FILED: APPELLATE DIVISION - 1ST DEPT 09/27/2024 10:02 AM 2024-03297
NYSCEF DOC. NO. 16 RECEIVED NYSCEF: 09/27/2024

Civil Court of the City of New York Index No. LT-303449-22/NY

New York Supreme Court

Appellate Division — First Department

WEST PIERRE ASSOCIATES, LLC,

Petitioner-Respondent

Case No. 2024-03297

– against –

JULIA HARVEY,

Respondent-Appellant

BRIEF OF *AMICUS CURIAE* THE LEGAL AID SOCIETY IN SUPPORT OF RESPONDENT-APPELLANT

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I. PRELIMINARY STATEMENT

The Legislature enacted the Housing Stability and Tenant Protection Act of 2019 (HSTPA) in the midst of a housing emergency: rents in rent-stabilized units were too high, and there were not enough units. The result was the dislocation that rent stabilization aims to prevent. Abuses of the rent-stabilization system compounded the emergency, as tenant-driven enforcement mechanisms proved inadequate. Tenants lacked the information and means necessary to timely challenge illegal rent increases. Among other purposes, the HSTPA's Part F sought to ensure that tenants "are not left paying more than they should" (Sponsor's Memo., Bill No. S4169)[1]—in other words, it sought to prevent illegally inflated rents resulting from years of inadequate enforcement from undermining the rent-stabilized system indefinitely into the future.

Respondent-Appellant Julia Harvey's case illustrates the inequity that the Legislature sought to confront with Part F. Ms. Harvey's landlord, West Pierre Associates, is charging her a rent that appears to incorporate an illegal increase, based on inflated claims of apartment improvements. Her rent-stabilized tenancy began on December 1, 2020, nearly eighteen months after the HSTPA's enactment. So, her rent overcharge defense and counterclaim, raised in 2022, only relate to

[1] Available at https://www.nysenate.gov/legislation/bills/2019/s4169/amendment/original [last accessed Aug. 28, 2024].

rents charged and collected beginning eighteen months after Part F instituted new rules about how legal regulated rents and overcharge awards are calculated. Yet, the Appellate Term deemed that pre-HSTPA law governed Ms. Harvey's rent overcharge claims. If upheld, this decision would mean that a landlord could indefinitely continue to collect an unlawful rent increase because it first imposed the rent increase before June 2015.

The Appellate Term's decision is based on an erroneous conception of *Matter of Regina Metropolitan Co. v. N.Y. State Division of Housing & Community Renewal* (*Regina Metro.*) (35 NY3d 332 [2020]) and the constitutional law of retroactivity. Courts are required to give full force to the Legislature's intent, subject to constitutional limits. Due process does not prevent courts from applying Part F's rules to determine the legality of rents charged and collected after its enactment. As applied to post-June 2019 rents, Part F is clearly rationally related to a "'*conceivable* legitimate State purpose'" (*Am. Economy Ins. Co. v State*, 30 NY3d 136, 158 [2017], quoting *Myers v Schneiderman*, 30 NY3d 1, 15 [2017]).

Part F's application to claims and defenses regarding post-June 2019 rents is not retroactive. And even if its application could be considered to have a retroactive effect, retroactivity furthers the legislative goals of returning units to rent stabilization, moderating and ensuring the propriety of rents, preserving the rent-stabilized housing stock, and deterring future overcharges—all recognized as

legitimate by the Court of Appeals. In the face of a housing crisis, the legislature had a sound basis for mandating that landlords were no longer permitted to charge inflated rents for rent-stabilized units. Courts must effectuate the Legislature's intent by applying Part F to post-June 2019 rents.

II. STATEMENT OF INTEREST OF AMICUS CURIAE

The Legal Aid Society is a non-profit organization that provides free legal services to low-income New York City residents, including thousands of rent-stabilized tenants annually. Its staff members have direct experience regarding the salutary effects of rent regulation on the lives of low- and moderate-income New Yorkers and frequently provide testimony and guidance to the New York State legislature about policy and legislation related to affordable housing and rent regulation. Additionally, The Legal Aid Society is on the steering committee of the Housing Justice for All Coalition, which advocated for the passage of the Housing Stability and Tenant Protection Act.

As a result, The Legal Aid Society has a unique and valuable perspective—informed by decades of assisting tens of thousands rent-burdened, low-income New Yorkers in challenging and rolling back improper rent increases—on the critical importance of the Court implementing Part F of the HSTPA to the full extent permitted by the Constitution.

