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COURT OF APPEALS
STATE OF NEW YORK

TAX EQUITY NOW NY LLC,

Appellant,

-against-

CITY OF NEW YORK,

Respondents.

NO. 1

20 Eagle Street
Albany, New York
January 9, 2024

Before:

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

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Amanda M. Oliver
Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon. The first
2 case on this afternoon's calendar is Case No. 1, Tax Equity
3 Now New York v. City of New York.

4 Counsel?

5 MR. BRESS: Chief Judge Wilson, may it please the
6 court, Richard Bress for Tax Equity Now New York. I'd like
7 to reserve seven minutes for rebuttal if I may.

8 CHIEF JUDGE WILSON: Yes.

9 MR. BRESS: Thank you. Section 305 of the Real
10 Property Tax Law effectuates a cardinal rule of tax law and
11 Article XVI of the Constitution by requiring that all
12 properties be assessed at a uniform percentage of their
13 market value.

14 CHIEF JUDGE WILSON: Are the two different,
15 Article XVI and Section 305, or are they the same
16 substantively?

17 MR. BRESS: We don't see any line between them,
18 Your Honor. We think that one effectuates the other. One
19 calls for the legislature to pass a law; the other is the
20 law.

21 We came here to court because the city for too
22 long has violated Section 305. Assessments within Class 1
23 are grossly uniform within boroughs and between boroughs,
24 and in Class 2, assessments for co-ops and condominiums are
25 - - - have - - - are assessed at a far lower rate than

1 rental properties.

2 JUDGE RIVERA: So can I just be clear on the
3 Class 2 argument. Are you complaining about the use of
4 rent stabilized buildings as opposed to - - - or rent
5 stabilized units as opposed to what it would otherwise rent
6 for if it wasn't rent stabilized? Or are you arguing that
7 the use of rentals is problematic, so it's that the
8 statute's the problem, that it should be sales that is the
9 comparison.

10 MR. BRESS: Your Honor, we're not arguing that
11 the requirement of 281, appropriately interpreted, is a
12 problem. So we're not contesting that condos and co-ops
13 need to be valued as if they - - - as if the individual co-
14 op or condo were a rental property. So the problem isn't
15 the statute. It's how the City is - - - is interpreting
16 and applying it.

17 JUDGE RIVERA: So then you have no State claim
18 with respect to that statute?

19 MR. BRESS: Your Honor, if this court were to
20 rule, and let me be clear, both with respect to 581 and to
21 1805, if this court were to agree with the City and the
22 First Department as to either of those, that they actually
23 require how the state is applying them, then we do argue
24 that there would be a claim against the State for a
25 violation of Article XVI.

1 But if this court were to agree with us that how
2 the City is applying them is not how it needs to apply them
3 - - -

4 JUDGE RIVERA: And where is that argument in the
5 initial brief? I'm - - - I'm getting to the State's claim
6 that - - -

7 MR. BRESS: That it's somehow dropped - - -

8 JUDGE RIVERA: - - - you have not properly
9 presented your arguments and therefore we can't address
10 them.

11 MR. BRESS: Well - - -

12 JUDGE RIVERA: With respect to the State - - -

13 MR. BRESS: - - - we have argued in the first
14 brief, Your Honor, that the - - - if 1805 or 581 meant what
15 they claim it means, the City claims it means, then they
16 would have a constitutional problem under Article XVI. And
17 as we've clarified in the reply brief, under this court's
18 decision in Cass, a claim that a state statute is
19 unconstitutional, or that the State has violated, the
20 legislature has somehow violated the Constitution, for that
21 sort of a claim, the state is an appropriate defendant.

22 JUDGE RIVERA: So if I'm understanding you
23 correctly, then your argument is if - - - if as a matter of
24 law, the City is correct, that it - - - it can do this
25 because it must - - - well, it can't do this - - - it must

1 apply the system it's adopted because of the state law.
 2 But then your argument is then that's the - - - that's the
 3 unconstitutionally of the - - - unconstitutionality of the
 4 state law, and that's why the state defendants are
 5 appropriate?

6 MR. BRESS: For both the - - -

7 JUDGE RIVERA: An alternative argument?

8 MR. BRESS: - - - for both Article XVI, Your
 9 Honor, and the other - - -

10 JUDGE RIVERA: Okay.

11 MR. BRESS: - - - federal constitutional claims
 12 and for the FHA. But if this court were to agree with us
 13 that it's the City - - -

14 JUDGE TROUTMAN: Then how is it applicable to the
 15 City? If it's the - - - how is it applicable to the City?

16 MR. BRESS: I'm not sure what the "it" is, Your
 17 Honor.

18 JUDGE TROUTMAN: With respect to if it's the - -
 19 - if - - - if it's the statute, itself, which was passed,
 20 and the City is faithfully following it, then - - -

21 MR. BRESS: Your Honor, we would agree that if -
 22 - - if the question is whether - - - is whether - - - the
 23 way the City - - - sorry. If the question is whether 305
 24 itself, mixed in with 581 and - - - and 1805 is
 25 unconstitutional, that that claim under Article XVI should

1 not be against the City. And we would - - - we would agree
2 that can be dismissed as against the City. It really would
3 be a State claim.

4 JUDGE RIVERA: So let me just ask you this. The
5 - - - the - - - the core of your argument with respect to
6 the system is the disparities, right, that the one group
7 carries more than its fair share than the other group, if
8 I'm understanding - - -

9 MR. BRESS: That it's being assessed at a higher
10 rate, right.

11 JUDGE RIVERA: Being assessed at a higher rate.
12 So what is the resolution of that?

13 MR. BRESS: So, Your Honor, we believe that the -
14 - - to be clear, we think the State is wrong - - - the City
15 is wrong - - -

16 JUDGE RIVERA: Um-hum.

17 MR. BRESS: - - - to point its fingers at the
18 State. We think both 1805 and 581 can and should be
19 interpreted in a way that gives full meaning to 305. And
20 it's just how the City is choosing to - - - to apply them.
21 But the problem - - -

22 JUDGE RIVERA: I know, but let me interrupt you
23 here - - -

24 MR. BRESS: - - - and so the resolution here - -
25 -

1 JUDGE RIVERA: Your - - - you - - - I didn't
2 think your position was that it has to be exactly equal
3 numbers. I thought your position was you recognize that
4 there might be some range, some play that's acceptable
5 under the statutes and the Constitution. If I'm wrong
6 about that, you'll correct me. So - - - but if I'm right
7 about that argument, that that is your argument, then sort
8 of how much of a disparity does the Constitution allow and
9 the statutes allow?

10 MR. BRESS: Thank you, Your Honor. So, I think
11 perfection is not something we can reach as humans in the
12 sense that if you have fifty assessors going out and
13 looking at fifty different buildings, they're all going to
14 subjectively be somewhat different. You're not going to
15 get true perfection. That we understand and, that, you
16 know, the State itself has accepted. There's a publication
17 from the ORPTS, called User's Manual for Maintaining
18 Uniformity, that discusses that very issue.

19 But we think it's a different case when the City
20 purposefully chooses to apply the caps, with a consequence,
21 the 1805 caps with a consequence of creating dis-
22 uniformity. It's like the equal protection clause - - -

23 CHIEF JUDGE WILSON: Is the - - - is the guts - -
24 -

25 MR. BRESS: - - - in that sense.



1 CHIEF JUDGE WILSON: - - - is the guts of your
2 argument about the caps, really? So, for example, I - - -
3 I read parts of the complaint to complain about things like
4 tax incentives.

5 MR. BRESS: Your Honor, our complaint for - - -
6 just to be clear, our complaint under 305 is really about -
7 - -

8 CHIEF JUDGE WILSON: Well, equal protection, too.
9 I mean, I - - -

10 MR. BRESS: Okay.

11 CHIEF JUDGE WILSON: - - - right?

12 MR. BRESS: So as to equal protection, it would
13 take in everything, Your Honor.

14 CHIEF JUDGE WILSON: And so that - - - that seems
15 to me a kind of unusual view of the - - - the taxing power
16 because, you know, tax breaks are frequently given to
17 people in all sorts of circumstances to promote various
18 social policies, and to say that's an equal protection
19 violation - - -

20 MR. BRESS: Your Honor - - -

21 CHIEF JUDGE WILSON: is novel.

22 MR. BRESS: Let me be clear. I think the main
23 thing is - - - is going to be the caps as to that argument.
24 So let me be very clear about that.

25 And if I may, just on the merits for a moment of

1 these, it's the City that's brought 581 and 1805 into this
2 by claiming that those absolve the City of failing to have
3 uniformity in its assessments. Our position is that they
4 don't. And here's why.

5 So let's start with 581, because we were talking
6 about it earlier. 581 does require the City to value a co-
7 op or condo by what it would be valued for as a rental.
8 What it doesn't require, and what the City is doing, is the
9 City values each co-op and condo by reference to a
10 particular apartment building that it finds, even if that
11 apartment building is not actually comparable, even if it's
12 a stripped down apartment building as opposed to a luxury
13 condo or co-op, and even if it's subject to rent control,
14 whereas under the ETPA, the condo or co-op would have
15 priced out of rent control years ago. That's really the
16 problem. It's how it's applying it. Because in truth - -
17 -

18 JUDGE SINGAS: But isn't that a legislative issue
19 and not a judicial one?

20 MR. BRESS: No, Your Honor, because the
21 legislature has already spoken. The legislature has said
22 in 305 - - - it is a legislative issue. But in 305, the
23 legislature has said, flat out, that all properties must be
24 assessed in a uniform percentage of market value. So
25 that's the base case. That's what you have to do.

1 JUDGE CANNATARO: Counsel, with respect to 1805,
2 I know you were back on apartments, but I just want to move
3 ahead for a second.

4 MR. BRESS: I'm happy to go wherever you'd like,
5 Your Honor.

6 JUDGE CANNATARO: So you say that there is a
7 legal way to apply the caps in 1805, but you - - - I know
8 that the statute itself does - - - it certainly doesn't
9 prescribe a methodology for it, and it doesn't prohibit the
10 methodology that the City is currently using.

11 So how do - - - how do we address that?

12 MR. BRESS: So, Your Honor, you know, I think
13 O'Shea, this court's decision in O'Shea, answers a lot of
14 those questions, because the court said in O'Shea - - - and
15 I'll get exactly to where you'd like to go. The court said
16 in O'Shea that nothing in 1805 prevents an assessing unit,
17 here, it would be the City, from complying with its mandate
18 that no property be assessed by more than six percent
19 increase over the prior year by reducing the fractional,
20 the target fractional, assessment rate, that that's a
21 perfectly fine thing for an assessing unit to do in order
22 to cure intraclass inequities. That's what this court
23 said.

24 CHIEF JUDGE WILSON: Right, I mean, in essence,
25 you're really saying Judge Smith's dissent, which says

1 there really is no limit because of the way that they can
2 reduce the - - - allows the City enough flexibility to
3 eliminate the equal protection or the 305 disparity?

