merits, that there be a balancing of the equities in the Plaintiff's favor, and that the Plaintiff will be irreparably harmed in the absence of the injunction.

Ultimate success

19. It is clear that the Plaintiff will succeed on the ultimate merits of this case. Defendant may be acting this way because he is a menace who refuses to follow rules even when we are not in the midst of a global pandemic, but that is no excuse. What is clear, is that this is a life safety issue which needs to be addressed imminently. Thus, Plaintiff's ultimate success is clear.

Balancing the Equities

20. It is clear that there can be no equity in favor of the Defendant at all. He is a shareholder with a checkered history of causing trouble, engaging in significant

nuisances, and whose guests have had altercations with the authorities, and engaged in drug use, ultimately culminating in the discovery of the dead body of his former roommate having been found in his Apartment. His acts, are outrageous and shocking, and are putting the health and safety of the building residents, who are law abiding people, in grave danger. All the equities weigh against him.

Irreparable Injury Absent the Injunction

21. No amount of money can compensate for the harm that the Defendant is doing. He is threatening the health of every occupant in the Building with substantial injury or worse yet, death at the hands of the deadly coronavirus which is ravaging our City. These other occupants can bring various enforcement proceedings against Plaintiff due to Defendant's violation of the Protocol and/or the Order to which the Plaintiff will have no truly effective defense. Plaintiff and its directors will thus be under personal threat of fines and penalties. There is no monetary remedy for that.
22. Therefore, it is respectfully requested that the injunction issue forthwith.
23. No previous application for this or any other provisional remedy has been made in this or any other court.

WHEREFORE, it is respectfully requested that the motion be granted in all respects, together with such other and further relief as to the Court seems just and proper.

_____

[NAME OF CLIENT]

Sworn to before me this
___th day of _____, 2020

_____

NOTARY PUBLIC

Exhibit 8

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____, *Plaintiff,* -against- _____, *Defendant.*	Index No. **AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE**

_____, being an attorney duly licensed to practice before the courts of the State of New York affirms the following to be true under penalties of perjury.

1. I am a partner of _____, attorneys for the Plaintiff, and make this affirmation in support of Plaintiff's motion upon information and belief, the sources of my information and the grounds for my belief being the files maintained by my office in this matter.
2. I make this Affirmation in support of Plaintiff's motion for an Order temporarily, preliminarily and permanently enjoining and restraining the Defendant from persistently violating the Plaintiff's protocols and the Governor's Orders restricting non-essential gatherings and guests in light of the present COVID-19 Pandemic.
3. I have explained to my client that in order to make an application for a preliminary injunction, it is necessary that the movant demonstrate a likelihood of

success in the ultimate relief sought, a balancing of the equities in the movant's favor, and irreparable injury absent the injunction.

4. I have reviewed the pleadings in this matter and it is clear to me that these standards are satisfied.
5. When a Board makes such efforts to ensure that a deadly disease does not spread to the Building's residents, some of whom are elderly and who have underlying health conditions, and staff, as well as Defendant, it is a real travesty.
6. Some people believe that they are above the law, and perhaps Defendant does not actually realize that he may cause his fellow neighbors, or even himself, great physical harm or even death.
7. It is against that background that I understand that once all the facts come out in this case, Plaintiff will ultimately prevail.
8. As to the balancing of the equities, it is clear that there is no equity to be had in favor of subjecting the Building's residents to COVID-19.
9. As to the irreparable injury, once your life is gone, you can never get it back. Moreover, many studies have shown that even for those individuals that do not die from coronavirus, some apparently suffer from long term lung damage or heart conditions. One's life and health cannot be measured in money, as that is the only true thing that we have in life.
10. Without life there is nothing.
11. Therefore, it is respectfully requested that the injunction issue immediately.
12. No previous application for this or any other provisional remedy has been made in this or any other court.

WHEREFORE, it is respectfully requested that the motion be granted in all respects together with such other and further relief as to the Court seems just and proper.

Dated: New York, New York
[DATE]

[PRINTED NAME OF LAWYER SIGNING PAPERS]

Exhibit 8

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____, *Plaintiff,* -against- _____, *Defendant.*	Index No. **EMERGENCY AFFIRMATION**

_____, being an attorney duly licensed to practice before the courts of the State of New York affirms the following to be true under penalties of perjury:

1. I am a partner at _____, attorneys for the Plaintiff, and make this emergency affirmation in support of Plaintiff's motion based upon my personal knowledge.
2. I make this Affirmation in support of Plaintiff's motion for a Temporary Restraining Order enjoining and restraining the Defendant from further violating the Plaintiff's COVID-19 Protocol, together with the Governor's Executive Order No. 202.10 & No. 202.33 (collectively, the "Orders").
3. On _____, I telephoned Defendant at approximately _____, in order to inform him that my office would be electronically filing an *ex parte* emergency Order to Show Cause application seeking a temporary restraining order for the relief requested therein on _____. I further advised Defendant to be available by

telephone in the event that the Court wishes to hold a conference with the parties in connection with the filing of this application, and that I would forward to him an e-mail confirming our telephone conversation.