III. ARGUMENT

Whether a statute operates retroactively or not, it satisfies substantive due process requirements if it is "'justified by a rational legislative purpose'" (*Am. Economy Ins. Co.*, 30 NY3d at 158, quoting *Pension Benefit Guaranty Corp. v R.A. Gray & Co.*, 467 US 717, 730 [1984]). There is a "strong presumption" of validity, and the party challenging the legislation "bears the heavy burden" of establishing that the "statute is so unrelated to the achievement of any combination of legitimate purposes as to be irrational" (*Myers*, 30 NY3d at 3, quoting *People v Knox*, 12 NY3d 60, 69 [2009] [internal quotation marks omitted]).

Although West Pierre Associates challenged Ms. Harvey's rent overcharge affirmative defense and counterclaim on substantive due process grounds, the Appellate Term's decision contained no rational basis analysis whatsoever (*see West Pierre Assoc., LLC v Harvey*, 2024 NY Misc LEXIS 290 [App Term, 1st Dept, Jan. 23, 2024, 571132/23]). Evidently, the Appellate Term drew an inflexible rule from the *Regina Metro.* decision: when an improper rent increase occurred more than four years before June 14, 2019, a post-June 2019 rent that incorporates this improper rent increase is immune from challenge.[2] If upheld, this rule would eviscerate Part F by permitting landlords to continue to collect the inflated rents that the Legislature sought to combat. Neither *Regina Metro.* nor the Constitution

[2] Unless there is a colorable claim of fraud (*Harvey*, 2024 NY Misc LEXIS 290, *2).

requires this outcome. Indeed, the constitutional system of separation of powers mandates the contrary result.

A. The legislature enacted Part F to address a housing crisis and combat illegally inflated rents and deregulated apartments.

The Legislature enacted the HSTPA in June 2019 in the midst of a housing affordability crisis, exacerbated by rising rents in rent-stabilized housing and the loss of rent-stabilized housing stock.

Low-income New Yorkers (The Legal Aid Society's clients) make up a large proportion of rent-stabilized tenants. In 2016, 64 percent of rent-stabilized tenants had household incomes under 80 percent of the Area Median Income (AMI)—the federal definition of "low-income," and the median income for rent-stabilized tenants was $44,560.00 (C.R. Waickman et al., NYC Dept. of Hous. Preservation & Dev., *Sociodemographics of Rent Stabilized Tenants* 4 [2018]).[3]

The preservation of rent-stabilized housing is critical to these low- and moderate-income New Yorkers. Yet, New York City had a net loss of approximately 142,868 rent-stabilized units between 1994 and 2018, driven by the deregulation of at least 298,426 units (NYC Rent Guidelines Bd., *Changes to the*

[3] Available at https://www.nyc.gov/assets/hpd/downloads/pdfs/services/rent-regulation-memo-1.pdf [last accessed Aug. 29, 2024].

Rent Stabilized Housing Stock in NYC in 2018 at 10 [May 2019]).[4] Landlords claimed high-rent vacancy deregulation significantly more than any other form of deregulation (*id*. at 16). The high-rent vacancy exemption accounted for 53.7 percent, or 160,292, of the total reported loss[5] of rent-stabilized housing between 1994 and 2018 (*id*. at 15-16). In 2018 alone, landlords deregulated at least 7,468 rent-stabilized apartments; 4,628 deregulations came through a claimed high-rent vacancy exemption—a 32 percent increase from 2017 (*id*. at 15).

While new units also entered rent-stabilization between 1994 and 2018, the majority were part of the Section 421-a tax program, and such units have initial rents that are out of reach of many New Yorkers. For example, nearly 80 percent of the new rent-stabilized units in 2018 resulted from the Section 421-a tax-exemption program, with median initial rents of $3,350. (*Id*. at 4, 12.) The median rent for a rent-stabilized apartment in New York City increased by twelve percent from 2017 to 2018, to $3,000—an amount that requires an annual household income of $120,000 to be affordable (*see id*. at 4). Meanwhile, in 2017, over 53 percent of low-income, 79 percent of very low-income, and 85 percent of

[4] Available at https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2019-Changes.pdf [last accessed Aug. 28, 2024]).

[5]Landlords did not need to report instances of high rent vacancy deregulation until 2014; prior to that time, the reporting of such deregulations was voluntary (*Changes to the Rent Stabilized Housing Stock in NYC in 2018* at 7).

extremely low-income New Yorkers were rent burdened, meaning that they paid over 30 percent of their income in rent (NYU Furman Ctr., *State of New York City's Housing and Neighborhoods in 2018* at 24 [2018]).[6]

Prior to the HSTPA, "Individual Apartment Improvements" (IAIs) drove increased rents and deregulation (NY St Reg, Apr. 24, 2013, at 13). Intended to incentivize landlords to maintain the habitability of the rent-stabilized housing stock, IAIs allowed landlords to make "improvements" during an apartment's vacancy[7] and permanently add up to 1/40th of the cost of the improvements to the monthly rent.[8] Landlords could dramatically increase rents close to or over the deregulation threshold by reporting that they had made improvements. However, because landlords could unilaterally impose IAI increases, with little oversight, and because new tenants had no firsthand knowledge of the condition of the apartment before they moved in, the system was prone to abuse (*see* Justin LaMort, *The Theft of Affordable Housing: How Rent-Stabilized Apartments are Disappearing Through Fraudulent Individual Apartment Improvements and What Can Be Done to Save Them*, 40 NYU Rev L & Soc Change 362-63 [2016]; *see also* Mireya

[6] Available at https://furmancenter.org/files/sotc/2018_SOC_Full_2018-07-31.pdf [last accessed Aug. 28, 2024]).