4 MR. BRESS: I think what we're saying is that
5 this court's rejection of Judge Smith's dissent, and saying
6 that the City may simply reduce fractional assessment
7 ratios in order to achieve intraclass inequity, that
8 Section 305 then requires that they do exactly that. And
9 the reason is this, you've got to reconcile two statutes.
10 And when we think about reconciling, we think about is
11 there a way to comply with both? And the only way to
12 comply with both of those is to reduce the target
13 fractional assessment rate, complying with 1805, and that
14 then complies with 305.

15 If instead you do it the way the City is doing
16 it, you're complying with 1805 but at the cost of grossly
17 violating 305.

18 JUDGE CANNATARO: It occurs to me, though, that
19 that might be a temporary fix. It - - - it might - - - in
20 the initial, it might give you a smaller band of
21 disparities. But over time, these assessments are going to
22 go out of whack again. Do we continually - - -

23 MR. BRESS: Let me explain why not. Exactly,
24 Your Honor.

25 JUDGE CANNATARO: Okay. Go ahead.



1 MR. BRESS: So how Nassau has done it, for
2 example, is they've just looked at it each year as - - -
3 and as need be, in order to prevent the dis-uniformities,
4 have reduced it. It's now at 0.1. That's not a problem,
5 by the way, because, again, you're only reducing it as
6 compared to what it was before. So you can go from 0.1 to
7 0.06 to 0.02 to 0.00. And you can continue that forever.
8 It's just math, and there's no legal problem with doing it
9 that way. And it really is the only way to comply with
10 both.

11 Otherwise, you - - -

12 CHIEF JUDGE WILSON: O'Shea - - -

13 MR. BRESS: - - - really are getting 305.

14 CHIEF JUDGE WILSON: O'Shea, I take it, and - - -
15 and you would say that O'Shea doesn't protect an increase -
16 - - property owners from an increase in their taxes. It
17 protects them from an increase in their assessment.

18 MR. BRESS: That's exactly what this court held
19 in O'Shea, and that's correct, Your Honor.

20 CHIEF JUDGE WILSON: And that is what - - - what
21 drives your argument.

22 MR. BRESS: Right. And so whereas the City on
23 both of these accounts is pointing at state law as to both,
24 we're really just saying, no, no, no, both of these state
25 laws allow you to comply with 305, it's just how you're

1 applying them leads to a gross dis-uniformity, which is in
2 violation.

3 CHIEF JUDGE WILSON: So I don't - - - I don't
4 know what your federal equal protection argument gets you
5 over a state argument. One of the things that concerns me
6 about it, though, is Nordlinger, and I'd like you to
7 address that.

8 MR. BRESS: Of course, Your Honor.

9 So if this court agrees with our state statutory
10 argument, we think Nordlinger is not an issue for us,
11 because at that point, we think we're in Allegheny
12 Pittsburgh world, Your Honor. In Allegheny Pittsburgh,
13 there was a constitutional provision and a state law
14 provision in West Virginia that required - - -

15 CHIEF JUDGE WILSON: Yeah, but I'm really - - -
16 I'm really asking why Nordlinger doesn't put a crimp in
17 your federal argument.

18 MR. BRESS: That's what I'm getting at, Your
19 Honor.

20 CHIEF JUDGE WILSON: Okay.

21 MR. BRESS: Is that - - - I'll start with
22 Allegheny Pittsburgh, go to Nordlinger, and explain how
23 they work together.

24 CHIEF JUDGE WILSON: Okay.

25 MR. BRESS: So, in Allegheny Pittsburgh, which



1 was again, you know, the West Virginia case, the court held
2 that - - - that there was no conceivable rational reason
3 for what the assessor was doing because state law required
4 uniformity, and there wasn't a state policy to allow
5 something different from that.

6 Nordlinger came along and there wasn't any such
7 state law requiring uniformity. And they said that's just
8 a different case. And, in fact, they said Allegheny
9 Pittsburgh is the unusual case where because state law is
10 as clear as it is, there isn't a conceivable reason.

11 And we know that it means that because years
12 later, in 2012, in the Armour case, A-R-M-O-U-R, the
13 Supreme Court said that Allegheny Pittsburgh was the
14 unusual case where a clear statute had been clearly and
15 dramatically violated.

16 We think that's this exact case, Your Honor. So
17 we think there would be an equal - - - federal equal
18 protection case. We also agree with you, Your Honor, that
19 in a way, if we win on the statute, it doesn't matter very
20 much, because you get to the same result.

21 CHIEF JUDGE WILSON: So can I move you over to
22 your substantive due process claims for a minute? Because
23 I don't really understand what the protectable interest - -
24 - I assume it's substantive due process, although maybe I'm
25 wrong.

1 MR. BRESS: No, it's not procedural, Your Honor.
2 It is substantive. And it requires effectively, Your
3 Honor, as the courts have said, that we demonstrate that it
4 is so unreasonable and so arbitrary as to not be an
5 exercise of the taxing power at all, and to be something
6 else akin to confiscation.

7 CHIEF JUDGE WILSON: That seems a lot harder to
8 win than your equal protection or statutory - - -

9 MR. BRESS: We agree with that, Your Honor.

10 CHIEF JUDGE WILSON: - - - argument. Okay.

11 MR. BRESS: It's a lot harder to win.

12 CHIEF JUDGE WILSON: Okay.

13 JUDGE SINGAS: Can I drill down a little bit on
14 your equal - - -

15 JUDGE HALLIGAN: May I have a follow up - - -

16 JUDGE SINGAS: - - - on your equal protection
17 claims? What are - - - what are the makeup of the classes?
18 In other words, when you're looking at Class 1, are all
19 Class 1 homeowners in the same class? And where are we
20 talking about the impact of race, is that only in fair
21 housing or are you - - -

22 MR. BRESS: So that's only in fair housing, and
23 I'd love to discuss that when - - - when we get to it, Your
24 Honor. But as to this, it really is the homeowners who are
25 not protected by the cap system under 1805 if this court

1 were to say that the City is handling that correctly; that
2 would be the class, Your Honor.

3 Now, as to - - - just to be - - - finish that
4 thought on 581, there is no rational basis at all for
5 valuing a condo or co-op by reference to an - - - a rental
6 apartment that everybody agrees is completely different and
7 lacks everything that makes that co-op or condo valuable.
8 I don't even know how they would try to uphold that under
9 equal protection.

10 Now, as to the FHA, Your Honor - - -

11 JUDGE SINGAS: I'm sure they're going to tell us.

12 MR. BRESS: I'd - - - I'd be excited to hear,
13 Your Honor.

14 As to the FHA - - -

15 CHIEF JUDGE WILSON: Before you move to the FHA,
16 I think Judge Halligan had a question.

17 JUDGE HALLIGAN: I did. Thank you.

18 I just wanted to follow up on your exchange with
19 the Chief Judge and equal protection. If we disagree with
20 your reading of the statutes, does anything remain of your
21 equal protection claim, or are you then in Nordlinger as
22 opposed to Allegheny?

23 MR. BRESS: Your Honor, if you disagree with us
24 on the statute, then I think there's something left to the
25 equal protection claim because this differs from the - - -



1 from Proposition 13, that was at issue in Nordlinger - - -

2 JUDGE HALLIGAN: Um-hum.

3 MR. BRESS: - - - in the sense that this statute,
4 1805, doesn't reset once you sell a property. And there
5 really isn't a rational basis that we've heard of yet for
6 allowing a property in perpetuity to benefit from the caps.
7 That doesn't satisfy any of the reasons that the State or
8 City has put forward here for - - - for its rule, which is
9 that homeowners who have been in a house for a long time
10 shouldn't be subject to a sharp increase in assessments
11 that they can't afford. That absolutely can never be true
12 when you hold that cap steady, even when they sell it.

13 So there's still an equal protection problem
14 there, and we think there's still one with 581, Your Honor.
15 And I'm sorry I didn't see you over there. So if you were
16 trying to speak earlier, I - - - I apologize.

17 JUDGE HALLIGAN: No, I - - - I appreciate it.
18 Thank you.

19 MR. BRESS: You're quite welcome.

20 JUDGE RIVERA: Okay.

21 MR. BRESS: So I don't know if I'm running short
22 of time, Your Honors - - -

23 JUDGE RIVERA: You want to address the Fair
24 Housing Act?

25 MR. BRESS: Yeah, I'd like to. Thank you.



1 So there's a violation of the Fair Housing Act
 2 here, Your Honor, as to both Class 1 and - - - and Class 2,
 3 because in - - - as to Class 1, as we've alleged, the tax
 4 system, as it's - - - as it's run right now, has led to a
 5 situation where majority minority - - - homes in majority
 6 minority neighborhoods are being assessed an extra 3 - - -
 7 1.9 billion, or an extra 376,000,000 in taxes, as compared
 8 to if they were a majority white neighborhood. Based on
 9 how these work out, it is a disparate impact that is a
 10 strong one.

11 And as to rental properties, they are being - - -
 12 they are being subject because of how the City is running
 13 this to an effective tax rate that's seven times as high as
 14 for co-ops and condos. And rental properties, unlike co-
 15 ops and condos, are predominantly - - - the residents are
 16 predominantly of color.

17 Now - - -

18 JUDGE TROUTMAN: And how is it, with respect to
 19 the stage of the proceedings, are we to look at all of
 20 these?

21 MR. BRESS: Thank you, Your Honor. So the - - -
 22 the court below looked at this and really applied a
 23 heightened pleading standard. We think that that's just a
 24 mistake. And every court that's looked at it has said
 25 that's the wrong way to think about it. It is true as a



1 substantive element that there is a robust causation that's
2 required substantively. But in pleading, all we've got to
3 do is what you usually do in pleading, which is we're
4 giving the benefit of, you know, all reasonable inferences,
5 et cetera. And the question is, have we plausibly alleged
6 facts that would demonstrate here the strong causality
7 that's necessary.

8 JUDGE RIVERA: Well, what - - - why aren't - - -
9 why aren't they right? That's me over here. Why aren't
10 they right - - - that's fine - - - when they respond, even
11 if it was a factor, it's - - - it's one of many, and it may
12 not affect any particular homeowner or neighborhood or
13 community at any - - - in any particular sense, and,
14 therefore, you can't satisfy - - - even - - - even
15 accepting all your factual assertions as true, you won't be
16 able to satisfy the pleading requirement?

17 MR. BRESS: So, Your Honor - - -

18 JUDGE RIVERA: And by the way, I wanted to ask
19 you - - -

20 MR. BRESS: - - - we have shown that it applies
21 to particular neighborhoods. So let me be clear. I mean,
22 if you looked at, you know, Canarsie, for example, versus
23 Park Slope, and you've got a probably a multiple of four in
24 terms of what the effective tax rate is there, and one is
25 majority minority and one is majority white. We've shown,

1 we've got statistics really coming off the pages in our
2 brief demonstrating that these - - - that the majority
3 minority neighborhoods are being assessed taxes at a far
4 greater rate - - -

5 JUDGE RIVERA: Um-hum.

6 MR. BRESS: - - - properties in those
7 neighborhoods than properties elsewhere. Where the City is
8 wrong, and Robinson was wrong, is in arguing that, well,
9 there's white folks in these areas, too. And because
10 they're also going to have the higher tax rates, therefore,
11 we don't have a claim. This is a disparate impact claim.
12 It's not an intentional discrimination claim. And all
13 we've got to show is that there is a disparate impact on
14 minority homeowners and renters, not that there's an
15 exclusive impact.