4. Defendant advised that he would be retaining counsel, _____, to represent him in connection with this application. At that point, I advised Defendant that I would be sending _____ an e-mail confirming the call, with a copy to Defendant. Annexed hereto as Exhibit A is a true and accurate copy of my _____ e-mail to Defendant's counsel which was sent to the e-mail address that Defendant provided to me: _____.

5. 22 NYCRR 202.7(f) provides in relevant part, as follows:

> Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, *an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by the giving of notice*. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application. This subdivision shall not be applicable to orders to show cause or motions in special proceedings brought under article 7 of the Real Property Actions and Proceedings Law, nor to orders to show cause or motions requesting an order of protection under section 240 of the Domestic Relations Law, unless otherwise ordered by the court.
>
> (Emphasis supplied).

6. We submit that this matter constitutes an emergency, thereby dispensing with the notice requirements set forth in 22 NYCRR 202.7(f).

7. Notwithstanding the dispensation of the notice requirement here, we nonetheless provided proper notice to Defendant. Accordingly, in the event that Defendant fails to appear, we respectfully request that the Plaintiff's temporary restraining order issue nonetheless.

8. Moreover, in accordance with the Supreme Court, New York County Civil-Term's Protocol for Emergency Applications pursuant to Administrative Order AO/78/20, effective April 2, 2020, the within papers should be accepted for filing as "essential" on the grounds that the application constitutes an "(6) emergency application related to coronavirus."

WHEREFORE, it is respectfully requested that the motion be granted in all respects together with such other and further relief as to the Court seems just and proper.

Dated: New York, New York
[DATE]

[PRINTED NAME OF LAWYER SIGNING PAPERS]

Exhibit 8

Index No.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____,

Plaintiff,

-against-

_____,

Defendant.

MEMORANDUM OF LAW

On the brief:
_____

Respectfully submitted:
[LAW FIRM]
Attorneys for Plaintiff
[PHYSICAL ADDRESS AND TELEPHONE NUMBER FOR LAW FIRM]

Exhibit 8

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully offered in support of Plaintiff's application for a Temporary Restraining Order and a Preliminary Injunction.

THE FACTS

Without even a hint of justification, the Defendant continues to persistently violate the Plaintiff's COVID-19 Protocol, as well as the Governor's Executive Orders No. 202.10 & 202.33 (collectively, the "Orders") restricting non-essential gatherings and non-essential visitors within the Building and Defendant's Apartment. The Plaintiff's security guard has tried to stop Defendant from surreptitiously sneaking his guests into the Building through the garage, but to no avail. Unfortunately, Plaintiff has been forced to seek emergency court intervention in an effort to stop Defendant and his guests from infecting himself, his guests, fellow residents and building staff with the deadly coronavirus. This is a building consisting of __ units, with ___ families, some of whom are elderly and suffer underlying health conditions, and therefore this application is all the more pressing, as all of the units are now being endangered by Defendant's actions.

IN SUPPORT OF THE MOTION

Preliminary injunctions are governed by C.P.L.R. § 6301, which states in full:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary

> restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

Thus, to be entitled to a preliminary injunction, it is incumbent upon the moving party to show: (1) a likelihood of success on the merits; (2) irreparable injury absent the injunction; and, (3) that the equities balance in the movant's favor. *Aetna Insurance Co. v. Capasso*, 75 N.Y.2d 860, 552 N.Y.S.2d 918, 552 N.E.2d 166 (1990); *Mucchi v. Eli Haddad Corp.*, 101 A.D.2d 724, 475 N.Y.S.2d 35 (1 Dept. 1984); *Church of God Pentecostal Fountain of Love, MI v. Iglesia de Dios Pentecostal, MI*, 27 A.D.3d 685, 812 N.Y.S.2d 131 (2 Dept. 2006).

It is an accepted rule of law that before a preliminary injunction will be granted pursuant to the provisions of C.P.L.R. § 6301, the moving party must establish a 'clear right' to the relief requested. *Park Terrace Caterers, Inc. v. McDonough*, 9 A.D.2d 113, 191 N.Y.S.2d 1001 (1 Dept. 1959). A 'clear right' means that a cause of action must be established, and that cause of action must be ripe for determination before a court with jurisdiction over the matter. *Columbia Gas of New York v. New York State Electric & Gas Corp*., 56 Misc.2d 367, 289 N.Y.S.2d 339 (1968); *see also City of Utica v. Mercon, Inc.*, 71 Misc.2d 680, 336 N.Y.S.2d 880 (1972),

To satisfy the irreparable injury element, a plaintiff must show that in the absence of a preliminary injunction, it will suffer an injury that is neither remote nor speculative, but is imminent, actual, and that it will be impossible to remedy if the case proceeds to trial without an injunction in place. *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112 (2nd Cir. 2005).