[7] Or while the apartment was occupied, with the tenant's permission.

[8] Former 9 NYCRR 2522.4 [a].

Navarro, *Tenants Living Among Rubble in Rent-Regulated Apartment War*, NY Times, Feb. 24, 2014[9] [stating that audit of more than 1,100 landlords by state tenant protection unit found that "in as many as 40 percent of cases, landlords did not have proof of apartment improvements used to justify rent increases"]). But, pre-HSTPA, these abuses went unchecked because unless tenants could show "fraud," they could not obtain overcharge damages based on even transparently false claims of improvements made more than four years before and were left paying these inflated rents (*cf. Matter of Boyd v N.Y. State Div. of Hous. & Community Renewal*, 23 NY3d 999, 1000-01 [2014]).

Faced with these and other facts, the Legislature enacted the HSTPA. It made legislative findings including a "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 (*Regina Metro.*, 35 NY3d at 383, citing L 2019, ch 36, part G, § 2 [internal quotation marks omitted]). Part F began as a stand-alone bill, sponsored by Senator Myrie. In his Sponsor's Memorandum, Senator Myrie noted that a primary justification for the bill was to address a

[9] Available at https://www.nytimes.com/2014/02/25/nyregion/in-new-york-push-for-market-rate-housing-pits-landlords-against-tenants.html [last accessed Aug. 30, 2024].

situation where "many tenants are left paying more for their rent stabilized apartments than they rightfully should" when overcharge complaints were not filed within four years, "whether a delay occurred because the tenant did not reside in the apartment when the overcharge occurred or they were previously unaware that they were being overcharged" (Sponsor's Memo., Bill No. S4169).

B. The Scope of *Regina Metro*.

In *Regina Metro.*, the Court of Appeals stressed the "narrowness" of the legal issue before it and that it was not addressing any question regarding the "prospective" application of the HSTPA, including Part F (*see, e.g.*, 35 NY3d at 349, 363, 388). These caveats warn against an expansive application of the decision's statement that "the overcharge calculation amendments cannot be applied retroactively to overcharges that occurred prior to their enactment" (*id.*). Courts should view this statement against the decision's background, including 1) the definition of an "overcharge" and 2) the factual and procedural context of the *Regina Metro.* appeals.

1. *An overcharge occurs when a landlord collects rent in excess of the legal regulated rent.*

The Rent Stabilization Laws' overcharge calculation rules regulate a landlord's collection of rent for a rent-stabilized unit (*see, e.g.*, NYC Admin. Code § 26-516 [a]; 9 NYCRR 2520.6 [c]). In other words, a rent overcharge occurs when a landlord charges and collects more than the legal regulated rent for a given

month, and, upon a tenant's complaint, the landlord can be penalized for this conduct (*see, e.g.*, *Regina Metro.*, 35 NY3d at 367-68; *Jenkins v Fieldbridge Assoc.*, 65 AD3d 169, 170 [2d Dept 2009]). In turn, the legal regulated rent is calculated from the time that a tenant files an overcharge complaint. Pre-HSTPA, the legal regulated rent was the rent charged on the date four years before the filing of the complaint (the base date), plus any subsequent legal increases (*Regina Metro.*, 35 NY3d at 348). Post-HSTPA, it is the rent 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 any subsequent lawful increases (NYC Admin. Code § 26-516 [a] [i]).

2. *The* Regina Metro. *tenants sought to apply Part F's revised overcharge calculation rules to claims filed and overcharges collected years before Part F's enactment*.

Regina Metro. involved four separate overcharge cases or proceedings, filed years before the HSTPA's enactment and concerning tenancies that commenced as much as twenty-five years before (*Regina Metro.*, 35 NY3d at 356). In each case, the landlord had wrongfully deregulated apartments in accordance with the New York State Division of Housing and Community Renewal (DHCR)'s interpretation of the statutory scheme governing the J-51 tax credit program. The Court of Appeals then repudiated this interpretation in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]). Each of the tenants in *Regina Metro.* took possession

in 2005 or earlier, following a deregulation "later revealed" by *Roberts* to be improper. Each signed successive market-rate leases without challenging the apartments' deregulation or rent. And following *Roberts*, between 2009 and 2016, each filed an overcharge claim. (*Regina Metro.*, 35 NY3d at 350, 351 n 2.) These overcharge claims had been pending for years by the time that the Court of Appeals took them up to fix the proper method of calculating overcharges for post-*Roberts* cases. While the appeals were pending, the enactment of the HSTPA intervened, and the tenants argued that the new law applied to their claims. (*Id.* at 348-49.)