16 JUDGE RIVERA: Yeah, I - - - I thought their
17 argument, you know, correct me, of course, once they get -
18 - - I thought their argument, at least in part, was that -
19 - - that you can't really make this argument for the robust
20 causality because there's - - - there's too many factors
21 that go into these choices about purchasing a home, what
22 neighborhood to live in, that you just - - - it gets so
23 thin that you cannot meet the - - -

24 MR. BRESS: And - - - and, Your Honor, I think
25 that goes to, and I'm - - - I'm glad you asked it - - -

1 JUDGE RIVERA: Yeah.

2 MR. BRESS: - - - it goes to causation, and is
3 our causation tight enough, if you will. We believe it is.
4 So as to homeowners, for example, higher property taxes add
5 to the burden of a homeowner. And we have alleged, and we
6 think quite credibly, that this contributes to the higher
7 rate that exists in these communities of foreclosures.
8 Now, yes, of course there's other factors, but we don't
9 think we have to demonstrate it's the only thing; it's - -
10 - if it's the straw that breaks the camel's back, and we're
11 prepared to prove that, then we think we've alleged enough
12 as to - - -

13 JUDGE RIVERA: So - - - so one of many may work.
14 Let me just ask you one thing, because your - - -

15 MR. BRESS: Yes.

16 JUDGE RIVERA: - - - red light is on. Because
17 you said the - - - the courts applied a heightened pleading
18 standard, but you don't mean they're applying like an Iqbal
19 heightened pleading standard.

20 MR. BRESS: So Iqbal, we think is basically fine,
21 right? I mean, if we just have to prove that our claim is
22 plausible - - -

23 JUDGE RIVERA: Um-hum.

24 MR. BRESS: - - - you know, and have to - - - not
25 prove - - - have to allege facts demonstrating a plausible

1 claim. We think that's fine.

2 JUDGE RIVERA: Um-hum.

3 MR. BRESS: What the court below seemed to think
4 is there was something more necessary and we don't think
5 so.

6 And, briefly, as to renters, the City has
7 admitted that the higher property taxes imposed on rental
8 buildings - - -

9 JUDGE RIVERA: Um-hum.

10 MR. BRESS: - - - discourage developers from
11 producing rental buildings. And we're talking about a city
12 that has a - - - a - - - you know, a housing crisis. So we
13 think we've alleged more than necessary to show that these
14 policies have rendered housing unavailable disparately to
15 minorities.

16 Thank you.

17 CHIEF JUDGE WILSON: Thank you.

18 JUDGE HALLIGAN: May I just follow up, Chief,
19 briefly on - - -

20 CHIEF JUDGE WILSON: Yes, of course.

21 JUDGE HALLIGAN: - - - that answer?

22 CHIEF JUDGE WILSON: Of course.

23 JUDGE HALLIGAN: Is there a different challenge
24 that you'd face meeting the causality standard with respect
25 to showing perpetuation of segregation as opposed to that -

1 - - that there is a racially discriminatory impact in
2 either Class 1 or 2?

3 MR. BRESS: Your Honor, my understanding of the
4 law here is that there's two ways of showing, and you can
5 show either of them, discriminatory effect; one is by
6 showing a disparate impact and one is by showing
7 perpetuation of segregation. We think we've done both.

8 But as far as perpetuation of segregation goes,
9 we think that we've demonstrated most clearly by our
10 allegation that the heightened taxes in these majority
11 minority communities discourage whites from moving into
12 those communities, make it harder for people to make a
13 decision to move into those communities. And perpetuation
14 of segregation goes both ways.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. BRESS: Thank you.

17 MR. BURKETT: Good afternoon. May it please the
18 court, Edan Burkett for the City of New York.

19 Your Honors, the City respectfully requests that
20 the decision of the Appellate Division First Department be
21 affirmed. It correctly held that there were no legally
22 actionable claims in the complaint and that the - - - the -
23 - - the gist of the complaint, the gravamen of the
24 complaint, is a disagreement with the duly enacted statutes
25 by the legislature, which have been faithfully enforced by

1 the City.

2 JUDGE RIVERA: Well, counsel, if I may interrupt
3 you. I think you're correct in this sense that, yes, if
4 they say, you know, we have a better way of doing this - -
5 - right, they could say that? We have a better way of
6 doing this. That might not be enough. But they're - - -
7 they're really saying there's a better way of doing this
8 that this court has perhaps pointed to and said is
9 permissible, and the reason that you have to do something
10 else, whatever you choose, it may not be their - - - what
11 they want, is because of the result, the inequalities, and
12 that - - - that that is what the City - - - the City - - -
13 yes, the City and State can choose to do whatever they want
14 to do, but they can't end up with these inequalities, that
15 that's what's prohibited by the Constitution and these
16 statutes.

17 MR. BURKETT: Well, with - - - with respect to
18 the idea of the outcomes - - -

19 JUDGE RIVERA: Um-hum.

20 MR. BURKETT: - - - that there - - - there is no
21 constitutionally protected right that they've identified
22 that - - - that taxing - - - a taxing system, especially
23 one as complex as the one in the - - - in the State and - -
24 - and - - - and in the City of New York, that there should
25 be equality of outcomes, that - - - that - - -

1 JUDGE RIVERA: Well, let me - - - let me ask you
 2 this on that. So let's say you've got a house in the South
 3 Bronx, that's market value, and - - - and no one disagrees
 4 about the market value, let's just take the market value.
 5 I'll just make up a number, 500,000. And then there's one
 6 in, let's say, Chelsea, also at 500,000. That they can end
 7 up paying different taxes before caps, before abatements,
 8 before all of that, just that number that you come up with;
 9 how - - - how is that permissible?

10 MR. BURKETT: Before the caps?

11 JUDGE RIVERA: Yes. When you're figuring out the
 12 - - - and I forgot the term, I'm sorry, the - - - the
 13 taxable amount, when you're doing your fractional share,
 14 and you come up with a - - - with a number, that's the
 15 assessment.

16 MR. BURKETT: Well, maybe I'll - - - I'll - - -
 17 I'll just sort of provide a little - - - a little sort of
 18 overview. In terms - - -

19 JUDGE RIVERA: And forgive my inability to,
 20 perhaps - - -

21 MR. BURKETT: No - - -

22 JUDGE RIVERA: - - - understand this very complex
 23 - - - - -

24 MR. BURKETT: It's - - -

25 JUDGE RIVERA: - - - taxing system.



1 MR. BURKETT: It - - - it is very complex. So -
2 - - so the first step is the determination of the market
3 value. Now that - - - there is some limitations placed
4 upon the market value, for example, the assessor is not
5 permitted to consider the conversion potential, some sort
6 of, you know, redevelopment potential, it's supposed to be
7 assessment of current use and occupancy under RPTL 302.
8 But - - - and - - - and depending on different properties
9 have - - - are - - - are typically valued in different
10 forms, Class 1 properties, mostly, one to three family.
11 They're typically valued based on sales, whereas most other
12 properties are valued based on the income capitalization,
13 sort of what the net income with a capitalization rate. So
14 - - -

15 JUDGE RIVERA: Well, that's Class 2, right?

16 MR. BURKETT: That's for Class 2.

17 JUDGE RIVERA: And sales is Class 1. You don't
18 do that Class 2 - - - or at least the condos and co-op, you
19 don't do them by sales.

20 MR. BURKETT: Correct.

21 JUDGE RIVERA: That's part of the issue.

22 MR. BURKETT: Well, and - - - and it - - - and it
23 was - - - it was nice to hear counsel acknowledge that
24 sales are not permitted in the valuation of co-ops or
25 condominiums because there's a lot of references to sales

1 in the complaint.

2 JUDGE RIVERA: And I - - - I guess he could
3 correct that. I didn't hear him say that sales are not
4 permitted. I thought he said it's not required.

5 MR. BURKETT: Okay. Well, I - - -

6 JUDGE RIVERA: But you could do a rental
7 comparison.

8 MR. BURKETT: We could - - - we could - - - you
9 could ask counsel on - - - on

10 JUDGE RIVERA: We'll clarify.

11 MR. BURKETT: - - - on rebuttal.

12 But - - - but it is true that the - - - and it -
13 - - and it's been held multiple times by this court,
14 especially in the D.S. Alamo case, as well as in the
15 Greentree at Lynbrook case. Those cases, which also cited
16 other precedents, especially notable, is in the - - - in
17 the Greentree matter, this court cited with approval the
18 Second Department's decision in South - - - South Bay
19 Development, which recounted a long, detailed history of
20 co-op and condominium valuation, and confirmed, and - - -
21 and this court agreed that the legislature, in enacting
22 Real Property 339-y, which applies - - - it's under the
23 Condominium Act, as well as RPTL 581, reaffirmed that
24 residential co-ops and condominiums are to be valued as if
25 they were apartment houses with rent paying tenants - - -

1 CHIEF JUDGE WILSON: Could I - - - could I move
2 you back to what I think was Judge Rivera's question. And
3 I understand that there are caveats like - - - that can
4 affect things, but assume that you've got two houses that
5 are identical in all the terms that matter, so their market
6 values are identical and their - - - one's located in
7 Chelsea and one's located in the South Bronx, and they're
8 Class 1. We're just dealing with Class 1. Do you read
9 Foss to say first that both of those must be assessed at
10 their actual true market value?

11 MR. BURKETT: Well, I hesitate to - - - to say
12 that Foss would - - -

13 CHIEF JUDGE WILSON: All right. The statute, the
14 Constitution - - -

15 MR. BURKETT: Right.

16 CHIEF JUDGE WILSON: - - - and - - - anything you
17 like.

18 MR. BURKETT: Okay. Well, so Foss is very, very
19 different, I think, in - - - in terms of that it - - - it -
20 - -

21 CHIEF JUDGE WILSON: Let them - - - sorry. Let
22 me not complicate - - -

23 MR. BURKETT: Okay.

24 CHIEF JUDGE WILSON: - - - it with Foss. Must
25 those be now valued at their true market value?

1 MR. BURKETT: The - - - the - - - the requirement
2 is that - - - that properties be valued at - - - at full
3 value - - -

4 CHIEF JUDGE WILSON: And they must be multiplied
5 by the identical assessment percentage?

6 MR. BURKETT: Correct. That - - - that would be
7 the - - - the - - - the - - - would typically referred to
8 as the assessment ratio.

9 CHIEF JUDGE WILSON: Right. And so the - - - the
10 assessment ratio times the market value for those two
11 properties should produce identical numbers?

12 MR. BURKETT: If they had - - - if they had
13 identical - - - identical market values, yes.

14 CHIEF JUDGE WILSON: Identical market values,
15 right. So but they - - - in Judge Rivera's hypothetical,
16 and I think in the pleadings, they don't. And there's, I
17 think, evidence from the City that like properties don't.