The final step necessary for determining entitlement to a preliminary injunction is balancing the equities. Here, Courts generally look at whether continuing injury to the plaintiff would be more burdensome than the harm caused to defendant by the imposition of an injunction. *Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corp.*, 70 A.D.2d 1021, 418 N.Y.S.2d 216 (3 Dept. 1979).

In this case, it is clear that the three requirements have been satisfied. Because the Plaintiff has both a lease right and a common law right to ensure that Defendant is not violating the Building's COVID-19 Protocol, as well as the law. The Defendant's refusal to abide by the law in this case has no hint of justification and the Plaintiff must prevail.

The balancing of the equities bring about the same analysis. There is no equity in favor of subjecting all of the other households and building staff to serious injury or death at the hands of the coronavirus. There is simply no equity to consider in favor of the Defendant.

The factor of irreparable harm shows the same analysis. It is not just the Plaintiff who is irreparably harmed by the Defendant's outrageous and shocking conduct, but the other residents whose interests the Plaintiff is both statutorily and contractually required to protect. Such harm cannot be repaired with any amount of money.

Thus, the Plaintiff has shown satisfaction of all of the required elements for the application for a Temporary Restraining Order and for a Preliminary Injunction.

CONCLUSION

Thus, we respectfully submit that Plaintiff has made the necessary showing to be entitled both to the Temporary Restraining Order and the Preliminary Injunction.

Dated: New York, New York
[DATE]

Respectfully submitted,
[LAW FRIM]
by

[LAWYER SIGNING PAPER, ALONG WITH ADDRESS AND TELEPHONE NUMBER FOR LAW FIRM]

4 N.Y.3d 839
Court of Appeals of New York.

NOBU NEXT DOOR, LLC, Plaintiff, and **Nobu** Corp., Appellant,
v.
FINE ARTS HOUSING, INC., Respondent.

April 5, 2005.

Synopsis
Background: Commercial tenants brought action against landlord after they purported to exercise option to renew restaurant lease and landlord rejected attempted renewal. The Supreme Court, New York County, Richard Braun, J., granted injunctive and *Yellowstone* relief, tolling time for exercise of renewal option conditioned on posting of bond, and denied landlord's cross-motion to compel tenants to replace exhaust chimney stack immediately. Landlord appealed. The Supreme Court, Appellate Division, 3 A.D.3d 335, 771 N.Y.S.2d 76,affirmed as modified, and tenants appealed.

[Holding:] The Court of Appeals held that Appellate Division did not exceed or abuse its equitable powers in vacating preliminary injunction tolling commercial tenant's time to exercise the renewal option in its lease.

Affirmed.

West Headnotes (2)

[1] **Appeal and Error**Prejudgment or provisional remedies in general
InjunctionDiscretionary Nature of Remedy

Decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts; Court of Appeals' power to review such decisions is thus limited to determining whether the lower courts' discretionary powers were exceeded or, as a matter of law, abused.

39 Cases that cite this headnote

[2] **Injunction**Landlord and tenant

Appellate Division did not exceed or abuse its equitable powers in vacating preliminary injunction tolling commercial tenant's time to exercise the renewal option in its lease.

57 Cases that cite this headnote

Attorneys and Law Firms

***49** Wagner Davis, P.C., New York City (Bonnie Reid Berkow of counsel), for appellant.

Borah, Goldstein, Altschuler, Schwartz & Nahins, P.C., New York City (Jeffrey R. Metz of counsel), for respondent.

****192 OPINION OF THE COURT**

MEMORANDUM.

***840** The order of the Appellate Division, insofar as appealed from, should be affirmed, with costs; the certified question should be answered in the affirmative.

[1] The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts. Our power to review such decisions is thus limited to determining whether the lower courts' discretionary powers were exceeded or, as a matter of law, abused (*Doe v. Axelrod*, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 532 N.E.2d 1272 [1988]). The party seeking a preliminary

injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor (*see* CPLR 6301; *see generally Doe,* 73 N.Y.2d at 750, 536 N.Y.S.2d 44, 532 N.E.2d 1272).

[2] Here, in addition to a *Yellowstone* injunction, plaintiff **Nobu** Corp. also sought a preliminary injunction tolling its time to exercise the renewal option in its lease (*see Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assoc.,* 85 N.Y.2d 600, 627 N.Y.S.2d 298, 650 N.E.2d 1299 [1995]; *First Natl. Stores v. Yellowstone Shopping Ctr.,* 21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868 [1968]). The Appellate Division considered appropriate equitable factors in determining that the balance of the equities did not tip in **Nobu** Corp.'s favor. Accordingly, that Court did not exceed or abuse its equitable powers in vacating the preliminary injunction.

Chief Judge KAYE and Judges G.B. SMITH, CIPARICK, ROSENBLATT, GRAFFEO, READ and R.S. SMITH concur in memorandum.

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order, insofar as appealed from, affirmed, etc.

All Citations

4 N.Y.3d 839, 833 N.E.2d 191, 800 N.Y.S.2d 48, 2005 N.Y. Slip Op. 02575

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