Under the law in effect at the time the tenants filed their overcharge claims (pre-HSTPA law), the base date for purposes of filing the legal regulated rent was four years before the filing date (*id.* at 348). This meant that tenants could only collect damages for overcharges that had occurred within the prior four years, and most of the rent increases associated with deregulation had occurred before then (*see id.* at 351 n 3, 382-83). To apply Part F in these cases, the Court of Appeals would have had to reach back to change the damages rules applicable to the landlords' past collection of rent. Critically, this would have created or significantly expanded liability for collecting rent over a decade before the HSTPA's enactment (*see id.* at 382). For instance, application of Part F in the *Regina Metro.* tenants' appeal may have increased the landlord's liability from

around $10,000 to over $285,000 (*id.*). In sum, *Regina Metro.*'s holding was narrow because of the unique factual and procedural context of the cases before the Court of Appeals.

C. Courts must apply Part F to post-June 2019 rents.

Regina Metro.'s narrow holding is that Part F could not be applied to pre-HSTPA claims concerning pre-HSTPA rents collections. The path to that holding had three steps: first, determining that applying Part F to the *Regina Metro.* appeals would have a retroactive effect; second, if so, determining whether the legislature intended for the statute to apply retroactively; and third, asking whether there was a rational basis for the retroactive application (*see generally Regina Metro.*, 35 NY3d 332). *Regina Metro.* does not dictate the outcome of this case because of the substantial factual and procedural differences between, on the one hand, pre-HSTPA claims seeking damages for rents collected in accordance with regulatory guidance years before the HSTPA's enactment (*Regina Metro.*) and, on the other, claims filed post-HSTPA alleging that a landlord first charged an illegally inflated rent in 2014-2015 and continued to charge it after the HSTPA imposed liability for doing so (this case).

When applied to post-June 2019 rents, Part F operates prospectively. First, *Regina Metro.* says as much by drawing contrasts between post-HSTPA conduct

and the retroactive application it prohibited. Second, the potential consequences of applying Part F to post-June 2019 rents do not meet the test of retroactivity.

Finally, even if applying Part F to post-June 2019 rents has some retroactive effect, *Regina Metro.* did not analyze (and could not have analyzed) whether there is a rational basis for this retroactive effect. There is a rational basis.

1. Regina Metro. *establishes that the application of Part F to rents collected after June 2019 is prospective.*

"The legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place" (*Landgraf v USI Film Prods.*, 511 US 244, 265 [1993] [citation omitted]). In *Regina Metro.*, the Court of Appeals followed this "timeless and universal" principle. In its decision below, the Appellate Term did not. Part F's application to rents charged and claims filed after June 2019 is prospective, and the limitation imposed by the Appellate Term has no foundation in the *Regina Metro.* decision.[10]

When determining whether a statute has a retroactive effect, a court must first identify the "relevant past event"[11] and then decide if the statute attaches new legal consequences to that event (*see, e.g.*, *Landgraf*, 511 US at 270; *Hughes Aircraft Co. v United States ex rel. Schumer***,** 520 US 939, 951-52 [1997]

[10] The *Regina Metro.* dissent anticipated that the "HSTPA w[ould] be applied as written for claims that were not yet pending as of its effective date" (35 NY3d at 391 n 32 [Wilson, J., dissenting]).

[11] Otherwise known as "relevant conduct" or an "important event."

[analyzing statute's effect on "relevant conduct" for purposes of retroactivity analysis]; *Deweese v Natl. R.R. Passenger Corp.*, 590 F3d 239, 251 [3d Cir 2009] ["In deciding whether a statute has a retroactive effect, a court must determine the "important event" to which the statute allegedly attaches new legal consequences."]).

The Court of Appeals's discussion of Part F's legal consequences clarifies that its retroactivity analysis hinged on the "relevant past event" being a landlord's collection of rent.[12] Expansion of the statute of limitations from four to six years would permit recovery for an additional two years of conduct (collecting rental overcharges). Imposing the new treble damages rule would increase liability for past conduct (the collection of four additional years of overcharges). And as discussed above, due to the expansion of the lookback period, Part F could create or expand liability based on rent collected in the past. (*Regina Metro.*, 35 NY3d at 367-68.)[13]

[12] This was proper because the collection of rent is the primary activity that Part F regulates. *See* Section III.B.1, *supra*; Section III.C.2, *infra*.