18 MR. BURKETT: Well - - -

19 CHIEF JUDGE WILSON: And as the plaintiffs
20 allege, that's a function largely of the caps - - -

21 MR. BURKETT: Yes.

22 CHIEF JUDGE WILSON: - - - would you agree with
23 that?

24 MR. BURKETT: Well, so - - - so - - - so there's
25 - - - there's a chain of - - - of operations. There's an



1 order of operations. So there's the market value. Then
2 there's the level of assessment. This is six percent for -
3 - - for Class 1 since for - - - for the past fifteen - - -
4 fifteen years or so, forty-five percent for the other three
5 classes. So you have the market value, you have the level
6 of assessment. This is on all of the notice of property
7 values, all the tax bills. There's no dispute. I don't
8 think that - - - that the City is somehow assessing certain
9 properties at - - - at seven percent or five percent on
10 that level.

11 And then you have the application of assessment
12 caps - - -

13 CHIEF JUDGE WILSON: Um-hum.

14 MR. BURKETT: - - - and exemptions and abatements
15 and any number of things.

16 And then you have your - - - your final tax
17 liability. And if you divide that tax liability by the
18 market value, you have the metric that is so frequent.

19 JUDGE GARCIA: But can I - - - can I try
20 something?

21 JUDGE RIVERA: Do you understand this?

22 JUDGE GARCIA: I think Judge Rivera's initial
23 hypothetical, unless I'm wrong, was absent the cap effect,
24 right? So I think the Chief Judge is asking you, okay,
25 you're alleging caps, right? They're alleging certain caps

1 will affect the numbers of the ultimate tax. But the
2 assessment, the first part of what you're talking about up
3 to you get a tax bill at X, those should be the same for
4 those two properties - - -

5 MR. BURKETT: At the level - - -

6 JUDGE GARCIA: - - - before the caps are applied.

7 MR. BURKETT: Yes, they - - - they - - - and I
8 don't think there's an argument that they aren't. They - -
9 - they're arguing - - - the - - - the appellant's argument
10 is that they're looking at, after the caps, which of course
11 they're going to be different because property values
12 appreciate differently in different parts of the city. And
13 so - - -

14 CHIEF JUDGE WILSON: Right. And so their
15 argument is, and as you said, the assessment ratio is now
16 six percent, that if you reduce the assessment ratio to 0.6
17 percent, the caps wouldn't apply. Do you agree, just as a
18 factual matter, that if you were to do that, that would be
19 true, caps wouldn't apply?

20 MR. BURKETT: If - - - if you reduced it by that
21 much, I - - - I would assume so.

22 CHIEF JUDGE WILSON: Okay. Is there anything in
23 the law that prevents you from doing that?

24 MR. BURKETT: Well, it - - - I - - - I think that
25 - - - that appellants are right, that this court, in

1 O'Shea, found that it - - - it was - - - that the level of
2 assessment is a discretionary determination. And under the
3 plain language of 1805(1), it's the assessed value, not the
4 market value, that counts. And it certainly - - - you
5 could essentially frustrate the - - - the spirit, at least,
6 of 1805 by adjusting down the assessment ratio.

7 CHIEF JUDGE WILSON: Well, that - - - when you
8 say frustrate the spirit of it, that assumes a different
9 outcome in O'Shea, that is if - - - if the court in O'Shea,
10 and you could disagree with me, if you - - - if you think
11 there's a reason to do that, or even if you think O'Shea
12 was wrongly decided, and we should reverse it, but in
13 saying that the City is free to reduce the assessment
14 ratio, or any municipality is free to reduce the assessment
15 ratio, as much as it wants, that only the assessment is
16 protected, not the ultimate tax, that the decision - - -
17 that decision, in your words, I guess, frustrates the
18 spirit of what you think the legislature - - - legislation
19 was after?

20 MR. BURKETT: Yeah, it was - - - one of the very
21 first things, it - - - it - - - clearly going back to the -
22 - - the - - - the passage of 19 - - - of the 1981 package,
23 the legislature was obviously at - - - this court correctly
24 found that the - - - the legislature wanted to prevent a -
25 - - a dramatic shift from - - - from commercial properties

1 onto residential properties. But the - - - the legislature
2 also in enacting the assessment caps, specifically said
3 that they wanted to protect against economic dislocation
4 and to provide stability against dramatic assessment
5 increases.

6 CHIEF JUDGE WILSON: And those arguments were
7 made by the losing side in O'Shea about the legislative
8 history and the spirit of the legislation and so on.

9 MR. BURKETT: Yes. And - - - and I think that
10 the - - - the court's analysis of O'Shea seemed to - - - to
11 depend - - - and most of the decision was about the
12 peculiarities of the situation in Nassau County at the
13 time. So if I had to hazard a guess as to why the decision
14 came out as it did, it hinged primarily on the fact that
15 the assessing system in Nassau County had so - - - had - -
16 - the - - - the assessed value - - - or the implied market
17 values based on the assessed values had gone so far out of
18 whack from the actual market values, and that the - - -
19 pursuant to a - - - a stipulation, Nassau County agreed
20 that they had to do a full market revaluation of - - - of
21 all the properties and in order to equalize the - - - the
22 disparities that had arisen from the fact that they weren't
23 doing annual market values for seventy years, they were
24 even, as of the nineties, they were using 1930s era
25 construction costs and 1960s era land values. So

1 properties were so undervalued that in order to revalue
2 them, the assessed - - - the market - - - the - - - the new
3 market values would be so higher, so much higher, that if
4 the assessed value caps under 1805 were to apply, it would
5 take decades, hundreds of years in order for - - - for the
6 properties to reach some sort of alignment.

7 So even - - - even if - - - even if it violated
8 the spirit of the law to allow the assessor to use the
9 lowering of the assessment ratio to, you know, that - - -
10 that people's actual taxes could double or triple, which
11 was - - - which was a concern that the dissent raised, that
12 it - - - it was technically in compliant - - - in
13 compliance with the - - - with the letter of the law.

14 But I think that the - - - the problem, which I
15 think Judge Cannataro pointed out, was that lowering the
16 assessment ratio, isn't that just a temporary fix. And
17 that's exactly what - - - some of the experts that - - -
18 that appellants point to, especially a man named George
19 Sweeting at the - - - he was at the Independent Budget
20 Office, and they cite extensively from a 2006 report. He
21 in - - -

22 JUDGE RIVERA: Well, let me - - - let me - - -
23 let me ask you this. Is it the City's view that what it
24 does in - - - in this system, the way you have interpreted
25 the statutes, the constitutional requirement, and the way

1 you've - - - what the system you've adopted and the way you
2 apply it, does not result - - - that's not what results in
3 the disparities.

4 MR. BURKETT: The - - - the - - -

5 JUDGE RIVERA: Is that your position, yes or no?

6 MR. BURKETT: Well, I - - - I - - - I think that
7 the - - - the disparities come from the fact that this is
8 an ad valorem tax system. This - - - the - - - the
9 assessments are downstream of market values, and market
10 values are not equal. And the - - - the fact that property
11 - - - that property tax burdens are not the same is - - -
12 is not a - - - is not a - - -

13 JUDGE RIVERA: No, I'm - - - I'm sorry. I'm
14 going back to my hypothetical, when the market value is the
15 same. I don't think anyone's talking about when someone's
16 got property that's worth a very different number from
17 another piece of property and trying to compare those.
18 Property that's got the same market value.

19 MR. BURKETT: Well, it - - - I think it - - - it
20 all depends - - -

21 JUDGE RIVERA: Is it - - - I - - - I understood -
22 - - so many comments by city officials that you - - - you
23 all conceded that these disparities exist because of the
24 way you apply the system. It's just you believe that the
25 law either mandates it, permits it, it's not

1 unconstitutional. But so I'm just trying to clarify that.

2 MR. BURKETT: I - - - I think that there - - -
3 there is some - - - I - - - I certainly think that - - -
4 that most people would agree that the system as - - - at -
5 - - you know, the - - - that the law is really the - - - if
6 there is a disparity, it's at the level of the policies of
7 the legislature, not - - -

8 JUDGE TROUTMAN: So it's not your application?

9 MR. BURKETT: It's not due to some sort of
10 arbitrary application. And - - - and - - - I - - - I see
11 that my time is - - - I don't - - - and I want to sort of
12 touch on some of the other questions including - - -

13 JUDGE CANNATARO: Before you do, counsel, I'm
14 sorry. I just - - - I'm having a little bit of trouble
15 still wrapping my head around this subversion of the intent
16 of 1805 argument that you're making. And is it - - - is it
17 your position that the application of caps is the
18 legislatively mandated way to address these disparities as
19 opposed to some other method, such as greatly reducing the
20 fractional assessment?

21 MR. BURKETT: Well, that was the policy that the
22 legislature chose to - - - to prevent this economic
23 dislocation and to create a stability in the tax - - - in
24 the tax bills really.

25 JUDGE CANNATARO: Might there not be a better way

1 that - - - that's not prohibited under the statute?

2 MR. BURKETT: Well, I don't - - - I don't believe
3 it is prohibited. And I - - - and I don't agree with
4 appellant's argument that RPTL 305 somehow requires some
5 equality of outcome. The - - - RPTL 305, the - - - it - -
6 - it legalized the existing - - - then existing assessment
7 practices, which had been the subject of heated discussion
8 throughout the 1970s, including Nassau County - - -

9 JUDGE RIVERA: I know your light is red, but I
10 just want to get back to - - - I don't think they've argued
11 equality, but of course they can challenge that, or say
12 otherwise on rebuttal. But I - - - I am a little bit
13 struck by part of what I understand to be your argument,
14 and you'll correct me again if I'm - - - if I'm
15 misunderstanding you. Your argument being that you can
16 have the types of dis - - - inequalities, these
17 disparities, that they have comprehensively described, and
18 that public officials have referred to in reports and
19 studies and - - - and in the media, and that there's
20 nothing wrong with that because it's an ad valorem system.

21 And I - - - I don't really understand that
22 particular argument because I understand that to mean that
23 you can favor one group on the backs of another. I don't
24 think the Constitution or the statutes permit that.

25 MR. BURKETT: Well, I mean, if - - - if the

1 argument is that it - - - it violates equal protection, I
2 think that it's a - - - it's a - - - it's not a good
3 argument, especially because of Nordlinger which said that,
4 you know, and - - - and this - - -

5 JUDGE RIVERA: Well, I'm - - - I'm even - - - I'm
6 not even on the - - - on the equal protection argument.
7 I'm on the reading of these statutes as to whether or not
8 that could be an acceptable outcome under the statutes.

9 MR. BURKETT: I - - - I - - -

10 JUDGE RIVERA: Yes, you want to - - - of course,
11 it's a legislative choice to protect the particular group
12 here, we're talking about Class 1 homeowners. The question
13 is, can you then shift that tax burden to another group so
14 that they're carrying more than their fair share?