[13] Retroactive application of Part F would "increase or create liability for rent overcharges that occurred years . . . in the *past*" and could "diminish[] or possibly eliminat[e] the constitutionally protected return on investment owners realized in the *past* . . . " (*Regina Metro.*, 35 NY3d at 382-83 [emphasis added]). Additionally, "application of the overcharge calculation amendments would merely punish owners more severely for *past conduct they cannot change*" (*id.* at 384 [emphasis added]).

Because rents charged or collected after June 2019 did not occur before the HSTPA's enactment, application of the HSTPA's overcharge calculation rules to determine the propriety of these rents does not implicate *Regina Metro.*'s defined "relevant past event" and cannot have a retroactive effect. The distinctions drawn in *Regina Metro.* between Part F's impermissible retroactive application and its potential prospective application reinforce this conclusion. First, the Court of Appeals contrasted the "profound impact" of Part F's retroactive application on overcharge calculations with the "legitimate and laudable policy goals" that may be served by "prospective application of part F to *overcharges occurring after the effective date*" (*see id.* at 383 [emphasis added]). Second, the Court of Appeals noted that the retroactive application of Part F to increase or create overcharge liability would not return apartments to rent stabilization or ensure the validity of rents collected in the future (*id.* at 383-84), while applying Part F's overcharge collection rules to rents charged after June 2019 would do exactly that.

2. *Applying Part F to post-June 2019 rents does not have a retroactive effect.*

Not all past conduct or events can support a finding of retroactivity: "[a] statute is not made retroactive merely because it draws upon antecedent facts for its operation," and "[e]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct" (*Am. Economy Ins. Co.*, 30 NY3d at 147, quoting *Landgraf*, 511 US at 269-70, 269-70 n 24). Rather, a statute

is retroactive if it "attaches new legal consequences to events completed before its enactment" (*id.*). However, as the cases that *Landgraf* synthesizes illustrate, only certain types of consequences make a statute retroactive. While the *Landgraf* majority describes its rule in a slightly different way, the caselaw bears out Justice Scalia's observation that only "primary retroactivity," meaning the alteration of the past legal consequences of past actions, qualifies as a retroactive effect—as opposed to "secondary retroactivity," meaning the alteration of future legal consequences of past actions (*see Landgraf*, 511 US at 293, n 3 [Scalia, J. concurring] [citations omitted][14]; *Bowen v Georgetown Univ. Hosp.*, 488 US 204, 219-20 [1988] [Scalia, J., concurring]). A primary reason for this distinction is that by altering the past legal consequences of a past action, a statute with primary retroactivity gives the impacted party no chance to alter its behavior in response (*see James Sq. Assoc. LP v Mullen*, 21 NY3d 233, 248 [2013]).

Thus, a statutory amendment that added a remedy for compensatory damages was retroactive if applied to an employer's past conduct because it would, at minimum, enlarge the extent of an employer's liability for pre-amendment

[14] Here, Justice Scalia's discussion of the *Landgraf* majority's "casino analogy" is apt. A law prohibiting gambling does not operate retroactively because it attaches a "disability" to investments made in existing casinos and casinos under construction, which were made under a prior legal regime when gambling was legal. Because the law regulates gambling, not the construction of casinos, the relevant retroactivity event is the primary activity of gambling, not the primary activity of constructing casinos. (*Landgraf*, 511 US at 292 n 3 [Scalia, J., concurring].) On the other hand, a law prohibiting gambling that also penalized people who gambled before the law took effect would obviously have a retroactive effect.

conduct (*see Landgraf*, 511 US at 282-84). Similarly, a False Claims Act amendment would operate retroactively were it to invalidate the effect of a defendant's prior disclosure regarding the subject of the claim to the government, as this disclosure provided a full defense to the claim under prior law (*see Hughes Aircraft Co.*, 520 US at 944, 946-50). Both of these statutes, if applied to past conduct, would alter the "past legal consequences of past actions" by changing the substantive rules of liability attached to those actions. As described above, Part F regulates the "primary activity" of the collection of rent. When applied to the past collection of rent, Part F's overcharge calculation rules had a retroactive effect for an analogous reason.