15 MR. BURKETT: I - - - I - - -

16 JUDGE RIVERA: I thought that was at the core of
17 their argument. I may have misunderstood them.

18 MR. BURKETT: I mean, I - - - I think that that
19 was initially something that came - - - the class share
20 system, for example, under - - -

21 JUDGE RIVERA: Yeah.

22 MR. BURKETT: - - - 1803. That - - - that seems
23 to have been de-emphasized in their briefing before this
24 court. I think that the - - - the core argument involves
25 305, 1805, and 581. I don't - - - I don't - - -

1 CHIEF JUDGE WILSON: And - - - and the FHA
2 claims, which if you would - - -

3 MR. BURKETT: And the - - -

4 CHIEF JUDGE WILSON: - - - if you would take a
5 minute or two, even though your time is up, to address
6 those, that would be great.

7 MR. BURKETT: Yeah. I - - - I wanted to briefly
8 mention that. I think it's very important to note that
9 what's notable about the FHA claim is that they cite
10 everything except for FHA claims against a taxing system.
11 That is a truly novel claim. And they can only come up
12 with two trial court decisions. They can't find a single
13 appellate level decision that's found that a taxing system
14 is subject - - -

15 JUDGE RIVERA: Well, then if - - - if it's novel,
16 unless you're going to argue it's completely foreclosed,
17 why - - - why don't they survive a motion to dismiss? It
18 doesn't mean they'll eventually win or persuade anyone on
19 the - - - what you're calling a novel position.

20 MR. BURKETT: Well, it's because I think that - -
21 - that - - - that, first of all, that the appellate level
22 precedents such as Robinson and Housing Justice Campaign
23 are important to recognize. But I think that you also have
24 to look at the - - - the purpose of the FHA, how it was
25 drafted, how it's been applied for the past sixty years,

1 that it's - - - it's quite significant that there's not a
2 single - - - they can only point to two lower court
3 decisions that are really absent - - - that are really
4 notable for the absence of any persuasive logic as to why
5 it would apply to a taxing system, because, again, taxes
6 are against property.

7 JUDGE RIVERA: It seems to me that would be one
8 of the most effective ways to argue the statutory
9 protection, because the statute, of course, is concerned
10 not just with individual discrimination, of course, but its
11 broader impact and is meant to be interpreted broadly.

12 MR. BURKETT: So it - - - the - - - the - - -
13 there - - - there are numerous problems. Number one, is
14 sort of the actual language of the statute. But also going
15 back to the Inclusive Communities case where the Supreme
16 Court not only said there had to be a robust causality, but
17 that the claim at the pleading stage, and that it should be
18 resolved at the soonest possible opportunity, had to - - -
19 had to connect again with robust causality to a specific
20 policy that has some sort of arbitrary, invidious
21 discrimination that could be remedied by a court order.

22 Here, what we have is we have a - - - we have
23 duly - - - duly passed state statutes, which again, the
24 legislature has - - - has almost nearly unconstrained
25 discretion in - - - in drawing up - - - in the lines of

1 taxation, and that the - - - the appellants simply haven't
 2 pointed to a specific policy, some sort of aberrational
 3 policy, which again, is what - - - which was - - - is
 4 significant. Really what they're pointing to is the - - -
 5 the sort of the outcome of a taxing system that's being
 6 enforced in compliance. They haven't pointed to any sort
 7 of aberrational enforcement policy, or - - - or some policy
 8 that the City has - - - has created that - - - and the
 9 First Department had - - - had a very good sort of analysis
 10 that they haven't pled concrete facts tying to any specific
 11 policy, and - - -

12 CHIEF JUDGE WILSON: So you think the pleading,
 13 as regards the application of a caps, is not specific
 14 enough to demonstrate - - - to - - - at the pleading stage
 15 to establish causality?

16 MR. BURKETT: No, I don't think so. Because it -
 17 - - because, again, it's - - - it's broadly applied. It's
 18 - - - it's - - - it's not some sort of discretionary
 19 policy. It's - - - it's simply the mechanical application
 20 of - - - of a policy that the legislature certainly has - -
 21 - has authority to create assessment caps.

22 JUDGE RIVERA: Well, it has authority, no
 23 disagreement there, to make those kinds of legislative
 24 choices.

25 But the FHA does place limits on how far you can

1 go. You can't do it in a way that has the kinds of
2 disparate impacts that they're alleging. You may - - - you
3 may say that there's - - -

4 MR. BURKETT: Well - - -

5 JUDGE RIVERA: - - - right? Your argument is
6 they haven't established causation. Can you address - - -
7 I know - - -

8 MR. BURKETT: Well, I - - -

9 JUDGE RIVERA: If the Chief Judge will allow me?

10 CHIEF JUDGE WILSON: Of course.

11 JUDGE RIVERA: If you - - - if you could address,
12 briefly, because you got your red light, this question of
13 how significant this factor must be if you're talking about
14 multiple factors that affect someone's decision to buy or
15 rent in a particular neighborhood. Because I understood
16 that - - - that was in part your position, that you can't
17 really disaggregate this particular factor, the - - - the
18 tax burden - - -

19 MR. BURKETT: Yes, exactly.

20 JUDGE RIVERA: - - - right, from all the other
21 factors that go into making these kinds of perhaps very
22 personal decisions.

23 MR. BURKETT: Yeah, I think the First Department
24 adequately addressed this, that - - - that people live in
25 different parts of the city for any number of reasons. And

1 to pin it on the tax system is without any - - - anything
2 further. It just simply is - - - is too simple.

3 And I think that the - - - the other point that
4 was - - - was raised by the First Department was that the -
5 - - one of the - - - one of the themes of the complaint is
6 that - - - is drawing these - - - these sort of simplistic
7 almost cartoonish examples of, you know, majority minority
8 neighborhoods being sort of over assessed, allegedly, and
9 then majority, super majority, non-minority neighborhoods.
10 But the - - - the sort of the end result is that they want
11 certain - - - these neighborhoods that they want to
12 integrate, allegedly, they want their taxes to go up, which
13 seems like an odd way of - - - of, you know, if - - - if
14 there was this issue of segregation, that somehow the tax
15 burdens were - - - was like the definitive factor or some -
16 - - some overriding factor just like everything else.

17 JUDGE RIVERA: Well, it - - - it just - - - I
18 thought in part that argument was it - - - it just means
19 that the tax burden is equalized across neighborhoods and
20 no neighborhood is - - - or home is benefited or favored
21 over another. And that's how you even that playing field.

22 MR. BURKETT: Well, I mean, I - - - I think that
23 they can - - - they can claim that. But it also, I think,
24 in terms of like the pleading standard, they have to - - -
25 they - - - they not only can't make legally conclusory

1 claims, but they also can't make facts that are flatly
2 contradicted by the record, and the record that they cite,
3 including this 2006 IBO report, I'll note that the - - -
4 the - - - it was page 31 in that report. It has a nice
5 chart that shows that since 1984 to 2007, which is the date
6 of the report, that the - - - the effective taxes in
7 majority minority neighborhoods such as Brownsville, Bed-
8 Stuy, Crown Heights, Morrisania, went from having the
9 highest tax rates in 1984 to the very lowest in - - - in
10 the - - - in the city in 2007, which again like their
11 theory of gentrification, is backwards. Their theory of
12 gentrification is that nonminority neighborhoods are
13 appreciating faster, when everyone kind of knows that over
14 the past forty years that hasn't been the case, and that
15 certain areas that are primarily minority have appreciated
16 tremendously.

17 And the idea that those residents who have had
18 the benefit of the caps all these years are somehow being
19 harmed by the caps is just simply - - - it's - - - it's
20 just contradicted by the record, and as well as the - - -
21 in the record itself, at page 207, there was a testimony of
22 George - - -

23 JUDGE TROUTMAN: But again you're looking at
24 pleadings at this stage.

25 JUDGE CANNATARO: Yeah, sounds like a summary

1 judgment motion you're arguing right now.

2 MR. BURKETT: Well, but I - - - but I think that
3 the pleading standard, I think, is also that if they're - -
4 - if they're making claims that are contradicted by their
5 own - - - their own statement, their own records that
6 they're integrating into the complaint, and they even annex
7 as Exhibit E to the complaint, it's page 207 of the record,
8 the testimony of George Sweeting, which basically, if you
9 read his - - - his - - - they offer it in support of their
10 claims. But if you read it, it essentially says this is
11 all the legislature, this has nothing to do with, like, the
12 City's aberrational enforcement, that co-op and condos are
13 required to be valued based on sales, that - - - and that -
14 - - that the - - - the - - - lowering the assessment ratio
15 would have almost no effect. And that in the IBO report,
16 perhaps, not in the - - - in the exhibit, the same author
17 said - - - again, said that essentially the effective tax
18 rates in majority minority neighborhoods has - - - have
19 went from being the highest in the city to the lowest.

20 CHIEF JUDGE WILSON: Thank you, counsel.

21 MR. BURKETT: Thank you.

22 MR. GRUBE: May it please the court, Mark Grube,
23 for the State of New York and the New York State Office of
24 Real Property Tax Services.

25 The State defendants are not proper parties in



1 this action because the legislature has given authority
2 over assessment decisions to local assessing units acting
3 in accordance with local needs within the parameters of
4 state law. Plaintiff does not identify any injunctive
5 relief against the State, does not identify any involvement
6 by the State, does not even refer - - -

7 JUDGE RIVERA: What about his - - - his
8 alternative argument that if - - - if we were to agree with
9 the City that this is what the law mandates, requires, that
10 that - - - his argument here, the plaintiff's argument,
11 that would mean it's unconstitutional?

12 MR. GRUBE: Well, that's reads to me as a
13 constitutional avoidance argument - - -

14 JUDGE RIVERA: Okay.

15 MR. GRUBE: - - - accept our interpretation,
16 because otherwise there'll be constitutional problems. But
17 I'm happy to talk about the statutory scheme and explain
18 why it is constitutional.

19 Starting with the caps in 1805, those provide - -
20 - protect homeowners from rapid - - - in rapidly
21 appreciating neighborhoods, from fluctuations in
22 assessments. And that's precisely the kind of rationale
23 that the Supreme Court in Nordlinger found supported the
24 scheme there, even though it didn't - - -

25 CHIEF JUDGE WILSON: But it doesn't - - - it



1 doesn't protect them from rapid changes in their taxes - -
2 -

3 MR. GRUBE: That's great.

4 CHIEF JUDGE WILSON: - - - does it?

5 MR. GRUBE: I mean, nothing - - - because towns
6 have discretion, city, they decide the levy. So, the
7 ultimate tax, you know - - - the assessments determine the
8 ratio that you will bear, and the levy determines the
9 ultimate liability. But to your point, the rational basis
10 doesn't require a perfect fit between the legislature's
11 purpose and the means of achieving it.

12 JUDGE TROUTMAN: So does it go to their
13 application, and not - - - it's not a result of what the
14 state legislature did; it's the application of the City?

15 MR. GRUBE: Well, I - - - I wouldn't even say
16 it's the application. It's the local assessment decisions
17 made by the City within the parameters of state law. The
18 state law provides - - -

19 JUDGE TROUTMAN: So are you saying the plaintiff
20 is wrong, that it's how it's being applied that's causing
21 the problem?