Conversely, a statute does not operate retroactively because it makes the continuation of conduct unlawful, prevents an affected party from engaging in certain future economic activity due to past actions, or disrupts expectations founded in prior law. For example, a statute that changed the consequences for pursuing a Strategic Lawsuit against Public Participation (SLAPP) did not operate retroactively when it punished a plaintiff for maintaining the SLAPP (i.e., not dismissing it) after the statute's enactment (*Gottwald v Sebert*, 40 NY3d 240, 259 [2023] ["There is no retroactive effect when these provisions are applied, according to their terms, to the continuation of the action beyond the effective date

of the amendments."]).[15] In a similar vein, the Court of Appeals has repeatedly held that statutes that restrict or prohibit certain business and professional activities because of pre-enactment conduct (whether lawful or not) do not operate retroactively (*Matter of Leon St. Clair Nation v City of New York*, 14 NY3d 452, 457 [2010]; *Miller v DeBuono*, 90 NY2d 783, 790 [1997]; *Forti v N.Y. State Ethics Commn.*, 75 NY2d 596, 609 [1990] [quoting McKinney's Cons Laws of NY, Book 1, Statutes § 51, at 87]).[16] As with the casino analogy, these laws did not change the legal character of the past conduct (such as the filing of the lawsuit, the construction of the embankment, the past State agency employment, and the purchase of the medical facilities); they merely changed the future legal consequences of these actions.[17]

Part F's application to post-June 2019 rents aligns with these latter cases by regulating the primary activity of the collection of rent. Importantly, unlike *James Square Associates LP* (21 NY3d at 250) and other cases where courts have found a

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[15] See also *Chicago & A.R. Co. v Tranbarger* (238 US 67, 71 [1915], cited in *Landgraf*, 511 US at 269-70 n 24), where the Supreme Court stated that a statute did not punish a company for constructing an embankment in the first place, but for maintaining the embankment in a manner prohibited by the new statute.

[16] Likewise, a regulation that limited future Medicare reimbursements based on equity capital attributable to goodwill did not operate retroactively even though it limited future payments to facilities purchased at the time that no such cap existed and whose purchase price included goodwill (*Natl. Medical Enters. v Sullivan*, 957 F2d 664, 666 [9th Cir 1991] [citing *Georgetown Univ. Hosp.*, 488 US at 219-20 [Scalia, J., concurring]).

[17] And, at least in the case of *National Medical Enterprises*, the change in law directly impacted its investment.

retroactive effect, as to post-June 2019 rent collections, Part F does not hold landlords liable for rent collected during a prior legal regime. If a landlord faces punishment for violating Part F's overcharge calculation rules as to post-June 2019 rents, it is because the landlord collected illegal rents after the HSTPA's enactment, not because of any prior conduct. And while Part F does reference past actions, such as the creation, filing, and service of registration statements (NYC Admin. Code § 26-516 [a] [i]), as to post-June 2019 rents, it only changes the *future* legal consequences of those actions by incorporating them as "antecedent facts" that are relevant to the determination of the legal regulated rent for a particular month. Post-June 2019, a landlord has notice of the overcharge calculation amendments and could and can avoid liability by ensuring that it only charges and collects rents that are justified, *viz.* "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 subsequent lawful adjustments (*id.*).

Regina Metro. identifies two other changes in Part F: the elimination of the "lookback rule" and changes to recordkeeping requirements (35 NY3d at 367-68). Neither creates a retroactive effect.

First, the elimination of the lookback rule does not increase the penalty for the past collection of rent and therefore does not alter the past legal consequences

of those collections. If eliminating the lookback rule leads to future consequences for a landlord because it continues to charge a rent that incorporates a past illegal rent increase, at most, this function of Part F imposes future consequences due to a past unlawful act, like the laws in *Matter of Leon St. Clair Nation* (14 NY3d at 457) and *Miller* (90 NY2d at 790). As those cases hold, this type of future consequence does not make a statute retroactive.

Moreover, even if four years elapsed following an initial overcharge, potentially shielding it from review under pre-HSTPA law, a landlord could not have a settled expectation regarding future collections of a rent level incorporating this overcharge. Landlords have no vested right to charge a certain rent (*see I.L.F.Y. Co. v City Rent & Rehab. Admin.*, 11 NY2d 480, 490–91 [1962]; *Bucho Holding Co. v Temporary State Hous. Rent Commn.*, 11 NY2d 469, 474 [1962]). Nor do they have a vested right with respect to any other aspect of the Rent Stabilization Laws—which they cannot expect to remain static—including the lookback rule (*see Regina Metro.*, 35 NY3d at 368; *Matter of 300 Wadsworth LLC v N.Y. State Div. of Hous. & Community Renewal*, 210 AD3d 454, 455 [1st Dept 2022]; *Matter of Schutt v N.Y. State Div. of Hous. & Community Renewal*,

278AD2d 58, 58 [1st Dept 2000]). Upsetting landlords' expectations or diminishing their return on investment does not make Part F retroactive.[18]

Again, a statute does not become retroactive when it is applied in a case arising from pre-enactment conduct or merely because its application to post-enactment activity draws on antecedent facts (*Matter of Aaron Manor Rehabilitation & Nursing Ctr., LLC v Zucker*, 2024 NY LEXIS 540, * 11 [Apr. 23, 2024, No. 31] [citations omitted]). While *Regina Metro.* holds that landlords should have repose as to rents that they collected under pre-HSTPA law,[19] applying the overcharge calculation amendments to determine what rents landlords may charge post-June 2019 does not upset that repose or punish landlords for past conduct. Instead, in some cases, the amendments require a landlord to "shoulder a new payment obligation going forward" (*Regina Metro.*, 35 NY3d at 382).