22 MR. GRUBE: No, no, I'm - - - that's - - - that's
23 not what I'm saying. I think plaintiff agrees that their
24 alleged violations can be remedied, consistent with state
25 law as it stands, which is - - - solves any sort of

1 constitutional problem - - -

2 JUDGE TROUTMAN: They can be read in harmony
3 together?

4 MR. GRUBE: They can be read in harmony together.
5 And - - -

6 JUDGE RIVERA: Is it because you - - - as I
7 understood your brief, you take no position on the
8 contentions against the City and whether or not the City
9 has violated the law, correct? Or am I misunderstanding
10 now what you're saying?

11 MR. GRUBE: Yes. I mean, we didn't take a
12 position. We didn't take a position on the constitutional
13 question. This court, in Matter of State Board of
14 Equalization and Assessment V Kerwick, stated that the
15 State and DTF have - - - do not have authority to direct
16 substantive assessment decisions, that the State and DTF's
17 role is to advise and aid in assessment, provide guidance.
18 So I can - - - I can talk about the statutory scheme and -
19 - - and why it's constitutional. But given that deference
20 to local decision making, the State has not taken a
21 position on the constitutionality of sort of particular
22 practices.

23 With respect to 581, I understand plaintiff to be
24 challenging assessment decisions essentially made by
25 individual assessors, what comparable buildings they chose

1 for rentals, for condominiums, and cooperatives.

2 JUDGE RIVERA: Well, there's a higher-level
3 policy on that, right? There may be, like, individual
4 buildings, but there's a higher-level policy - - -

5 MR. GRUBE: Right.

6 JUDGE RIVERA: - - - on that condo and co-op that
7 they're talking about, which is a systemic - - - it's a
8 challenge to a systemic approach?

9 MR. GRUBE: Right. And so there's a high level
10 of policy that they are talking about with respect to the
11 comparison to rent control buildings. And the - - - the
12 statute doesn't say one thing or the other on that
13 question.

14 JUDGE RIVERA: Um-hum.

15 MR. GRUBE: And DTF's guidance also does not one
16 - - - say one thing or the other. I think the City is
17 relying on this court's decision in Matter of Greentree,
18 and this court can clarify what it meant in Matter of
19 Greentree, but - - -

20 CHIEF JUDGE WILSON: Let me ask you the same
21 question I asked counsel for the City. Is there - - - is
22 this - - - is there anything in the state law that would
23 prevent the City from reducing the assessment ratio for - -
24 - rate for Class 1 tomorrow from six percent to 0.6
25 percent?

1 MR. GRUBE: That would be consistent with state
2 law. That is what happened in Matter of O'Shea and Nassau
3 County, though, of course, there, there was a stipulation
4 compelling Nassau County to do it. There's no stipulation
5 compelling the City, so it's a policy tool available to the
6 City, it's permitted, but not required - - -

7 CHIEF JUDGE WILSON: Permitted by state law?

8 MR. GRUBE: It's permitted, but not required by
9 the state statutory scheme.

10 Speaking to the state statutory scheme, I - - - I
11 just also want to note, I'm not - - - I'm not sure if I
12 heard this correctly, but I thought I heard Mr. Bress say
13 that essentially if you agree with our statutory argument,
14 there's a constitutional problem, that the constitutional
15 argument hinged on their interpretation of Section 305.
16 And that's precisely a reason why the court can avoid a
17 constitutional question by not adopting that interpretation
18 of 305.

19 Reading them together, harmoniously, I still
20 don't think I understand what function 1805 serves under
21 plaintiff's statutory reading. Under the State's reading,
22 it protects homeowners, provides a cap, but as, Your Honor,
23 noted, local governments have policy tools lowering the
24 assessment ratios available to them if they want to
25 mitigate any disparities that arise from the caps.

1 JUDGE RIVERA: Which - - - which retains the
2 protections the legislature intended from the cap because
3 you're not changing the cap.

4 Am I understanding this correctly?

5 MR. GRUBE: Right. And - - -

6 JUDGE RIVERA: But you're - - - but you're
7 avoiding a tax burden shift or an un - - - or a - - - a
8 type of disparity and inequality that might indeed violate
9 the constitution or some other provision of the statutes,
10 yes?

11 MR. GRUBE: That's correct, Your Honor. I think
12 - - - I think the effect is that lowering the assessment
13 ratio, everyone still benefits from the cap - - -

14 JUDGE RIVERA: Yes.

15 MR. GRUBE: - - - but that's sort of less
16 disparity in terms of how much - - - I think the
17 disparities arise from particular groups benefiting more
18 from the cap - - -

19 JUDGE RIVERA: Yeah.

20 MR. GRUBE: - - - than others, as - - - as
21 happens with any cap - - -

22 JUDGE RIVERA: Um-hum.

23 MR. GRUBE: - - - on a tax.

24 JUDGE RIVERA: And then they've - - - they've got
25 to do something to balance their budget?

1 MR. GRUBE: No, because, I mean, the - - - the
2 levy is sort of independent of how - - -

3 JUDGE RIVERA: Okay.

4 MR. GRUBE: - - - all these assessments work.

5 JUDGE RIVERA: I see.

6 MR. GRUBE: The City, any town in New York, they
7 decide - - - it's kind of reverse math. How much money do
8 we need?

9 JUDGE RIVERA: Right.

10 MR. GRUBE: And then - - - then they look at the
11 assessments and be, like, how are we going to combine them?

12 JUDGE CANNATARO: So if you reduce the
13 assessments dramatically by, you know, by taking six
14 percent and making it 0.6, you inevitably have to increase
15 the tax. I mean, that just seems like simple math, right?

16 MR. GRUBE: Right. I mean, if you uniformly
17 lowered everyone's assessment - - -

18 JUDGE RIVERA: Um-hum.

19 MR. GRUBE: - - - let's make the math easier - -
20 - easier than Your Honor's hypothetical. Let's use
21 100,000. Every property in - - -

22 JUDGE RIVERA: Oh, that's good.

23 MR. GRUBE: - - - New York City is worth 100,000.
24 And then you - - - you know, lower the assessment ratio so
25 that it's 10,000. Well, then you'd have to increase - - -

1 JUDGE CANNATARO: Tax everybody - - -

2 MR. GRUBE: - - - the tax rate.

3 JUDGE CANNATARO: - - - at fifty percent, or
4 something.

5 MR. GRUBE: And everyone would end up paying the
6 same tax, even though their assessment was - - -

7 JUDGE CANNATARO: It's not really the same,
8 though. The - - - the - - -

9 MR. GRUBE: Well - - -

10 JUDGE CANNATARO: - - - it's - - - it's a
11 mitigation - - - it's a - - - it reduces it to a
12 mathematical, you know, non-distinction. It - - -

13 MR. GRUBE: Right.

14 JUDGE CANNATARO: - - - it's not really
15 equalizing the assessments. It's just making them less
16 pronounced. Isn't that - - -

17 MR. GRUBE: Yeah, I - - - I think - - -

18 JUDGE CANNATARO: - - - correct?

19 MR. GRUBE: - - - we're also like, I mean, we're
20 oversimplifying in our hypotheticals - - -

21 JUDGE CANNATARO: Yes.

22 MR. GRUBE: - - - because there's also
23 assessments - - - I mean, abatements and exemptions - - -

24 JUDGE RIVERA: Yes. Yes.

25 MR. GRUBE: - - - and other things that affect



1 the underlying tax bill apart from the - - - what - - -
2 what we're talking about, the caps. And that's sort of the
3 problem with plaintiff's constitutional argument, is that
4 if you look at the end result, and say, look at the
5 underlying tax bill for two different properties, that
6 value the same, and maybe have different tax bills - - -

7 JUDGE RIVERA: Um-hum.

8 MR. GRUBE: - - - that doesn't tell you why
9 they're different, which policy tool, which part of the
10 formula made that difference. And that's why in the
11 constitutional analysis, courts look at whether the formula
12 - - -

13 JUDGE RIVERA: Well, what - - - what would be a
14 permissible factor for that difference?

15 MR. GRUBE: Permissible factor - - -

16 JUDGE RIVERA: It's not going to be race. It's
17 not going to be the geography.

18 MR. GRUBE: Sure.

19 JUDGE RIVERA: What - - - what would be a
20 permissible - - -

21 MR. GRUBE: Sure. So for - - - for example, the
22 caps, we talked about preserving stability.

23 JUDGE RIVERA: Yeah.

24 MR. GRUBE: Section 581 encourages home
25 ownership. That was enacted in 1981 at a time when many -

1 - - many rental buildings were considering whether to
2 convert to condominiums or cooperatives. And Section 581
3 says they shouldn't be penalized for a decision to convert
4 to a condominium or a cooperative because we want to
5 encourage home ownership. And so that's why - - -

6 JUDGE RIVERA: I guess what I'm - - - and it may,
7 again - - -

8 MR. GRUBE: Yeah.

9 JUDGE RIVERA: - - - be that I'm not fully
10 appreciating the complexity, even though the stellar
11 briefing on that matter, right - - -

12 MR. GRUBE: Right.

13 JUDGE RIVERA: - - - that if you have a policy
14 choice, as you say, to encourage home ownership, to
15 stabilize - - -

16 MR. GRUBE: Right.

17 JUDGE RIVERA: - - - home owners so they don't
18 get these spikes - - -

19 MR. GRUBE: Right.

20 JUDGE RIVERA: - - - does that end up, because at
21 some point, you got to pay for your services, you've got to
22 do something - - -

23 MR. GRUBE: Right.

24 JUDGE RIVERA: - - - with your budget, that
25 renters end up paying more than their fair share?

1 MR. GRUBE: Well, I'm not sure that's exactly the
2 case. I think we haven't really talked about - - -

3 JUDGE RIVERA: Then particular homeowners end up
4 - - -

5 MR. GRUBE: Yeah.

6 JUDGE RIVERA: - - - paying more than their fair
7 share?

8 MR. GRUBE: Well, I want to emphasize that 581
9 also protects renters and tries to provide equality. We
10 haven't talked - - -

11 JUDGE RIVERA: Um-hum.

12 MR. GRUBE: - - - about subsection 3, which I
13 think was previously subsection 2, but that is the
14 provision that says - - -

15 JUDGE RIVERA: Yeah.

16 MR. GRUBE: - - - that rental buildings should
17 not be assigned a premium because a developer might want to
18 pay more for a rental building to convert it into a
19 condominium or a cooperative. And so rentals cannot be
20 valued assigning that sort of premium. So it's trying to
21 maintain equality between rentals and condominiums and co-
22 ops, and that - - - that's plainly rational and the - - -
23 and the use of particular comparators is a local assessing
24 decision that the State leaves to local government.

25 Unless there's further questions, I see my time

1 is up, and we ask that you affirm the dismissal.

2 JUDGE RIVERA: I'm sorry. Just - - - yes, I want
3 to get back to this question. I'm sorry, sir. I know your
4 - - - I know your red light is on.

5 To your - - - I think it was your first point,
6 that their claims against the State are not properly before
7 us because they didn't make the arguments in their brief.

8 MR. GRUBE: Right.

9 JUDGE RIVERA: I just want to get back to that.
10 What is it you say is missing from their initial brief that
11 would have sufficiently presented to us, in your opinion,
12 the arguments against the State?