Part F's expansion of DHCR and courts' authority to consider the rent history when determining legal regulated rents also only changes the future legal consequences of past actions. While Part F may "penalize[] [landlords] indirectly for a disposal of records that was legal under prior law" if such records would have

[18] "Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino . . . ." (*Landgraf*, 511 US at 269 n 24).

[19] By "repose," the Court of Appeals meant that landlords should not face increased liability for having collected these pre-HSTPA rents (*see, e.g.*, *Regina Metro.*, 35 NY3d at 360, 382).

helped establish the reliability of a prior registration statement (*see id.* at 368-69), the cases cited above show that this type of indirect effect does not render a statute retroactive. Part F's changes do not alter the legal character of a landlord's prior destruction of records—a landlord who disposed of records after four years pre-HSTPA did not commit an unlawful act or face liability for destroying the records, and Part F does not change that.

Additionally, the Part F's expansion of the examinable rent history does not disrupt settled expectations, as landlords had no vested right to dispose of records. Pre-HSTPA, the four-year record retention rule operated in tandem with the lookback rule and was intended "to alleviate the burden on honest landlords to retain rent records indefinitely, not to immunize dishonest ones from compliance with the law" (*Thornton v Baron,* 5 NY3d 175, 181 [2005]). This record retention rule served a specific purpose within the pre-HSTPA overcharge calculation scheme and, even pre-HSTPA, landlords who destroyed records could be "penalized indirectly." For instance, landlords could have had to justify a unit's deregulation (*see Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 199 [1st Dept 2011]), and the lack of records would have made that justification more difficult.

Therefore, as to post-June 2019 rents, Part F operates only prospectively, and the application of Part F to determine post-June 2019 overcharge claims does not run afoul of *Regina Metro.*

3. *Even if the application of Part F to post-June 2019 rents does have a retroactive effect,* Regina Metro. *does not foreclose its application.*

Regina Metro. found that Part F's retroactive application did not have a rational basis because it would have resulted in an "unfair retroactive assessment of liability" to cases "pending in the appellate pipeline" (35 NY3d at 387, quoting *Eastern Enters. v Apfel,* 524 US 498, 558 [1998] [Breyer, J., dissenting]; *id.* at 383). As discussed above, in reaching this conclusion, the Court of Appeals analyzed the effects of and rationale for expanding landlords' liability for rents collected under the pre-HSTPA scheme.

This appeal presents a different issue: whether Part F can be applied to a claim filed after the HSTPA's enactment, concerning rents collected after the HSTPA's enactment, when the claim that the landlord is collecting an overcharge under Part F's rules is based on a rent increase that the landlord initially charged before 2015.[20] As explained above, applying Part F to this case would not have a retroactive effect. But even if the Court disagrees and finds Part F's application would operate retroactively, that would not end the inquiry. The retroactive application is nonetheless constitutional if it has a rational basis[21] (*Am. Economy Ins. Co.*, 30 NY3d at 157-58).

[20] The identified rent increase occurred between 2014 and 2015, and West Pierre Associates produced the records it claims support the increase.

[21] *Regina Metro.* already held that the Legislature intended that Part F apply retroactively (35 NY3d at 374).

Regina Metro. did not address, and could not have addressed, the constitutionality of Part F's application to the calculation of post-2019 rents. This issue did not determine the *Regina Metro.* appeals. Had the Court of Appeals addressed it, it would have issued an improper advisory opinion (*see Cordero v Transamerica Annuity Serv. Corp.*, 39 NY3d 399, 409 [2023] [citation omitted]; *Coleman v Daines*, 19 NY3d 1087, 1090 [2012] [citation omitted]). Further, *Regina Metro.*'s analysis centered on the destabilizing effect of retroactively increasing or creating liability regarding rents that had been collected far in the past (*e.g.*, 35 NY3d at 382). To the extent that the decision refers to effects that applying Part F to post-June 2019 rents may have, this is dicta, and does not dispose of the case before the Court.