13 MR. GRUBE: Well, I mean, there isn't any
14 argument that the State is responsible - - - and it doesn't
15 ask for any form - - - conceivable form of injunctive
16 relief against the State that would remedy the violations.
17 Even as to the constitutional arguments, that I don't read
18 them as constitutional challenges, but arguments that their
19 position should be accepted as a matter of statutory
20 construction to avoid constitutional issues.

21 And I think in their brief they cited pages 39
22 and 40 of their opening briefs as preserving their
23 arguments against the State. And I don't - - - I looked at
24 it and I could not understand why.

25 CHIEF JUDGE WILSON: They were asking for

1 declaratory as well as injunctive relief.

2 MR. GRUBE: Yes. So - - -so to the extent that
3 the court considers that there is an active constitutional
4 challenge, the State is here, and that issue can be
5 resolved right now. But to the extent that there are any
6 proceedings going forward, there's - - - the State has no
7 proper role in those.

8 JUDGE HALLIGAN: So to be - - - to be clear,
9 counsel, if I can, your position is that if there is an
10 active constitutional challenge, as opposed to an argument
11 that a statute should be construed a particular way because
12 of constitutional concerns, that the State is a proper
13 party?

14 MR. GRUBE: Well, I - - - I don't want to quibble
15 about the capacity. I think, technically, the - - -
16 generally, the State has discretionary authority to
17 intervene. And in the Foss versus City of Rochester case,
18 the attorney general participated pursuant to Executive Law
19 71.

20 Here, we're here, we're defending the
21 constitutionality of the State's scheme. So it - - - we
22 don't think sort of the capacity is material right now.
23 The main point is that going forward, there is no role for
24 the State.

25 Unless there are further questions, thank you.



1 CHIEF JUDGE WILSON: Thank you.

2 MR. BRESS: And I will try to move quickly, but
3 I've got a number of things I'd like to at least clarify.
4 I think it would help the court.

5 To start with, in Cass, the State - - - there
6 weren't any injunctive claims made with regard to the
7 State. The court just simply said the dismissal of the
8 State was improper because the State is a proper defendant
9 in a case where you're challenging the constitutionality of
10 a statute. So if you were to disagree with us on the
11 statutory claims here, and our constitutional claim were to
12 go forward under Article XVI, the State would be an
13 appropriate defendant. Otherwise, we're happy to let them
14 go.

15 So as to what we're challenging under 581, we're
16 not challenging individual - - - individual assessor's
17 decisions here. Now, the State's in an unusual position
18 because they're saying it's not our fault, these are local
19 assessment decisions. But there are local assessment
20 policy.

21 The City believes, and you can get this if you
22 look at page 207 to 210, page 228 to 230 of our appendix,
23 you'll see that the deputy heads of Finance, and of the
24 Independent Budget Office, say we've got to value these
25 condos and co-ops by reference to apartment - - - rental

1 apartments, and sometimes there aren't comparables, and
2 that leads to problems.

3 And so it leads to gross undervaluation. And
4 there is an option they can use; it's not that hard,
5 honestly. The City has data on these sublet or sub-rental
6 of condos and co-ops. It can use that data to help it
7 figure out how much income these luxury co-ops and condos
8 would bring in as rentals. It doesn't have to just shrug
9 and say, we're going to pick a stripped-down rental in a
10 different borough, and we're going to value our Fifth
11 Avenue condo by reference to it. That's just insane.

12 JUDGE CANNATARO: Right. I - - - I don't
13 understand how that works because you can't - - - if - - -
14 if their position is you have to include rent - - - rent-
15 regulated apartments, you can't sublet a rent-regulated
16 apartment.

17 MR. BRESS: Okay. Let me start there then. I -
18 - - there - - - there's two different things going on here,
19 Your Honor.

20 JUDGE CANNATARO: Certainly, not for market
21 value.

22 MR. BRESS: Understood. There's two different
23 things that are going on, right? And they both lead to
24 gross undervaluation of the condos and co-ops. One is - -
25 - has nothing to do with rent regulation or stabilization.

1 It's just that they'll value a Fifth Avenue co-op by
2 reference to a stripped-down apartment in the Bronx - - -

3 CHIEF JUDGE WILSON: Can I - - -

4 MR. BRESS: - - - just because it's the same size
5 - - -

6 CHIEF JUDGE WILSON: - - - can I - - -

7 MR. BRESS: - - - and the same age.

8 CHIEF JUDGE WILSON: - - - can I clear up a - - -
9 just a factual issue. The undervalue - - - in your - - -
10 according to your pleading, or your theory, the undervalued
11 co-ops and condos are ones that are built pre-1974?

12 MR. BRESS: That's one part of them, Your Honor.
13 So the ones - - -

14 CHIEF JUDGE WILSON: So what happens - - -

15 MR. BRESS: - - - that are affected by rent
16 stabilization - - -

17 CHIEF JUDGE WILSON: Just a second.

18 MR. BRESS: - - - are the other ones.

19 CHIEF JUDGE WILSON: Just a second. I'm just
20 trying to understand.

21 MR. BRESS: Yeah.

22 CHIEF JUDGE WILSON: So I walk around Manhattan,
23 I see there are condo and co-op buildings going up now,
24 right? Are those going to be undervalued?

25 MR. BRESS: Yes, Your Honor.



1 CHIEF JUDGE WILSON: And so why is that?

2 MR. BRESS: So - - - and again, this is in the
3 testimony of those deputies - - -

4 CHIEF JUDGE WILSON: Um-hum.

5 MR. BRESS: - - - I mentioned earlier. There are
6 no good comparables, if you will, for the new luxury condos
7 going up.

8 And so instead of recognizing - - -

9 CHIEF JUDGE WILSON: What about the - - - what
10 about the condos and co-ops that went up ten years ago; why
11 aren't those comparables?

12 MR. BRESS: The - - - the City believes it has to
13 value a co-op or condo by reference to a rental apartment
14 building. And so it says - - -

15 CHIEF JUDGE WILSON: But there are also rental
16 apartment buildings that are luxury rentals, right, that
17 have gone up five years ago, they're going up now.

18 MR. BRESS: The City has acknowledged, again, in
19 - - - in the testimony we're looking at, that often they
20 can't find a comparable for the most luxurious condos and
21 co-ops that are - - - that are in the city. They can't
22 find one. And so they pick one of a similar age and one of
23 a similar size, and they say that's the best we can do.
24 All we're saying is - - -

25 CHIEF JUDGE WILSON: Okay. All right. So that -

1 - -

2 MR. BRESS: - - - that's not good enough.

3 CHIEF JUDGE WILSON: - - - that helps me because
4 then that would suggest to me that your description of what
5 they're doing is for a luxury co-op or condo that's going
6 up tomorrow, they would look for a luxury rental that - - -
7 that went up last year? They wouldn't look - - -

8 MR. BRESS: If they could find one - - -

9 CHIEF JUDGE WILSON: - - - at - - - well,
10 they're - - -

11 MR. BRESS: - - - in the same neighborhood, et
12 cetera, right.

13 CHIEF JUDGE WILSON: Yeah, I mean - - -

14 MR. BRESS: Sure.

15 CHIEF JUDGE WILSON: - - - there seem to be a
16 lot.

17 MR. BRESS: They try to do that.

18 Now, as to the rent stabilization, that's a
19 separate problem.

20 CHIEF JUDGE WILSON: So your - - - but your
21 bigger problem, if I understood it correctly, is that for
22 the ones that are built in 1920, that are co-ops and
23 condos, they're looking for rentals that were built in
24 1920, instead of comparing them to rental - - - luxury
25 rentals that were built last year?

1 MR. BRESS: Well, that's part of the problem,
2 Your Honor, and it's certainly part of it. But the other
3 part of the problem is that - - - and this is mostly pre-
4 '74, right, so they're looking at - - -

5 CHIEF JUDGE WILSON: Um-hum.

6 MR. BRESS: - - - apartment buildings that would
7 be rent stabilized under the ETPA.

8 CHIEF JUDGE WILSON: Um-hum.

9 MR. BRESS: You all are probably more familiar
10 with this than I am, but they're looking at that.

11 CHIEF JUDGE WILSON: As the comparator?

12 MR. BRESS: As - - - as the comparator. And a
13 great number of those include many units that are rent
14 stabilized. And the problem with that comparison is that
15 given the locations, the finishes, the amenities, et
16 cetera, that exist - - -

17 CHIEF JUDGE WILSON: Is - - - is that choice
18 compelled by state law?

19 MR. BRESS: No.

20 CHIEF JUDGE WILSON: Okay.

21 MR. BRESS: That's what I'm - - - yes, exactly,
22 Your Honor. They're just methodologically, reflexively
23 looking at an apartment building and saying that one's rent
24 stabilized, so we're going to pretend that this condo, if
25 it were rental - - -

1 JUDGE GARCIA: And they always - - -

2 MR. BRESS: - - - were rent stabilized.

3 JUDGE GARCIA: They always - - - if it's a pre-
4 '74 building, always look to a - - - to a rent-stabilized -
5 - -

6 MR. BRESS: They always look - - -

7 JUDGE GARCIA: - - - comparable?

8 MR. BRESS: Sorry, Your Honor. They always look
9 to a building they think is comparable in age and size, et
10 cetera. And they say, well, that one has, you know, eight
11 - - - thirty-percent rent-stabilized units, so we're going
12 to judge this one as having thirty rent-stabilized units.

13 And the problem is, again, how the ETPA worked,
14 and worked for pre-2019, is that you could raise rents upon
15 vacancy. And when rents exceeded a certain number, at one
16 point it was 2,500 a month, then it was 2,700 a month, you
17 exited rent stabilization entirely. And our proposition,
18 again, our allegation in the complaint, is that these
19 luxury condos would have come out from rent - - - rent
20 stabilization years ago, and they shouldn't be treated as
21 if they were rent stabilized.

22 JUDGE CANNATARO: Is there a stock of deregulated
23 apartments of similar vintage, because I - - - there seems
24 to be a rationality to me of looking at 1940 and 1940; is
25 there a stock of deregulated housing that they could use as

1 comparators?

2 MR. BRESS: Your Honor, I don't know if there
3 were, and they - - - they were comparable in other ways,
4 right, same amenities, type - - - same types of finishes,
5 in the same sought after locales, we have no problem at all
6 with - - - with valuing the condos and co-ops that way.

7 The problem is that they're - - - they're not
8 doing it that way - - -

9 JUDGE RIVERA: Cause it - - - cause - - -

10 MR. BRESS: - - - and in not doing it that way,
11 they're forgetting you have to look at the co-op or condo
12 in question and look at how it would be valued if it were
13 rental - - -

14 JUDGE RIVERA: Because that - - - that - - -

15 MR. BRESS: - - - not just generically.

16 JUDGE RIVERA: - - - the approach you are
17 describing, I assume your argument is, would not be
18 problematic under state law because it doesn't put the
19 owner of the condo or co-op in a worse position based on
20 ownership?

21 MR. BRESS: Exactly.

22 JUDGE RIVERA: Because it's comparison of the
23 nature of the property itself has nothing to do with
24 whether or not you're an owner or a renter, it's just
25 bricks and mortars?

1 MR. BRESS: We couldn't agree more, Your Honor.
2 And, in fact, it's interesting that they cite D.S. Alamo.
3 D.S. Alamo says you don't want to penalize co-ops and
4 condos because they're - - - they have a different
5 ownership structure than rentals. We perfectly agree with
6 that. The problem is they're giving them vast advantages
7 as compared to the rentals with the methodology they're
8 using. That's not what the law was ever supposed to be
9 about.

10 JUDGE RIVERA: Can I ask you about my
11 hypothetical? Is that what you are talking about or is it
12 sort of, you know, phantasmagorical, as they say?

13 MR. BRESS: Nothing is phantasmagorical. We're
14 all in the world, Your Honor. But it's - - - it's - - -

15 JUDGE RIVERA: Some might say the system is, the
16 City's property tax.

17 MR. BRESS: It is complex, that's for sure. So,
18 Your Honor, look, we are saying that if you've got a - - -
19 a home in one borough that is - - -

20 JUDGE RIVERA: Okay.

21 MR. BRESS: - - - valued at, and accurately
22 valued at \$500,000 - - -

23 JUDGE RIVERA: Yeah.

24 MR. BRESS: - - - and you've got a home in
25 another borough - - -

1 JUDGE RIVERA: Yeah.

2 MR. BRESS: - - - so let's say the first one is
3 Manhattan, the second one is the Bronx - - -

4 JUDGE RIVERA: Um-hum.

5 MR. BRESS: - - - also valued at \$500,000.

6 JUDGE RIVERA: Yeah.

7 MR. BRESS: It's - - - we're not talking about
8 the constitution here, or at least we don't have to.

9 JUDGE RIVERA: Uh-huh.

10 MR. BRESS: Section 305, itself, says all
11 properties shall be assessed at - - - at an equal
12 percentage of their value. So, yes, they have to be
13 assessed the same. And contrary to some of what I was
14 hearing from my esteemed colleagues - - -

15 JUDGE RIVERA: I guess I'm asking - - -

16 MR. BRESS: - - - is that - - -

17 JUDGE RIVERA: - - - is that in part what you're
18 complaining about, that they are not - - -

19 MR. BRESS: Yes.

20 JUDGE RIVERA: - - - that - - - that example,
21 which is just the most basic of - - -

22 MR. BRESS: It's hugely - - -

23 JUDGE RIVERA: - - - examples.

24 MR. BRESS: It is what we're complaining about,
25 Your Honor.

1 JUDGE RIVERA: Okay, yeah.

2 MR. BRESS: And - - - and there's a little bit of
3 confusion here because you're being told, well, the
4 fractional assessment ratio is applied and then there's a
5 cap, but you don't figure out what the assessment is until
6 after the cap has been applied. The cap, when they apply
7 it, determines the assessment.

8 JUDGE RIVERA: Right.

9 MR. BRESS: And so when you look at an equal - -
10 -

11 JUDGE RIVERA: I'm sorry, I lost you - - -

12 MR. BRESS: - - - assessed at an equal - - -

13 JUDGE RIVERA: - - - I lost you there.

14 MR. BRESS: Okay. Let me start - - -

15 JUDGE RIVERA: I might be the only one, but help
16 me.

17 MR. BRESS: Let me start that all over again.
18 Okay. So you - - - you first figure out the market value
19 of the property - - -

20 JUDGE RIVERA: Yeah.

21 MR. BRESS: - - - then you multiply it by what -
22 - -

23 JUDGE RIVERA: That's my 500,000.

24 MR. BRESS: What they call - - - yes. And then
25 you multiply it by what, again, George Sweeting, or Michael

1 Hyman, you know, the heads of these things, call the target
2 assessment ratio. We called it earlier, the fractional
3 assessment ratio - - -

4 JUDGE CANNATARO: Sorry.

5 MR. BRESS: - - - what have you.

6 JUDGE RIVERA: Um-hum.

7 MR. BRESS: You multiply it by that. So let's
8 say it's at six percent - - -

9 JUDGE RIVERA: Um-hum.

10 MR. BRESS: - - - right? And so that would be
11 \$30,000.

12 JUDGE RIVERA: Yeah.

13 MR. BRESS: And you'd have a \$30,000 number there
14 right?

15 JUDGE RIVERA: Yep.

16 MR. BRESS: But under the City's methodology - -
17 -

18 JUDGE RIVERA: Yeah.

19 MR. BRESS: - - - if the last year's assessment -
20 - -

21 JUDGE RIVERA: Um-hum.

22 MR. BRESS: - - - and I'm not going to try to do
23 math on my feet, but was more than six percent lower than
24 that thirty, then you've got to lower the \$30,000 to get
25 the assessment of your second property here. And what the

1 result of that, is that the two assessments will not be at
2 the same percentage - - -

3 JUDGE RIVERA: Yeah.

4 MR. BRESS: - - - of their value. And that's why
5 you have the violation of 305.

6 JUDGE RIVERA: Because it's historically baked
7 in; is that your point?

8 MR. BRESS: Well, it's - - -

9 JUDGE RIVERA: Because you're looking at the
10 prior year?

11 MR. BRESS: Well, it's because the assessment, if
12 you apply the cap as they've suggested, it truncates and
13 lowers the assessed - - - the assessment.

14 CHIEF JUDGE WILSON: If one of those two
15 properties had been \$250,000, market value, in the prior
16 year, and jumped at - - - market value doubled, you would
17 only be able to increase its assessment and therefore its
18 taxes by six percent?

19 MR. BRESS: Exactly. Rather than by - - -

20 CHIEF JUDGE WILSON: Fifty percent - - - 100
21 percent.

22 MR. BRESS: 100 percent, that's right, Your
23 Honor.

24 JUDGE CANNATARO: And what's the - - -

25 MR. BRESS: And that leads to the - - - the



1 problem that we've got here.

2 JUDGE CANNATARO: What's the error in the
3 Appellate - - - the Appellate Division said you have to
4 look at both of them together, you have to read them in
5 concert, and make them work as a - - - as a scheme.

6 MR. BRESS: And we - - -

7 JUDGE CANNATARO: What's the error there?

8 MR. BRESS: So we agree with that as a rule, of
9 course. The problem is that they didn't. What they did is
10 they looked at 1805 and 305, and they applied 1805, as
11 we've discussed, it can be done in two ways, you can comply
12 with the caps either by reducing the assessment ratio or
13 applying the caps individually. They did the latter. They
14 said that was how you do 1805, but that was at the cost of
15 violating 305 because now what's - - -

16 JUDGE HALLIGAN: So what's left - - - sorry.
17 What's left of 1805 under your reading? What - - - what
18 purpose, what function, does it serve?

19 MR. BRESS: So, Your Honor, if I look at a
20 statute's function by what it mandates, what 1805 mandates
21 is that assessments do not go up by more than six percent
22 in Class 1 or eight percent in Class 2. If you lower the
23 assessment ratio, that is one way to comply with 1805, and
24 you have actually effectuated that command. The
25 assessments did not go up.

1 Now, why would they have cared about it? It's
2 hard for me to get in the head of a legislature - - -
3 legislator, Your Honor. They might have cared about it
4 because in 1981 everybody was concerned about their
5 assessment suddenly increasing.

6 But what we know from this court's decision in
7 O'Shea is that it's perfectly permissible for them to
8 comply with 1805 that way by just lowering the assessment
9 ratio. And if they try to comply with 1805 the way they're
10 doing right now, they lead directly to a violation of 305.

11 So in reconciling the two statutes, there's
12 really only one way to do it that gives meaning to both, or
13 - - - or complies with both, Your Honor, in - - - in the
14 language I was using a moment ago.

15 I think I've covered a good bit of what we were
16 going to do. I wanted to note two other things. One, is
17 it's not a temporary fix. As we discussed earlier, you can
18 continually lower the ratio. And, in - - - in fact, if you
19 look at the testimony to which my friend pointed of George
20 Sweeting, George Sweeting acknowledged that. He said it
21 doesn't cure all the other problems with 1805. 1805 is
22 inefficient if you want to help people that are in their
23 own home, why are you helping rich people as well as poor
24 people? He was discussing all sorts of other things, but
25 he agreed you can fix this problem by continually lowering

1 the ratio.

2 Next, it's absolutely the City's policy, let's
3 just be very clear on 581 and 305. And I think the State
4 has now tacitly agreed that the City can do it either way
5 it wants, you know, in terms of how it wants to look at it.
6 But one way is illegal, and it's the City's policy; it's
7 not state law that's causing it. The City has tried to
8 escape responsibility for years, pointing at Albany. It
9 would be very helpful with this court to not only say it's
10 the City's policy, and it's illegal.

11 JUDGE CANNATARO: But only with respect to 1974
12 and prior, right?

13 MR. BRESS: Oh, we're back to - - - sorry, 281.

14 JUDGE CANNATARO: I just want to make sure that -
15 - -

16 MR. BRESS: We're on 281 now, Your Honor?

17 JUDGE CANNATARO: Yeah.

18 MR. BRESS: Because I was talking about 1805 is
19 what - - -

20 JUDGE CANNATARO: Oh, I'm sorry. Oh - - - oh,
21 never mind, never mind.

22 MR. BRESS: As to - - - it's more than just pre-
23 '74, just to be clear.

24 JUDGE CANNATARO: I thought you said 281.

25 MR. BRESS: But - - - even under 281.



1 But - - - and - - - and lastly, FHA, I - - - I'm
2 not quite sure what to make of the arguments that we were
3 hearing, but if this court were to look at page 130 of the
4 record, it shows the areas in the city that have, as a
5 result of - - - of how the City is applying 1805 and 581,
6 the parts of the city that have the highest effective tax
7 rates as a result who is burdened by all of this, from an
8 FHA standpoint, and it is the poorest areas of the city and
9 is the areas with the greatest minority composition.

10 So to the extent that the City was trying to
11 suggest to you that these caps are somehow helpful to
12 minorities in the city, that's absolutely off base. Our
13 statistics that we've cited in our brief make that
14 incredibly clear.

15 Next, you don't have to show invidious
16 discrimination. We're talking here about a disparate
17 impact case. So whatever the City was thinking about that
18 is just incorrect.

19 No appellate cases on taxing systems. So that
20 would suggest that a city could say you have to pay an
21 extra tax if you sell your house to a black person, and the
22 FHA would have nothing to say about that? That's crazy.
23 There is no exemption for tax cases. There are no
24 appellate cases that this court could look to that make
25 sense on the merits, because Robinson suggested that you

1 can't have a disparate impact case unless no white people
2 are affected. That's clearly just wrong, as a matter of
3 law. The two cases that have looked at it and had a
4 reasonable analysis are actually Coleman, in - - - in the
5 first iteration, and the other one is Brighton Park, out of
6 Illinois. And they both went our way and got it right.

7 I'm not going to take your entire afternoon, Your
8 Honors, but thank you so much for hearing me out. I
9 greatly appreciate it.

10 If there's any further questions, I'm happy to
11 answer them.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. BRESS: Thank you.

14 JUDGE RIVERA: Thank you, counsel.

15 (Court is adjourned)

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

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Tax Equity Now NY LLC v. City of New York, No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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