If the application of Part F to this case does have one or more retroactive effects, any effect is different than the one that *Regina Metro.* subjected to a rational basis review. Therefore, the Court must independently analyze the effect to determine if it has a rational basis. To do otherwise would ignore the edict that "rational basis review is a paradigm of judicial restraint" (*Myers*, 30 NY3d at 16 [citations and internal quotation marks omitted]) and the separation of powers that undergirds our constitutional system (*see* NY Const art III, § 1; *Montgomery v Daniels*, 38 NY2d 41, 54-55 [1975]).

D. Part F's application to post-June 2019 rents has a rational basis.

To prevail on a substantive due process challenge, the challenger must demonstrate the statute's constitutional invalidity beyond a reasonable doubt (*Am. Economy Ins. Co.*, 30 NY3d at 149). There is a heavy presumption of validity (*Myers*, 30 NY3d at 15). "A challenged statute will survive rational basis review so long as it is 'rationally related to any conceivable legitimate State purpose'" (*id.*, quoting *People v Walker*, 81 NY2d 661, 668 [1993]). The Legislature need not explicitly state this purpose: courts may "'hypothesize the Legislature's motivation or possible legitimate purpose'" (*Myers*, 30 NY3d at 15, quoting *Affronti v Crosson*, 95 NY2d 713, 719 [2001]). Courts judge statutes with a retroactive effect by the same rational basis test, but the "conceivable legitimate State purpose" must relate to the retroactive effect (*Am. Economy Ins. Co.*, 30 NY3d at 158 [citation omitted]). Whether Part F operates prospectively or retroactively when applied to this and similarly situated cases, its application has a rational basis. The Court must give Part F full effect with respect to post-June 2019 claims.

Drawing on the Legislature's findings, *Regina Metro.* already "hypothesized" many of Part F's legitimate purposes: the overcharge calculation amendments serve to deter future overcharges, moderate future rents, and preserve the rent-stabilized housing stock (35 NY3d at 383-84; *see also Bldg. & Realty Inst. of Westchester & Putnam Ctys., Inc. v. New York*, 2021 US Dist. LEXIS 174535,

*101-06 [SD NY Sept. 14, 2021, No. 19-CV-11285 (KMK); No. 20-CV-634 (KMK)], affd 2024 U.S. App. LEXIS 5905 [2d Cir Mar. 12, 2024] [discussing rational basis for the HSTPA]). Moreover, Part F prevents tenants from experiencing future harm (in the form of unjustified rent increases or apartment deregulations) simply because of confusion created by high turnover rates, or a prior tenant's failure to file a complaint, or the tenant's unfamiliarity with the Rent Stabilization Laws' requirements (*see* Sponsor's Memo., Bill No. S4169). In other words, the application of Part F to post-June 2019 rents "return[s] apartments to rent stabilization and ensure[s] the propriety of rents collected in the future" (*Regina Metro.*, 35 NY3d at 384).

All of these purposes are undoubtedly legitimate. And they are rationally related to any retroactive effect caused by the elimination of the lookback rule and the expansion of DHCR and courts' authority to examine the rental history. Without these modifications, Part F's changes would have no effect on any wrongful rent increases (and associated deregulations) that took place prior to June 2015, as the fact that an improper rent increase had gone uncontested for four years would continue to shield it from challenge. Thus, Part F's amendments are

rationally related to the legitimate goal of ensuring that tenants are not paying "more than they rightfully should" under the statutory scheme.[22]

As applied to post-June 2019 rents, Part F does not punish landlords "more severely for past conduct they cannot change" (*Regina Metro.*, 35 NY3d at 384). Rather, Part F's application to post-June 2019 rents represents the latest recalibration of rent stabilization's "financial benefits and burdens. In an ultimate sense, the [overcharge] amendment[s] neither created a new right nor impaired an existing one, although the reallocation might be characterized verbally either way" (*Becker v Huss Co.*, 43 NY2d 527, 542 [1978] [citation omitted]).

Part F's application to post-June 2019 rents is constitutional, and the Court should apply it in this case.

IV. CONCLUSION

For the foregoing reasons, the Court should reverse the Appellate Term's decision and order affirming the dismissal of Ms. Harvey's rent overcharge counterclaim and defense and the denial of her motion for her discovery.

[22] Should the Court deem the record inadequate for a rational basis analysis, it should remand the proceeding for this purpose.

Dated: September 3, 2024
New York, NY

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 NYCRR) § 1250.8(j), the foregoing brief was prepared on a computer using a proportionally spaced typeface, specifically, Times New Roman 14 pt. for the body and Times New Roman 12 pt. for footnotes. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 6,380.

Evan Henley

AFFIRMATION OF SERVICE

I, Evan Henley, an attorney duly licensed to practice in the Courts of the State of New York, hereby affirm under the penalty of perjury that on September 27, 2024, I caused a true and correct hard copy of the foregoing brief to be sent via first class mail, postage pre-paid, to each of the following recipients:

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I affirm this 27th day of September 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

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